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Prenuptial Agreements in Ontario

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What is a Prenuptial Agreement?

A "**Prenuptial Agreement**" is a written contract between two people who intend to be married. This Agreement differs from a Cohabitation Agreement because the parties aren't necessarily cohabiting together (i.e. living together in a conjugal relationship). A Prenuptial Agreement refers to the fact that it is entered into BEFORE marriage. During the course of the marriage, however, the couples may enter into a similar contract which is called a "**Marriage Contract**". The name doesn't really matter: it's just important to realize that they can be entered into prior to or during the marriage. These Agreements deal with the parties' respective rights and obligations during and after their marriage (or on death) and can deal with things like: ownership or division of property, support obligations, the right to direct the education and moral training of children, and any other matter in the settlement of their affairs (s. 53 of the Ontario ***Family Law Act***). Importantly, a Prenuptial Agreement CANNOT say who will have custody of, or access to, children if the relationship ends. Furthermore, a Prenuptial Agreement cannot prevent a spouse from being in possession of the matrimonial home – irrespective of who owns it! Finally worth mentioning is that a Prenuptial Agreement does not need to deal with all rights and obligations concerning the relationship: it can only be concerned with one asset (e.g. a house) or one obligation (e.g. support to one party upon termination).

When are they used?

Prenuptial Agreements are used by couples who are not necessarily living together but who plan on getting married. These Agreements are used by parties who want certainty, predictability and control over their financial affairs in case the relationship breaks down. There are a number of reasons why couples or particular spouses may insist in having a Prenuptial Agreement. First, a spouse who is wealthier than the other spouse may want to avoid having to share their increased wealth if and when the marriage breaks down. With a Prenuptial Agreement, certain assets – such as pensions, real estate, etc. – can be kept away from the other spouse if this happens. Second, a Prenuptial Agreement can be used to make special arrangements for particular property in which one or both spouses have an interest. Such property may include business interests (e.g. partnerships, corporations, etc.). The Prenuptial Agreement may allow the parties to determine who owns what upon a breakdown of the marriage, instead of just having legislation and courts make that determination. Finally, a Prenuptial Agreement can be used to establish specific spousal or child support obligations in advance of the marriage breaking down.

What are the legal requirements for a Prenuptial Agreement?

The legal requirements for a Prenuptial Agreement in Ontario include the following:

1. The parties must make full disclosure of their financial assets, liabilities, income and expenses;
2. The contract must be in writing and signed by each party before a witness; and
3. The contract must be entered into voluntarily (i.e. no duress, undue influence, unconscionability, etc.).

It is advisable that each party retain separate legal counsel to protect their rights and promote their interests.

How can a Prenuptial Agreement be challenged?

A Prenuptial Agreement can be challenged in various ways relating to the substance (i.e. terms and conditions) of the Agreement or the process in which it was entered into. For more general information about this topic, please refer to the DL Guide entitled "**Is My Legal Form Valid and Enforceable?**" The Ontario *Family Law Act* also outlines various ways in which these Agreements can be challenged by a party.

To begin, a party can make an application to a court to have a Prenuptial Agreement – in whole or in part – set aside on the basis under section **56(4)** that:

(a) a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
(b) a party did not understand the nature or consequences of the domestic contract; or
(c) otherwise in accordance with the law of contract.

In ***Loy v. Loy***, [2008] W.D.F.L. 351, the Ontario Superior Court of Justice reviewed the jurisprudence concerning section 56(4). In that particular case, Mrs. Loy had challenged the validity of a Marriage Contract (which, like a Prenuptial Agreement, is called a **domestic contract**) which she had entered into. The Court found no grounds to set aside that domestic contract. Here is the Court's reasoning under section 56(4):

Section 56(4)

174 This section of the ***Family Law Act*** gives a court the power to set aside a provision or an entire agreement, if it falls within one of the enumerated categories. Mrs. Loy has submitted that the domestic contract in this case should be set aside due to a lack of financial disclosure and a lack of independent legal advice. She also submits that Mr. Loy pressured her to sign the contract and that she did so under duress. Duress would be a factor the court could consider under section 56(4)(c) as otherwise in accordance with the law of contract.

175 In ***Hartshorne***, (2004), 47 R.F.L. (5th) 5 (S.C.C.), the Supreme Court of Canada reiterated that the approach to be taken in determining the weight to be accorded to an agreement is the two-stage analysis laid out in ***Miglin***, 2003 SCC 24, and, further, that there is no "hard and fast" rule regarding the level of deference accorded to marriage agreements as compared to separation agreements.

176 In ***Rosen***, (1994), 3 R.F.L. (4th) 267 (Ont. C.A.), the Ontario Court of Appeal confirmed that courts do not have a general discretion to set aside contracts that appear to be unfair. It is only where the bargain reaches the level of unconscionability that the contract should be set aside.

177 In ***LeVan***, (2006), 82 O.R. (3d) 1 (Ont. S.C.J.), Backhouse J. held that the proper approach under s. 56(4) is to first determine if a claimant can bring him or herself within one of the enumerated subsections. If the claimant is successful, then it must be determined whether the court should exercise its discretion in favour of setting the contract aside.

Failure to Disclose

178 Under subsection 56(4)(a) if substantial assets or liabilities were not disclosed, then a court has discretion to set aside the agreement. In ***LeVan***, Backhouse J. held that this section places a positive duty on every spouse to make complete, fair and frank disclosure of all financial circumstances before the parties enter into the contract. Notwithstanding this requirement, not every breach will result in setting aside the agreement. Justice Backhouse, relying on ***Dochuk v. Dochuk***, (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.) and ***Demchuk v. Demchuk***, (1986), 1 R.F.L. (3d) 176 (Ont. H.C.) set out the factors to be taken into consideration when exercising judicial discretion, including whether:

(a) there has been concealment of the asset or material misrepresentation;

(b) there has been duress, or unconscionable circumstances;

(c) the petitioning party neglected to pursue full legal disclosures;

(d) the petitioning party moved expeditiously to have the agreement set aside;

(e) the petitioning party received substantial benefits under the agreement;

(f) the other party has fulfilled his or her obligations under the agreement;

(g) the non-disclosure was a material inducement to the aggrieved party entering into the agreement.

179 In ***Baxter v. Baxter***, (2003), 41 R.F.L. (5th) 23 (Ont. S.C.J.), similar to ***LeVan***, a list of factors relevant to the court's discretion in setting aside an agreement due to lack of financial disclosure was enumerated:

1. Whether the funds existed at the time of the signing of the agreement;

2. Whether the party seeking to set aside on this basis knew the facts were different than originally stated but decided not to inquire further about details, or neglected to pursue full legal disclosure;

3. Whether there was concealment or misrepresentation;

4. Whether there was duress, or unconscionable circumstances;

5. Whether the non-disclosure was material; how important would the non-disclosed information have been to the negotiations;

6. Whether the agreed-upon terms are reasonable and fair; would they have been different had all the facts been known;

7. Whether the request to set aside is made expeditiously.

Examples of Cases Decided Under s. 54(4)(a)

180 In ***Baxter***, the husband had disclosed the existence of shares to his wife during settlement negotiations, and provided a valuation of the shares as of the date of separation; however, he did not disclose that they had been sold for $2.95 million post-separation. Justice Olah held that while the sale would not effect the net equalization payment, it was relevant to the determination of child and spousal support. In light of the provision in the minutes of settlement that the division of property and quantum of child support were "inextricably intertwined", the agreement was set aside for non-disclosure.

181 In ***LeVan***, the husband had deliberately failed to disclose his income and assets and misrepresented the purpose and extent of the contract to the wife. Additionally, the husband had interfered in the wife's receipt of independent legal advice. Because of the cumulative weight of all the factors, Backhouse J. exercised her discretion to set aside the marriage contract.

182 In ***Armstrong v. Armstrong***, [2007] W.D.F.L. 255 (Ont. C.A.), the Ontario Court of Appeal reversed the trial judge's findings with respect to disclosure. The Court held that the wife was aware of the husband's assets and had as much ability to value them as he did, therefore there was no ground upon which to set aside that part of the agreement.

183 The financial disclosure in the Loy marriage contract was not detailed and contained only estimates as to "global net worth" for each party. However, Mrs. Loy did not seek further disclosure, which, in fact, would have indicated that Mr. Loy had overestimated his worth in the agreement.

184 The Applicant did not suggest she would not have signed the marriage contract if she had more complete financial disclosure. I accept the Respondent's submission that such a position would not make sense given the fact that more complete disclosure would have revealed that the Applicant had significantly underestimated her net worth while the Respondent had significantly overestimated his. The Applicant cannot rely on her own failure to provide accurate disclosure to set aside the contract. The Respondent disclosed his income.

Independent Legal Advice

185 The *Family Law Act* does not require independent legal advice a prerequisite to the formation of a domestic contract, nor is it a requirement at common law: ***Somerville v. Somerville***, [2005] W.D.F.L. 1957 (Ont. S.C.J.). Rather, independent legal advice is closely related to s. 56(4)(b), under which a marriage contract may be set aside if a party did not understand the nature or consequences of the contract.

186 In ***Hartshorne***, the Supreme Court of Canada noted that:

> [i]ndependent legal advice at the time of negotiation is an important means of ensuring an informed decision to enter an agreement.

187 In ***Atkinson v. Atkinson***, [1990] W.D.F.L. 1135 (Ont. H.C.), Ross J. stated that:

> in reference to the significance of independent legal advice...what must be considered is whether the parties freely and willingly entered into the bargain.

Examples of Cases Decided Under s. 54(4)(b)

188 In ***Settle-Beyrouty v. Beyrouty***, (1996), 24 R.F.L. (4th) 318 (Ont. Gen. Div.), the parties executed a marriage contract and each acknowledged receipt of independent legal advice. The wife alleged in her application for support that she did not respond truthfully when asked by the respondent's lawyer whether she had obtained independent legal advice. She submitted that, as she did not receive independent legal advice, she did not understand the consequences of the marriage contract. Justice Dunnet held that courts should be loathe to set aside an agreement where a spouse did not avail himself or herself of the opportunity for independent legal advice. According to Dunnet J., the wife was

> intelligent, articulate and well-educated. She [was] employed in a responsible position. I have no doubt that she was aware of the nature and contents of the contract and she understood them.

189 In ***Keough v. Keough***,(2005), 248 Nfld. & P.E.I.R. 165 (N.L. T.D.), the Newfoundland and Labrador Supreme Court determined that an agreement concerning the matrimonial home resulted in inequity for the husband, since it excluded him from having any interest in the property. The husband had been given an opportunity to seek independent legal advice but decided not to pursue it. The Court upheld the agreement since the husband signed of his own free will and understood the nature and consequences flowing from the contract.

190 Mrs. Loy was familiar with domestic contracts and the role that legal advice should play in executing them, since she had signed an agreement with the aid of a notary public in her first marriage. Further, as mentioned above, there was no urgency in signing the contract as a wedding date had not been set, the parties were living in different countries and her immigration status had not been resolved. Mrs. Loy is an educated, intelligent woman who would have understood the seriousness of the agreement. Although she had the means and time to seek legal advice, she chose not to. As held in Beyrouty, a court should be loathe to set aside a domestic contract where a party chose not to seek independent legal advice.

191 The position of the parties at the date of separation is not a significant departure from the reasonable expectations each party would have had at the time the contract was negotiatied. I find that Mrs. Loy's lack of employment is not related to the marriage or the separation but is of her own choosing. No explanation was provided as to why she has not become certified in Canada or why she cannot undertake employment of any kind.

Financial Disclosure

192 Under s. 56(4)(a), an entire contract may be set aside if a party has failed to disclose significant assets. Although the disclosure in the marriage contract was not detailed, Mrs. Loy did not seek further disclosure. In fact, Mr. Loy overestimated his net worth in the agreement; therefore, this argument is not persuasive.

193 Under s. 56(4)(b), an entire contract may be set aside if a party did not understand its' nature or consequences. Mrs. Loy argues that she did not receive independent legal advice and, hence, could not understand the contract. However, Mrs. Loy is an intelligent, educated, businesswoman who had previous experience with marriage contracts in her native South Africa. Although she may not have been familiar with Canadian law, she did not seek independent legal advice and signed the contract freely. A court should be loathe to set aside a contract when a party did not avail herself of independent advice.

194 The Applicant knew what she was doing when she relocated herself and her children to Canada. She knew the income she was giving up by leaving the two businesses behind. The Applicant has not attempted to explain why she is not able to earn any income at all. She was able to persuade a bank to loan her money to purchase two condominiums during the marriage without any financial assistance or backing from Mr. Loy.

In ***Loy v. Loy***, Mrs. Loy also challenged the validity of the domestic contract on the basis of section 33(4) of the ***Family Law Act***. That section says that a Court may set aside a provision for support or a waiver of the right to support in a Prenuptial Agreement and may set support:

(a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;
(b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or
(c) if there is default in the payment of support under the contract at the time the application is made.

Once again, however, the Court disagreed with Mrs. Loy and found no reason to set aside the provision of support in the domestic contract before it. Here is the Court's reasoning with respect to section 33(4):

Section 33(4)

162 Section 2(10) of the *Family Law Act* provides that a contract is determinative of the rights between the parties unless the *Act* provides otherwise. Section 33(4) is one of the ways that the *Act* "provides otherwise". Under this section, a court may not set aside an entire agreement; rather, only a provision for support or a waiver of the right to support may be overruled. Since s. 33(4) is concerned only with support, the property arrangement in the agreement cannot be altered [footnote: In fact, if the domestic contract is held to be valid (i.e. not set aside), then a court cannot alter the property provisions since there is no power to do so in the *Family Law Act*].

163 The relevant subsection in this case is s. 33(4)(a), that is, "the provision [...] results in unconscionable circumstances".

164 ***Scheel v. Henkelman***, (2001), 52 O.R. (3d) 1, 11 R.F.L. (5th) 376 (Ont. C.A.), a decision of the Ontario Court of Appeal, discussed several important aspects of s. 33(4)(a). First, the Court of Appeal held that the section is directed only to unconscionable circumstances and not entire agreements:

> The use of the phrase "results in" in s. 33(4)(a) means that the subsection is not directed to unconscionable agreements, but to unconscionable results of a provision waiving support. An agreement which was fair and reasonable when it was signed, may, through circumstances that occur in the future, result in unconscionable circumstances at the time of a support application.

165 The Court discussed the meaning of "unconscionable" in the subsection. Adopting the discussion of the Ontario High Court in ***Newby v. Newby***, (1986), 56 O.R. (2d) 483 (Ont. H.C.), it was held to mean "shocking to the conscience of the Court". The factors to be considered in determining whether unconscionable circumstances have resulted are:

> (a) the circumstances surrounding the execution of the agreement, including the fact that each party was represented by competent counsel, the absence of any undue influence, the good faith and the expectations of the parties;

(b) the results of the support provisions of the agreement, including any hardship visited upon a party; and

(c) the parties' circumstances at the time of the hearing including their health, employability and ability to maintain their life-style.

Also, blameworthy conduct may be considered by the Court.

Examples of Cases Decided Under s. 33(4)(a)

166 In ***Scheel***, the applicant woman was living on a meagre monthly pension following the breakup of her 11-year Prenuptial with the respondent, who had assets approaching $3 million. The Court of Appeal held that it was clear the woman was enduring significant economic hardship and that the man had the ability to support her. Give the relative circumstances of the parties, it would be shocking to the conscience to require the woman to live on her modest pension. The Court awarded the woman monthly, indefinite support.

167 In ***Mongillo v. Mongillo***, 2007 CarswellOnt 2731 (Ont. S.C.J.), a recent case concerned with s. 33(4)(a), Wood J. determined that the circumstances at the time of application were not so extreme as to be unconscionable. Even though the wife was unable to earn any significant amount of money due to ongoing health problems and had been influenced by the husband's father during the negotiations, the waiver of spousal support had not caused the degree of hardship that one would expect. Indeed, the wife had received a gift of one-half the value of a home from the husband's father and the option was available to free up this capital. Justice Wood also reiterated that simply because unforeseen circumstances have caused hardship to one party does not mean that a properly negotiated domestic contract shall be overridden by s. 33(4). A review of ***Scheel*** and ***Desramaux v. Desramaux***, (2002), 216 D.L.R. (4th) 613 (Ont. C.A.) (wife forced to live on savings as she was limited to baby-sitting to support herself. The agreement for time-limited support was premised on the assumption that she would be self-sufficient within five years, which was unrealistic and had not occurred) led Wood J. to conclude that:

> In each of these decisions, the Court of Appeal took into account the present circumstances of the parties. In each case, it also clearly took into account in [sic] the conduct of the parties while they were together and subsequent to their separation. In each case, the party seeking support was destitute or close to it, and the party from whom support was sought lived an affluent lifestyle and had amassed significant assets. As well, in each case, the court found some element of blameworthiness in the conduct of the party from whom support was sought.

168 The provision waiving support in the Loy marriage contract is not "shocking to the conscience of the Court". The parties had both been married before and both had children from their first marriage. Each party was a successful business person and financially independent. The first factor to evaluate is the circumstances surrounding the execution of the agreement. Both parties had the opportunity to obtain independent legal advice prior to signing the contract; there was no interference by Mr. Loy with Mrs. Loy's ability to obtain this advice. Mrs. Loy claims to have been pestered by Mr. Loy to sign the agreement; however, she must have realized there was no urgency in signing as a wedding date had not been set, the parties were living in different countries and her immigration status had not been resolved. Mrs. Loy had previous experience with domestic contracts and is an educated, intelligent woman who would have understood the seriousness of the agreement. She had the means to seek legal advice and chose not to, for whatever reason.

169 The financial circumstances of Mrs. Loy at the time of hearing are not clear. She states she has not looked for work or received any income other than the temporary spousal support since separation. She provided no explanation for why she cannot seek some employment. She has not taken any steps since separation to become certified as an accountant in Canada since separation. She has taken no steps in Canada to upgrade except for two night courses at Wilfred Laurier University in 1999. She testified she is continuing in her correspondence program and has nearly completed a Bachelor's degree in Management. This degree will be her third post-secondary education program. Yet, she offers no explanation as to why she cannot secure employment. In fact, she stated in cross-examination that she has not made any efforts to seek employment since the separation in February 2005.

170 The circumstances that Mrs. Loy claims have resulted in financial hardship to her cannot be described as unforeseen. She knew what she was doing when she left South Africa to live in Canada with her children. Mrs. Loy's net worth at the time of separation was $881,212.00. She had the financial ability to purchase two condominiums during the marriage without any financial contribution from Mr. Loy. She was able to persuade a bank to finance these purchases. She is not destitute.

171 I find that there is no blameworthy conduct on the part of Mr. Loy with respect to the execution of the contract. He did not place undue duress upon Mrs. Loy. I am satisfied that Mr. Loy and Mr. Lang did everything they could to direct Mrs. Loy to seek independent legal advice. I accept the evidence of Mr. Lang that he urged Mrs. Loy to seek independent advice from an Ontario lawyer, being aware that she had a sister who practiced law in South Africa. Mrs. Loy's evidence is not credible. She states that she did all that she could to retain a lawyer familiar with Ontario law. Her efforts did not have to stop after she signed the contract. She did not marry Mr. Loy until 5 months after the contract was signed. If there was something in the contract she did not understand when she signed it she had a lot of time to obtain the advice or information she needed before she married Mr. Loy. As an educated and experienced businesswoman Mrs. Loy would know the importance of a contract. Whether or not she understood Canadian law is not as significant as the fact that she certainly would know that she was signing a document that impacted on her future rights and obligations.

172 I accept Mr. Loy's evidence that there was no urgency to the signing of the contract in February 1997.

173 There is no evidence to suggest the parties were not equal bargaining partners or that one preyed upon the other.

Tips to avoid having an invalid and unenforceable Prenuptial Agreement

Based on the jurisprudence, here are some tips to avoid having your Prenuptial Agreement rendered invalid and unenforceable by a Court:

Provide Adequate Disclosure

Adequate disclosure depends on the circumstances. Clearly, the assets, liabilities, income, etc. listed in Schedule "A" to the Prenuptial Agreement is a great start. But what about providing values? If it's possible to put down approximate values of the most substantial items (e.g. assets, liabilities, etc.), then that would be a good idea. Sometimes, the person making disclosure can only guess – perhaps based on their knowledge.

Negotiate the Agreement

There will always be some issues that have to be negotiated, regardless of how significant or trivial they may appear to some people. The fact of the matter is that evidence of negotiation (i.e. that a party reviewed and put forward their own position – and perhaps even compromised to get a result) strengthens the view that the Agreement is valid and enforceable. Negotiating also means giving enough time for the parties to review and revise the Agreement; rushing things before the period of Prenuptial begins could be disastrous!

Get Independent Legal Advice

To avoid having a party later claim that they didn't understand or appreciate the nature or consequences of the Agreement is to make sure that they receive independent legal advice. This also helps avoid arguments that they were pressured or threatened into signing. One "no-no" that can be easily avoided is referring the other party to a lawyer. There are lots of lawyers out there who can review the Agreement, advise the other party, and render a certificate of independent legal advice; leave it to the other party to do this for themselves. Things can look bad for you if you arrange to do it for them!

Draft Appropriately

The final agreement should reflect the negotiated agreement between the parties. Clear and simple language should be used. This will prevent the other side from saying that they didn't understand the terms of the agreement. It will also help prevent a court from using its own interpretation to fix things. Remember: mistakes will not be looked upon favourably – particularly against the party who drafted the final Agreement!

Is Independent Legal Advice Required?

Independent legal advice is NOT a formal requirement under the ***Family Law Act*** (or under the common law) to have a valid and enforceable Prenuptial Agreement. That said, its presence helps to eliminate (except in the most exceptional circumstances) the ability for one party to have a court set aside the Prenuptial Agreement on the basis that it did not understand "the nature or consequences of the [Prenuptial Agreement]" or to set it aside "otherwise in accordance with the law of contract". Basically, having an independent lawyer gives the impression that the lawyer's knowledge and understanding is transferred to the party (because of the solicitor-client relationship and because it makes common sense). If it didn't mean that, then the idea of having independent legal advice would be meaningless. One other thing: it is best not to have a party or their lawyer recommend a lawyer for the purpose of obtaining independent legal advice.

What happens if a Prenuptial Agreement is set aside?

If a court sets aside a Prenuptial Agreement, then that Agreement will not apply to the termination of the parties' relationship. So what COULD govern the ownership or division of property and support obligations? Well, the ***Family Law Act*** would govern the ownership and division of property, while the ***Divorce Act*** would govern spousal and child support issues. Under the ***Family Law Act***, absent a valid domestic contract (such as a Prenuptial Agreement), the net worth of the couples during the course of their marriage is equalized (i.e. split in two). Essentially, you take the value of spouse's property at the date of separation, subtract the value of their property at the date of marriage, and split that amount between the two spouses. This is called **EQUALIZATION OF NET FAMILY PROPERTY**. Finally, if the Prenuptial ends because one of the parties dies, then the ***Succession Law Reform Act*** could impose support obligations on the deceased party's estate. That *Act* COULD apply if the parties were spouses (as defined above under the *Family Law Act*) and the deceased spouse was providing support or was under a legal obligation to provide support immediately before his or her death. Here, if the deceased spouse failed to provide proper support for the remaining spouse, the latter could apply to the court for proper support.

When does a Prenuptial Agreement terminate?

A Prenuptial Agreement generally provides for the circumstances under which it terminates. These circumstances could include, for example:

- the parties divorce each other;
- the parties enter into a Marriage Contract;
- either of the parties die;
- the parties have a child;
- the parties cease to cohabit with each other (as defined in the Prenuptial Agreement) and there is no reasonable prospect that they will resume cohabitation;
- after a set period of time or on a particular date.

How is the Matrimonial Home dealt with?

Part II of the ***Family Law Act*** deals with the "**Matrimonial Home**". This is the home that either a spouse has an interest in or, if the spouses are separated, was at the time of separation "ordinarily occupied by the person and his or her spouse as their family residence". OK, so what's so special about the matrimonial home? Well, section 19(1) of the ***Act*** says that BOTH spouses have an EQUAL right to POSSESSION of a matrimonial home. Section 19(2) goes on to say that, when only ONE spouse has an interest in a matrimonial home, the other spouse's right to possession ends when they cease to be spouses (unless a separation agreement or court order says otherwise). So what does this mean for you? Well, even if a Prenuptial Agreement says that only ONE spouse will be the owner of the matrimonial home, the OTHER spouse will still have a right to possession. This means that the ONE spouse who owns the matrimonial home CANNOT dispose of (i.e. sell, transfer, gift, etc.) or encumber (e.g. mortgage, use as collateral, etc.) any interest in a matrimonial home UNLESS:

- the OTHER spouse signs the paperwork;
- the OTHER spouse consents to the transaction;
- the OTHER spouse has released all rights under Part II of the ***Family Law Act*** by a separation Agreement;

- a court has authorized the transaction or has released the property from Part II of the ***Family Law Act***; or
- the property is not designated by both spouses as a matrimonial home and a designation of another property as a matrimonial home, made by both spouses, is registered and is not cancelled.

Importantly, if only ONE spouse owns the matrimonial home tries to dispose or encumber the matrimonial home without falling under one of the above situations, then that transaction may be SET ASIDE by a court. Finally worth mentioning is that, regardless of who owns the matrimonial home or its contents, and despite a spouse's right of possession, a spouse can ask the court for exclusive possession of the home (among other things). In determining whether an order for exclusive possession is appropriate, a court must consider the following factors under sections **24(3)** and **(4)**:

- the best interests of the children affected (i.e. possible disruptive effects of a move to another home and the child's views and preferences – if they can be ascertained);
- any existing orders under Part I (Family Property) and any existing support orders;
- the financial position of both spouses;
- any written agreement between the parties;
- the availability of other suitable and affordable accommodation; and
- any violence committed by a spouse against the other spouse or the children.

Interestingly, even if a court orders that ONE party be given exclusive possession of the matrimonial home, it can still direct that party to make periodic payments to the other spouse (among other things), pay for all or part of the repair and maintenance of the matrimonial home, and keep or remove certain contents of the matrimonial home. Finally worth mentioning is that under section **25**, if a court is satisfied that there has been a material change in circumstances, it can discharge, vary or suspend any order made concerning possession of the matrimonial home (as noted above).

Terms of a simple Prenuptial Agreement

In what is to follow, some of the terms and considerations for a simple Prenuptial Agreement will be discussed.

Introductory Clause

Here, you'll need to properly identify (using the full legal names) the parties, the nature of the document (i.e. it's a Prenuptial Agreement), and the date of the Prenuptial Agreement. Keep in mind that the date of the Prenuptial Agreement may be different from when the parties started or plan to start cohabiting. This distinction may be important and you should be mindful of it.

Background

The background section gives the context and purpose of the Prenuptial Agreement. It may simple note that the parties are cohabiting or intend to cohabit, whether they are living in a home, and whether they have children (either together or from separate relationships). The background section will also indicate that the parties are not legally married but intend to be married. You can also put in specific dates if you know them. The purpose of the Prenuptial Agreement is typically to allow the parties to specify their rights and obligations during and after marriage with respect to things like property, support, and education of children. It cannot deal with things like custody and access to children or possession of the matrimonial home.

Definitions

The definitions that appear in a Prenuptial Agreement can include the legislation that will be referred to throughout (e.g. *Family Law Act*, *Divorce Act*, *Succession Law Reform Act*, etc.), and terms such as "property", "ownership", and "support". Sometimes, "breakdown of the relationship" or "end of the marriage" is defined in this section so that the parties understand the circumstances in which the agreement will come to an end. For drafting purposes, it may make more sense to put these types of definitions in the termination section (i.e. where they are relevant).

Domestic Contract

This section simply notes that the Prenuptial Agreement is meant to be a "Domestic Contract" under the ***Family Law Act*** and supersedes and is in full satisfaction of the rights under that ***Act*** (so long as the *Act* says so).

Effective Date

As previously noted, the date that the agreement is signed is not necessarily the same date that the Prenuptial Agreement comes into effect. This may, for example, be at a future date and is up to the parties to determine.

Support Obligations

A Prenuptial Agreement could go either way when it comes to support obligations. On the one hand, each party could acknowledge that they are not dependent on the other for support, will be responsible for their own support, will not assert any claim to support from the other at any time, and will release the other from all obligations to provide support. On the other hand the Prenuptial Agreement could create an obligation on one of the parties to pay a certain amount of support during or even after the period of Prenuptial. This may reflect the reality that one of the parties is economically dependent on the other and would experience or anticipate economic disadvantage arising out of the end of the relationship.

Ownership and Division of Property

This section will deal with how the parties' property will be divided upon termination of the Prenuptial Agreement. The parties may have already decided a certain percentage or simply say that they get whatever they put into the relationship during its term. The parties may want to also evidence here how much they've contributed (e.g. buying a house together or in a joint account). Property rights can be waived and the parties can release each other from claims to the other's property. The parties can also waive rights they may have to property under doctrines of trust. In what follows, some of the more important issues concerning property will be discussed.

Excluded Property

As discussed above (p. 16) when married parties divorce, there is an EQUALIZATION OF NET FAMILY PROPERTY. Essentially, you take the value of spouse's property at the date of separation, subtract the value of their property at the date of marriage, and split that amount between the two spouses. If the parties want to exclude certain of their property from NET FAMILY PROPERTY, they can do so through a Prenuptial Agreement. The key thing to remember is that, while certain assets will not be included in Net Family Property because they were owned outside of the marriage (e.g. before the parties got married), the assets may nevertheless be capable of growth, sale, and further investment. If the property is capable of increasing in value or providing income, then these things should be excluded from NET FAMILY PROPERTY as well as the asset itself (if that is the parties' intention)! So too should any property that is substituted for that property, as well as any appreciation in value or income that can be derived from the substituted property.

Constructive Trust

With respect to ownership or division of property, one of the parties may be able to assert a right based on the doctrine of **CONSTRUCTIVE TRUST**. A constructive trust is essentially a trust created by a court to benefit a party that has been wrongfully deprived of its rights. Courts may look at the pre-existing proprietary rights of the parties prior to the dispute to determine whether a constructive trust is an appropriate remedy. Historically, courts have been reluctant to impose a constructive trust in the family law context absent clear evidence and strong arguments to the contrary.

The Supreme Court in ***Rawluk v. Rawluk***, [1990] 1 S.C.R. 70 dealt with the issue of constructive trust in the matrimonial law context and laid down some general principles which are worth repeating here. While this case did NOT involve a Prenuptial Agreement, it is still important to understand (particularly, if couples are trying to avoid Constructive Trust claims via a Prenuptial Agreement). In that case, a husband and wife had separated. Throughout the years, the wife had assisted the husband in their business operations. After the separation, the value of certain property (farm machinery and realty) increased dramatically. While the wife was entitled to an equalization of net family property up to the date of separation, she was not entitled to any increase in value of the net family property after that date under the Ontario ***Family Law Act***. The only way she could claim entitlement to a distribution of half of the increase in value after separation was through the doctrine of CONSTRUCTIVE TRUST!

The trial judge and the Ontario Court of Appeal held that those properties were impressed with a Constructive Trust which gave the wife a beneficial half interest in the properties at the time of separation and entitled her to participate, as owner, in the value of the properties AFTER SEPARATION AS WELL! The husband appealed the decision that a spouse could assert a remedial constructive trust to determine ownership in equalization proceedings under the ***Family Law Act***. The Supreme Court of Canada disagreed with the husband and upheld the lower courts' decisions:

> **56** In this case fairness requires that the dedication and hard work of Jacqueline Rawluk in acquiring and maintaining the properties in issue be recognized. The equitable remedy of constructive trust was properly applied.

So the bottom line is that, absent a private agreement (e.g. Prenuptial Agreement) that says otherwise, where both spouses have contributed to the acquisition or maintenance of property, the non-titled spouse should be able to assert an interest in the property by way of Constructive Trust and realize the benefits that ownership may provide. Therefore, the remedial Constructive Trust is an available equitable principle or remedy that may be used to calculate beneficial ownership of property. The interest arises when the unjust enrichment first arose, although it is judicially declared at a later date.

Assuming that the parties to a Prenuptial Agreement understand how Constructive Trust operates, they can specify how they would like to deal with it. This may involve, for example, the parties agreeing that no principles of equity or trust (e.g. resulting trust, constructive trust, restitution, unjust enrichment, etc.) will affect ownership or division of property.

Gifts / Inheritances

Gifts or inheritances (other than the Matrimonial Home) that are received from a third party during the marriage are specifically EXCLUDED under the ***Family Law Act*** from NET FAMILY PROPERTY. But what about INCOME from such gifts or inheritances? The ***Act*** says that that income is to be excluded IF the donor or testator expressly stated that it was to be excluded. But what if they didn't say anything? Well, then you may want to specify how income is to be dealt in the Prenuptial Agreement.

Matrimonial Home

As discussed above (on pp. 17-18), while you can deal with issues such as ownership of the Matrimonial Home, you can't deal with rights to possess it (which is governed by the ***Family Law Act***). The Matrimonial Home must be viewed in light of (1) who owns it and (2) who is entitled to possess it. If a party who owns it tries to prevent the other party from possessing it contrary to the ***Act***, disaster could result! Ownership of the Matrimonial Home can be dealt with in a number of ways. First, one part could be entitled to own the whole thing. Second, the parties could divide ownership according to some formula. For example, the parties could value the Matrimonial Home as of the date of marriage and agree to repay that amount from selling it and then divide any remaining proceeds equally or in accordance with some mutually-acceptable formula. Remember: if during the course of the marriage, you move to another Matrimonial Home, you may want the same terms and conditions in the Prenuptial Agreement to apply *mutatis mutandis* to the new Matrimonial Home!

Specific Property

Specific property may include business interests (e.g. partnership units, limited partnership units, corporate shares, etc), pensions and annuities, licenses to practice, etc. With respect to Canada Pension Plan, this is a complicated area of law, and you are advised to speak with a lawyer if you have comments, questions, or concerns.

Release against Estate of other Party

Here, the parties agree not to make claims against the other party's estate when they die. This provision may become relevant in the case of intestacy (i.e. one of the parties dies without a will) or where a Will is involved. This provision may also become relevant where a party is a spouse under the *Succession Law Reform Act* and is asserting a claim as a dependent to proper support from the deceased spouse's estate.

Worth mentioning is that the language of the release is of utmost importance. If a release is too general, it may not succeed in covering things which the parties may have intended. For example, in ***Dimma v. Algoma Steel Corp*** (1979), 98 D.L.R. (3d) 160, the Ontario High Court of Justice held that a general release in a separation agreement (a type of domestic contract, just like a Prenuptial Agreement) did not prevent a wife from getting her deceased husband's pension benefits. The separation agreement between the husband and wife provided a release "from all claims and rights that (she) may have, had, or afterwards may acquire: (b) upon the death of the other, under the laws of any jurisdiction". The Court held that this language only prevented the wife from claiming statutory rights, but not contractual rights, such as pension benefits, or the ability to dispose of assets under a Will.

Similarly, in ***Re Saylor*** (1984) 3 D.L.R. (4th) 434, the High Court of Justice held that a general release in a separation agreement did not prevent a wife from claiming that she was a dependent and entitled to support under the ***Succession Law Reform Act***. In this case, the wife and husband's separation agreement contained a general release which said that the parties accepted the terms of the agreement "in satisfaction of all claims and causes of action each now has ... including ... claims and causes of action for ... possession of or title to property, and any other claims arising out of the marriage of the husband and the wife". Now, after the husband died, new legislation (the ***Succession Law Reform Act***) came into force. Under that legislation, a dependent of a deceased could apply to the court for proper support from the estate. The wife claimed entitlement to the matrimonial home, which she had previously transferred to her deceased husband as part of the separation agreement. The Court held that the general release did not prevent her from claiming a right to the matrimonial home. Among other things, the Court held that the language of the release was clear enough only to bar *inter-vivos* claims, BUT NOT CLAIMS AGAINST ESTATES!

The lessons to be learned from these cases (and others) is that you must be as precise and comprehensive as possible if you wish to prevent a party to a Prenuptial Agreement from making claims at common law, statute, equity, trust, or in contract.

General Terms

The end of the Prenuptial Agreement generally includes terms such as:

- **Acknowledgments**: the parties acknowledge that they have received full financial disclosure from the other side, understand the nature and consequences of the agreement, have had independent legal advice, and are entering into the agreement freely.
- **Amendment:** can this be done at all, for example, by both parties consenting in writing?
- **Entire Agreement:** i.e. this agreement supersedes all other agreements – whether oral or written – relating to the same subject matters in the agreement
- **Governing Law:** which jurisdiction governs the interpretation and enforcement of the agreement?
- **Interpretation:** singular vs. plural; masculine vs. feminine, section headings, etc.
- **Severability**: in case one provision is struck down and rendered invalid doesn't invalidate the rest of the agreement
- **Survival of Terms:** which terms, if any, survive the expiration or termination of the agreement?
- **Waiver:** no failure or delay of a party to enforce or exercise its rights under the agreement constitutes a waiver

Schedule A

This Schedule is more like a checklist for the parties to go over and make sure they provide the other party with fair, full, and accurate financial disclosure as of the date that they are entering into the Prenuptial Agreement. This schedule will assist the parties in disclosing their real and personal property, including homes, vehicles, business interests, annuities, appliances, furniture, jewelry, securities and investments, etc.

Execution

To execute a Prenuptial Agreement, the parties must sign in the presence of a witness. It is a good practice to have both parties and the witness initial the bottom right hand corner of every page. It's also a good idea to have the witness swear an Affidavit of Execution to the Prenuptial Agreement, and attach it to the Agreement itself. Finally, it's recommended that the parties have at least 2 copies of the Prenuptial Agreement.

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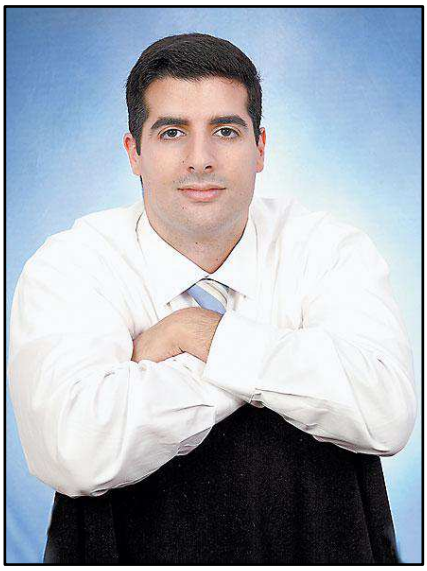

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