

10 Things you Should Know about Cohabitation and Pre-Nuptial Agreements

Author : Diane Ferrante



So you're in love. That's great. Maybe you are planning a splashy wedding. Or looking for the perfect condo in a hot downtown neighbourhood. Either way, if you decide on mapping out an agreement before you jump in with both feet (and bank accounts) here are some things to consider.

1. Cohabitation Agreements and Pre-Nuptial Agreements are not the same thing.

Married couples are governed by the *Divorce Act* and the *Matrimonial Property Act* while common-law relationships are governed by the *Family Law Act* and, to some extent, the *Adult Interdependent Relationships Act*. Why does this matter? Property. For example, the family home, bank accounts (joint or separate), the business, investments and pensions, furniture or jewellery.

The *Family Law Act* does not deal specifically with the division of property upon separation; it covers things like guardianship, child support, and partner support. While the *Matrimonial Property Act* sets out specifics on how property is to be divided between separated spouses (and what property may be exempt from division such as property a party had prior to the marriage); currently, it is only applicable to married parties who can in a pre-nuptial agreement decide that they do not want to follow the *Matrimonial Property Act*. Couples who have separated and are not married must rely on the common law and the equitable principles of unjust enrichment and constructive trusts which are not as clear cut and leave more room for interpretation than a legislated regime.

Couples can enter into a Cohabitation Agreement prior to, or after, they have decided to move in with one another. Pre-nuptial Agreements, as per the *Matrimonial Property Act*, can only be entered into if the parties are contemplating marriage (I suggest, engaged with a wedding date) and are not enforceable until after the marriage. That said, some parties do decide to put the

agreement in writing after they are married creating a post-nuptial agreement.

2. You need to share detailed financial information

In both types of agreements, the disclosure requirements are onerous but necessary. Full disclosure includes things such as income tax returns, pay stubs, banks account and credit card statements, RRSP/investment statements and a statutory declaration of all income, assets and debts, among others. It is critical for parties entering into these agreements to exchange these documents because inadequate disclosure may render an agreement unenforceable. Your lawyer can give you a comprehensive list of the disclosure necessary in your specific circumstances (i.e., more disclosure necessary if you own shares in a business or are a beneficiary under a trust).

3. It is necessary for each party to obtain independent legal advice

Having independent legal advice for both parties ensures that everyone is informed and understands what they are agreeing to when they sign. This means that each party needs to meet with their own lawyer to review the agreement and sign it after receiving legal advice on the effect the agreement has on their legal rights. The Alberta Court of Appeal has held that a lawyer has a duty to advise their client of options to a proposed settlement, an opinion on whether the proposed settlement is reasonable, a discussion of pros & cons of the settlement in comparison to other options and to establish that the settlement is the result of an informed decision. This requires full disclosure as set out above.

4. Relationships can end in different ways – and this might matter to you

How do you define “separation”? Most couples agree that they would treat things differently if one partner was to pass away during the relationship, as opposed to the couple deciding to go their separate ways. You can include different eventualities in your agreement.

5. Keep the kids out of the agreement...

It is very difficult to ensure that an agreement relating to the children, were a couple to separate in the future, will be enforceable because of something called *Parens patriae*. Essentially, courts have the power to make decisions concerning people who are not able to take care of themselves (i.e., children) and their best interests will supersede any agreement.

6. ...Unless you should keep the kids in the agreement

If one of you have children from a previous relationship, it may make sense to include those children in your agreement as to what the expectations are of the party who is not the biological parent. *In loco parentis* means ‘in place of a parent’. In cases of step children, a party might be viewed to have stepped into the place of a parent and, may, as a result, have obligations to the

child(ren) after the relationship ends. For more on child support obligations for step-parents view this article on [Step-Parents and Child Support Obligations](#).

7. Spousal/Partner support waivers are not iron clad

Although you may include a clause releasing each other from spousal or partner support obligations, you cannot count on this to be the case. There is a two-part test for spousal/partner support: entitlement (whether you or your partner is entitled to support under the *Divorce Act* or the *Family Law Act*); and, quantum & duration (how much support and for how long that support should be provided).

It can be argued that when parties are entering into a Cohabitation Agreement or Pre-Nuptial Agreement; they can not possibly contemplate all possibilities that lie ahead of them to determine whether they will suffer an economic disadvantage as a result of the breakdown of the relationship (i.e., loss of employment, illness or injury, childcare responsibilities) necessitating some form of financial support from the other and, therefore, can not properly waive their potential right to support. This concern can be tempered by including review clauses or by agreeing to some arrangement for spousal/partner support or, arrangement as to when spousal/partner support would be payable.

8. Yes, you can include the dog

Because if your relationship ends, you are going to need the support of your best friend.

9. Can we change it?

It is a good idea to include a review clause in your agreements allowing for changes to be made if both parties agree and each have independent legal advice; actually reviewing your agreement is even better.

10. Things change, including the law

There are changes afoot that may see common law couples covered by the *Matrimonial Property Act*. Stay informed and be sure to seek legal advice on how this might affect an agreement you have in place.

As we mentioned, this is some top-line information so you can start to inform yourself. Our firm has a team of family lawyers with years of experience drawing up agreements for couples. Please [contact us](#) if you have any questions or would like to discuss your situation. We would be happy to help.

[Diane Ferrante](#)