



# The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

## FAMILY LAW

---

### **Chapter 7** Agreements

July 2023

# TABLE OF CONTENTS

---

- TABLE OF CONTENTS ..... 1**
- A. INTRODUCTION..... 4**
- 1. Relevant Legislation..... 5**
  - a) Introduction ..... 5
  - b) The Divorce Act..... 5
  - c) The Family Law Act ..... 6
  - d) The Family Property Act..... 7
  - e) Pension Legislation..... 11
  - f) The Homesteads Act ..... 12
  - g) The Intestate Succession Act ..... 13
  - h) The Dependants Relief Act..... 14
  - i) Income Tax Considerations ..... 15
- 2. Responsibilities to Children ..... 16**
- B. SEPARATION AGREEMENTS – SPECIAL CONSIDERATIONS..... 17**
- 1. Court Order and/or Agreement? ..... 17**
  - a) Enforcement ..... 17
  - b) Variation ..... 18
  - c) Scope ..... 20
  - d) Satisfaction..... 20
  - e) Collateral Attack..... 20
  - f) Structure..... 20
  - g) Costs ..... 21
- 2. Combination of Court Order and Agreement..... 21**
- C. PRE-NEGOTIATION CONSIDERATIONS..... 23**
- 1. Financial Disclosure ..... 23**
- 2. Obtain Information for Parenting and Support Issues ..... 24**
- 3. Analyze the Facts and Issues ..... 25**
- 4. Relationship with the Client ..... 25**

<b>5. Relationship with Other Counsel .....</b>	<b>26</b>
<b>6. Relationship Between Spouses.....</b>	<b>26</b>
<b>7. Interim Separation Agreements.....</b>	<b>27</b>
<b>D. SPECIFIC ISSUES.....</b>	<b>28</b>
<b>1. Spousal Support.....</b>	<b>28</b>
<b>2. Parenting.....</b>	<b>28</b>
<b>3. Child Support .....</b>	<b>30</b>
<b>4. Real Estate.....</b>	<b>30</b>
<b>5. Corporate Assets .....</b>	<b>32</b>
<b>6. Income Tax Aspects of Income and Property Division .....</b>	<b>34</b>
<b>7. Estate Considerations.....</b>	<b>35</b>
a) Binding the Estate.....	35
b) Alternatives to Binding the Estate.....	35
<b>E. AGREEMENT NEGOTIATION .....</b>	<b>38</b>
<b>1. Preparing for Negotiation .....</b>	<b>38</b>
<b>2. Negotiation Processes .....</b>	<b>38</b>
a) Meetings.....	38
b) Negotiation in Writing .....	40
<b>F. FINISHING THE FILE .....</b>	<b>41</b>
<b>1. Drafting Agreements .....</b>	<b>41</b>
<b>2. Follow Through .....</b>	<b>43</b>
<b>G. VARIATION AND FINALITY OF AGREEMENTS .....</b>	<b>45</b>
<b>1. Generally .....</b>	<b>45</b>
<b>2. Judicial Intervention: Separation and Spousal Agreements.....</b>	<b>46</b>
a) Common Law Defects .....	46
b) Statutory Restrictions on the Right to Enter into Binding Contracts.....	48
c) Miscellaneous Defects.....	50
<b>H. ETHICAL CONSIDERATIONS.....</b>	<b>52</b>
<b>I. GIVING INDEPENDENT LEGAL ADVICE .....</b>	<b>55</b>

<b>J. CHECKLIST: DRAFTING COHABITATION, PRENUPTIAL AND SPOUSAL AGREEMENTS.....</b>	<b>58</b>
<b>K. CHECKLIST: DRAFTING SEPARATION AGREEMENTS .....</b>	<b>63</b>
<b>L. PRECEDENTS .....</b>	<b>74</b>
<b>1. Cohabitation and Prenuptial Agreement (agreement intending to be separate as to property, spousal support, child of prior relationship).....</b>	<b>75</b>
<b>2. Interim Separation Agreement .....</b>	<b>105</b>
<b>3. Interim Separation Agreement (to acknowledge tax deductibility of spousal/common-law partner support) .....</b>	<b>109</b>
<b>4. Separation Agreement .....</b>	<b>113</b>
<b>5. Sample Certificates .....</b>	<b>134</b>
a) Certificate of Acknowledgment .....	134
b) Certificate of Acknowledgment (opposite party declines independent legal advice).....	135
c) Certificate of Independent Legal Advice .....	137
<b>6. Affidavit of Execution .....</b>	<b>138</b>

## A. INTRODUCTION

---

Negotiation and preparation of agreements are some of the most valuable services for a family law client. In order to skillfully negotiate an agreement, a lawyer will have to be well acquainted with the facts of the client's case and have a thorough knowledge of the applicable statutes and case law. Because an agreement is a contract, an understanding of the law of contract and considerable drafting skills are essential.

The main types of domestic contracts are:

- cohabitation agreements;
- prenuptial agreements;
- spousal (or marital) agreements; and
- separation agreements.

Cohabitation agreements, prenuptial agreements and spousal agreements are especially useful to clients who wish to define or limit the responsibilities and obligations arising from their relationship, either through legislation or by operation of the common law.

A cohabitation agreement is an agreement entered into between two people who are living together or who intend to live together in a conjugal relationship. A prenuptial agreement is essentially the same type of document, designed for parties who intend to marry.

A spousal or marital agreement, sometimes known as a post-nuptial agreement, is tailored for parties who are married and are not separating at the current time. Such agreements allow the parties to deal with ownership or division of their property, support obligations, and other relevant matters in their relationship.

A cohabitation agreement will not survive marriage unless it specifically states that it will so survive and specifically references the relevant legislation. Often an agreement entered into between two people who are or will be living together and plan to get married will be called a "cohabitation and prenuptial agreement." It is important to discuss whether the parties intend to marry in the future so that their agreement can specifically contemplate what will happen in that circumstance. Most commonly, cohabiting parties enter into a "cohabitation and prenuptial agreement" that specifically contemplates the possibility of marriage even where no such promises have yet been made.

Separation agreements are used to document all or some of the terms of settlement between separated parties.

In some instances, the lawyer may simply be recording terms of settlement that have been reached through mediation, collaborative law or otherwise. In other instances, the terms of the agreement have been reached in the course of contested litigation or as a result of negotiations between counsel. In all situations, separation agreements must be thoughtfully prepared and clearly written as they are intended to govern the parties' future dealings with each other.

## 1. Relevant Legislation

### a) Introduction

Before drafting any agreement for a client, the lawyer should be familiar with relevant legislation, including the *Divorce Act*, *The Family Law Act*, *The Family Property Act*, *The Dependents Relief Act*, and pension legislation.

Depending on where the client is employed, pension legislation such as *The Pension Benefits Act*, *The Pension Benefits Standards Act*, *The Pension Benefits Division Act*, *The Civil Service Superannuation Act*, *The Legislative Assembly Act*, *The Teachers' Pensions Act* or other specific pension legislation may be relevant.

Most statutes (except for the *Divorce Act*) extend rights to common-law partners. However, the definition of common-law partners is not uniform and varies from statute to statute.

The relevant legislation is discussed in more detail in other Chapters of these materials concerning the subjects of parenting, child support, spousal support and property. The discussion below provides a summary only, in relation to the preparation of agreements.

### b) The *Divorce Act*

The *Divorce Act* applies only to married parties. It includes provisions for corollary relief including parenting matters, child support and spousal support. All of these are potential subjects for a separation agreement.

Parenting matters and child support are difficult to include in a cohabitation and/or prenuptial agreement as they are appropriately dealt with only at the time of separation. This is when the children's best interests can be considered in relation to parenting, and incomes and other financial circumstances relevant to support are known. Any such terms included in a prenuptial and/or cohabitation agreement would not be binding on the court.

Spousal support is often included in a cohabitation and/or prenuptial agreement as well as in a separation agreement. Under the *Divorce Act*, the existence of an agreement as to support is only one factor for the court's consideration (see s. 15.2) and support can be ordered in a way that is inconsistent with the parties' agreement. Strong and detailed releases are essential in order to support an argument that the terms of the agreement should be honored.

Child support is also commonly included in a separation agreement. The court has a duty to satisfy itself that reasonable arrangements have been made for the support of any child of the marriage. The court must ensure that the amount of child support is in accordance with the *Child Support Guidelines*. Even where both spouses consent, the court may only award an amount that is different from the guidelines in certain very limited circumstances, and if the court is satisfied that reasonable arrangements have been made for the support of the child (s. 15.1(1) to s. 15.1(8)).

If reasonable child support arrangements have not been made, the court must stay the granting of the divorce until such arrangements are made (s. 11(1)(b)). With respect to the issues of parenting matters or child support, the parties cannot, by private agreement, override the court's inherent discretion.

### **c) *The Family Law Act***

*The Family Maintenance Act* was repealed in its entirety on July 1, 2023 and replaced by *The Family Law Act* and *The Family Support Enforcement Act*. *The Family Law Act* harmonizes with the *Divorce Act* and contains parenting terms and relocation provisions consistent with those in the *Divorce Act*.

*The Family Law Act* applies to married parties and common-law partners, whether the same or opposite genders.

Common-law partners are defined as parties who have:

- cohabited for three years; or
- cohabited for one year and they are together the parents of a child; or
- registered their common-law relationship under section 13.1 of *The Vital Statistics Act*.

There is no limitation period for an application.

Common-law partners have the same rights under *The Family Law Act* as married partners. *The Family Law Act* covers matters which include parenting, child support and spousal support. For the purposes of support, the definition of "spouse" includes common law partners. These matters are treated in ways that are similar but not identical to the corollary relief provisions in the *Divorce Act*.

Both *The Family Law Act* and the *Divorce Act* now speak of “parenting time” and “decision-making responsibility”.

Unlike the *Divorce Act*, *The Family Law Act* provides in section 68 that where parties have separated and one has released rights to support in writing or has agreed in writing to a specified amount for support, that no order may be made under that *Act* for support. An exception exists where the amount is inadequate, the payor is in default or the recipient is in need of public assistance.

Section 9 of *The Family Support Enforcement Act* provides that either party to a separation agreement may file the agreement with a director for maintenance enforcement where both parties consent to its filing or the agreement contains a provision permitting it to be filed. Where the parties have complied with the conditions and have filed the agreement, the support provisions of the agreement will be enforceable by the Maintenance Enforcement Program in the same way as support provisions contained in a judgment or order of the court.

#### **d) *The Family Property Act***

*The Family Property Act* applies to married and common-law partners. Section 1(1) defines common-law partners as those who:

- have cohabited in a conjugal relationship for a period of at least three years, commencing either before or after the coming in force of the definition; or
- parties who have registered their relationship under section 13.1 of *The Vital Statistics Act*.

*The Family Property Act* prescribes how the value of the parties’ assets and debts will be shared on relationship breakdown or death by way of an accounting and division. Equal division is the norm although the court has the discretion to vary the equal division on relationship breakdown in some circumstances.

The provisions relating to death appear in Part IV, and are similar but not identical to the provisions relating to separation. There is no discretion to vary equal division in case of death and various other items such as jointly held property and insurance proceeds are relevant.



Section 5 of the Act provides that the parties can agree by way of a spousal agreement or a common-law relationship agreement that the Act does not apply to any or all assets and that any provision of the Act can be varied in its application to an asset.

A spousal agreement is defined in section 1 of the Act as:

- (a) any marriage contract or marital agreement, or*
  - (b) any separation agreement, or*
  - (c) release or quit claim deed,*
- in writing, or any other written agreement or other writing between spouses, made within Manitoba or elsewhere before or after the coming into force of this Act and either during marriage or contemplation of marriage, affecting all or any of the assets of the spouses in a manner described in s. 5.*

The definition of a common-law relationship agreement in section 1 is similar to a spousal agreement, speaking of “cohabitation” rather than “marriage”.

Accordingly, parties who are cohabiting or married to each other, or who intend to marry or cohabit, may enter into an agreement in which they agree on their respective rights and obligations during the marriage or relationship and/or on separation or death, including ownership in or division of property.

These agreements may address the parties’ arrangements during marriage or the relationship; most frequently they are intended to resolve issues arising in the event of the breakdown of the marriage or relationship.

For the purposes of prenuptial, spousal and common-law relationship agreements, the most important section of *The Family Property Act* is section 5 which provides as follows:

***Assets disposed of by spousal agreement***

*5(1) This Act does not apply to any asset disposed of by a spousal agreement or common-law relationship agreement or as to which the Act is made inapplicable by the terms of a spousal agreement or common-law relationship agreement, but where a spousal agreement or common-law relationship agreement is silent as to an asset this Act if otherwise applicable to the asset applies as if the spousal agreement or common-law relationship agreement did not exist.*

***Provision of Act made inapplicable by agreement***

*5(2) Where a spousal agreement or common-law relationship agreement by its terms makes a provision of this Act inapplicable to an asset, that provision does not apply to the asset but the remaining provisions of the Act if otherwise applicable to the asset apply as if the spousal agreement or common-law relationship agreement did not exist.*

### ***Provision of Act varied by agreement***

*5(3) Where a spousal agreement or common-law relationship agreement by its terms varies any provision of this Act in its application to an asset, that provision if otherwise applicable to the asset applies as varied and the remaining provisions of the Act if otherwise applicable to the asset apply in unaltered form.*

Prenuptial or cohabitation agreements are most common in situations where both parties have significant assets at the time of marriage or cohabitation, or one of the parties has significant assets and the other does not, or where one or both of the parties are in a second relationship and wish to protect their respective assets and estates for the benefit of children from an earlier relationship.

Where the parties enter into a spousal agreement while still married and cohabiting, it may be because one of the spouses wishes the other party to release an interest in a particular asset.

For example, in order to get additional financing for a small business, the bank may insist that the spouse of the business owner provide a release of family property claims as against the business. It may be a condition of a shareholder agreement that the spouses or common-law partners of the shareholders each agree to enter into an agreement which will require them to be bound by the provisions of the shareholder agreement. It may be that one of the parties acquires an asset which would be exempt from sharing, such as inherited funds, and wishes to use it in a way that would, absent an agreement, make its value shareable.

Prior to 2004, *The Family Property Act* did not apply to unmarried parties such that property rights did not automatically accrue (although trust claims were available in appropriate cases). Common-law partners (as defined) now enjoy the same rights as married parties with shareability of assets and debts being back-dated to the date the parties' common-law relationship commenced, even if prior to 2004. Such parties may wish to now consider a cohabitation agreement if they wish to deal with some or all of their respective assets by agreement in the event of separation and/or death.

The terms of a cohabitation and prenuptial agreement will vary depending on the parties' circumstances, including:

- their ages and desire for estate planning purposes;
- the existence of children of prior relationships and/or the possibility of children in the new relationship;
- the nature of the assets and which party owns them;

- whether all or some of the assets or debts will be excluded from sharing;
- whether assets exempt from sharing will remain exempt even in circumstances that would otherwise cause the exemption to be lost;
- whether there will be different terms in the event of separation or in the event of death while the parties continue to cohabit.

See the checklist “Drafting Cohabitation, Prenuptial and Spousal Agreements” in this chapter for a more detailed list of some of the issues that should be considered in a cohabitation and/or prenuptial agreement.

From the point of view of enforceability, it is best to have comprehensive financial disclosure. It is a good practice to attach a detailed financial statement listing each party’s respective assets and liabilities including their values or amounts as a schedule to the agreement. It is wise to offer the other party such additional information as may be requested, as well as an opportunity to review it thoroughly with their own advisers.

In Ontario, section 56(4) of the *Family Law Act* specifically provides that a domestic contract (which includes prenuptial, cohabitation, spousal and separation agreements) may be set aside if a party failed to disclose significant assets or debts existing at the time the agreement was made. Manitoba’s *Family Property Act* does not contain such a provision but a lack of disclosure could amount to misrepresentation or otherwise be challenged. (See the comments in [Rick v. Brandsema](#), 2009 SCC 10 with respect to the importance of financial disclosure.)

In drafting the terms for property division in a separation agreement, financial disclosure is essential.

Full disclosure as to all assets and debts, along with documentary proof should be exchanged, whether or not the parties have engaged in litigation or a dispute resolution process in which it is an absolute requirement.

In many cases, since all of the assets and debts should be known in a case of separation, it is easier to draft property terms in a separation agreement than in a cohabitation or prenuptial agreement.

Care must be taken to ensure that proper procedures are followed where assets and/or debts are to be transferred or retained by one party, and that tax consequences are taken into account.

For example, the transfer of corporate shares can be complex and may attract tax consequences, which might be avoided by proper tax planning with the assistance of corporate counsel.

The agreement between the parties that one will bear sole responsibility for a joint debt, even with an indemnity and promise to save harmless, does not bind the lender. A default by the “responsible” party will see the other remaining liable, unless the lender has provided a release.

See also *Anderson v. Anderson*, 2023 SCC 13 where the Court considered a separation agreement dealing with property and discussed the need to balance the parties’ freedom to settle their own affairs with the important procedural protections in legislation that help ensure the deal they make is fair.

## **e) Pension Legislation**

Both married partners and common-law partners have rights to share under Canada Pension Plan (“CPP”) and other pension legislation.

### **i. The *Canada Pension Plan Act***

The Canada Pension Plan has its own regime to split the pension plan credits of separating and divorcing spouses. This applies to both married and unmarried cohabitants. Normally an application to divide both parties’ pension credits is made and upon the spouse or common-law partner meeting certain criteria, pension credits will be transferred to their plan.

To qualify for a division of pension benefits, parties must have cohabited for a continuous period of at least one year.

There is no time limit for applying following a separation of married parties, except in the event of death of one of the separated spouses, in which case a request must be made within three years after the death. In the case of common-law parties, the application must be made after at least one year of separation and within 4 years of the date of separation unless the parties agree otherwise, or unless one of the parties has died.

In Manitoba, parties cannot effectively opt out of the shareability provisions of the *Canada Pension Plan Act*, by agreement or otherwise. Provisions whereby parties have attempted to do so by agreement, or have agreed not to apply for a division, have consistently been struck down by the courts in Manitoba as being void and against public policy.

## ii. ***The Pension Benefits Act and other Pension Acts***

*The Pension Benefits Act* applies to pensions within the jurisdiction of the Act. Generally, the Act will apply to all provincial government, civic and private pension plans in Manitoba except for those plans within federal jurisdiction.

The Office of the Superintendent – Pension Commission (OSPC) will advise whether a particular pension is within its mandate or not. *The Pension Benefits Standards Act* applies to pensions in federally regulated industries. Certain employers have their own pension or retiring allowances acts. For more detailed information, see the pension section in Chapter 4 - Property and Pensions.

## f) ***The Homesteads Act***

*The Homesteads Act* provides that upon the death of a party, their spouse or common-law partner has the right to continue living in the home owned by the deceased and in which they lived, for the remainder of their lifetime. For this reason, no sale or disposition of the homestead may be made during the owning party's lifetime without the consent of their spouse or common-law partner.

To qualify as common-law partners, a couple must have either registered their relationship under *The Vital Statistics Act* or they must have cohabited in a conjugal relationship for at least three years.

The Act also provides that only one spouse or common-law partner at a time may have homestead rights in a property, and a second or subsequent spouse or common-law partner does not acquire homestead rights until those of the first spouse or partner have been properly dealt with.

Cohabitation and/or prenuptial agreements may contain general estate releases as well as a specific homestead release in prescribed form which should then be registered in the Land Titles Office (Teranet Manitoba).

Such agreements may also continue such rights, particularly for older couples, or couples who have children, who do not want to displace the survivor or children in the event of the death of the party who owns the home. Sometimes a homestead release will be provided, and other provisions added to the agreement to provide similar rights for a shorter period of time.

Although homesteads rights terminate upon divorce or the termination of a common-law relationship, it is common for separation agreements to contain a homestead release in relation to property being retained by one party. This is important in the event of death after the signing of the agreement but prior to the divorce or the termination of the common-law relationship.

### **g) *The Intestate Succession Act***

Section 3(1) of *The Intestate Succession Act* provides that if at the time of the intestate's death, the parties were living separate and apart and one or more of the following conditions is satisfied, the surviving spouse shall be treated as if they had predeceased the intestate. The conditions are:

- (a) during the period of separation, one or both of the spouses applied for a divorce or for an accounting or equalization of assets under The Family Property Act and the application was pending or had been dealt with by way of final order at the time of the intestate's death; or*
- (b) before the intestate's death, the intestate and his or her spouse divided their property in a manner that was intended by them or appears to have been intended by them, to separate and finalize their affairs in recognition of their marriage breakdown.*

Section 3(2) contains a similar provision for common-law partners. The conditions under which a common-law partner will be treated as if they predeceased the intestate are:

- (a) where the common-law relationship was registered under section 13.1 of The Vital Statistics Act, the dissolution of the common-law relationship was registered under section 13.2 of The Vital Statistics Act before the death of the intestate;*
- (b) where the common-law relationship was not registered under section 13.1 of The Vital Statistics Act, three years have passed from the day on which the common-law partners began living separate and apart;*
- (c) during the period of separation, one or both of the common-law partners made an application for an accounting and equalization of assets under The Family Property Act and the application was pending or had been dealt with by way of final order at the time of the intestate's death;*
- (d) before the intestate's death, the intestate and his or her common-law partner divided their property in a manner that was intended by them, or appears to have been intended by them, to separate and finalize their affairs in recognition of the breakdown of their common-law relationship.*

Should a person die intestate leaving both a spouse and one or more common-law partners, section 3(3) gives priority to the person whose relationship with the intestate was most recent at the time of their death, provided that such a claim will not have priority over the claim of an earlier spouse or common-law partner under Part IV of *The Family Property Act*.

Section 3 gives specific recognition to the fact that separated parties can opt out of the operation of this Act.

It is crucial to discuss with parties the necessity of having a will to avoid the provisions of *The Intestate Succession Act* and to specifically discuss the provisions of *The Wills Act* including section 17 which provides that a will is revoked by marriage unless the will contains a specific declaration that it is made in contemplation of marriage, or a common-law relationship with a person whom the testator subsequently marries, or the will fulfills the testator's obligations under a court order or separation agreement to a former spouse or common-law partner.

## **h) *The Dependants Relief Act***

*The Dependants Relief Act* provides that if it appears to the court that a dependant is in financial need, the court may order that reasonable provision be made from the estate of a deceased person for the support of the dependant. An order may be made whether the deceased died testate or intestate and notwithstanding the provisions of the deceased's will or *The Intestate Succession Act*.

A dependant includes a married spouse or a common-law partner. A dependant also includes a former married or common-law partner who was entitled to support from the deceased at the time of death, pursuant to an order or agreement.

A common-law partner of the deceased person is defined under the Act in section 1 as:

*(a) a person who, with the deceased, registered a common-law relationship under section 13.1 of The Vital Statistics Act, the dissolution of which had not been registered under section 13.2 of The Vital Statistics Act before the death of the deceased, or*

*(b) a person who, not being married to the deceased, cohabited with him or her in a conjugal relationship*

*(i) for a period of at least three years, or*

*(ii) for a period of at least one year and they are together the parents of a child.*

The common-law partners' cohabitation must have been subsisting at the time of the deceased's death or have ceased within three years of the death.

The rights of a spouse or common-law partner under *The Homesteads Act* and *The Family Property Act* take precedence over *The Dependants Relief Act* but do not preclude an application.

In a cohabitation or prenuptial agreement, a party may wish to protect their estate from the potential effects of the Act (bearing in mind that any applicant would still have to prove financial need even if they meet the definition of dependant under the

Act). The other party may be concerned about forfeiting potential claims. These implications must be discussed with the client.

As well, the court is not bound to honour a release under *The Dependants Relief Act*. The court will consider all factors including evidence of the deceased's reasons for making the dispositions in their will or for not making reasonable provision for the dependant, including any statement in writing signed by the deceased and shall consider all circumstances in determining the weight to be given (see ss. 8(2) and 8(3)).

In determining the amount and duration of support for a dependant, the court will also consider all of the circumstances of the application, including the following:

- the measures available for a dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;
- the age and the physical and mental health of the dependant;
- the assets and financial resources that the dependant has or is likely to have in the foreseeable future;
- the capacity of the dependant to provide for their own support;
- if the dependant is a spouse or common-law partner, any distribution or division of property that the dependant has received or is entitled to receive under *The Homesteads Act* or *The Family Property Act*;
- the assets that the dependant is entitled to receive from the estate other than by an order under *The Dependants Relief Act*; and
- any provision which the deceased, while living, made for the dependant and for any other dependants.

On balance, notwithstanding the above, it is better practice for the agreement to contain a clause releasing all rights under *The Dependants Relief Act*, even though it will not bind a court. Given the court's discretion under the Act, a *bona fide* agreement may be effective against a surviving spouse or common-law partner who makes a claim under the Act. In the case of a dependant child, such a release would not be effective, as the child would not be a party to the agreement.

## **i) Income Tax Considerations**

The *Income Tax Act* (Canada) must be considered in every case where there is support payable, property transfers, division of RRSPs, division of pensions and related issues arising on relationship breakdown. Appropriate advice should be sought from the relevant expert (such as corporate counsel, tax lawyer or accountant) where necessary.



## 2. Responsibilities to Children

Where a person lives in a conjugal relationship with, or is married to someone with children, section 57(2) of *The Family Law Act* provides that the person has a duty to provide reasonably for child's support, but that the obligation is secondary to that of the child's parents.

Section 57(2) 3. provides that a person who is standing in the place of a parent to a child has a duty to provide reasonably for the support of that child. Note that in the case of *Chartier v. Chartier*, [1999] 1 S.C.R. 242, the Supreme Court of Canada held that a person cannot unilaterally withdraw from a relationship in which they stand in the place of a parent. The court indicated that one must look at the nature of the relationship to determine if a person does in fact, stand in the place of a parent to a child. Among the facts to be considered are the parties' intentions.

In *Chartier* the husband had severed his relationship with the step-child following separation and in the context of divorce proceedings he contested any claim for child support. Mr. Chartier was found to have continuing obligation notwithstanding that he had no biological link to the child, nor an ongoing role in the child's life.

Counsel who prepare cohabitation and/or prenuptial agreements in situations where there are children of prior relationships should carefully review the facts with their clients. In certain situations, parties may have determined and agreed that the step-parent will not have any parental authority or responsibility or play any parental role in the care of the step-child. It may be useful to record that fact in an agreement.

Parties cannot exclude the jurisdiction of the court by agreement, in matters of the welfare of children, including support. If the reality, notwithstanding the agreement, is that a person has assumed a parental role, there will be a basis upon which a legal duty to provide support may be asserted.

## B. SEPARATION AGREEMENTS – SPECIAL CONSIDERATIONS

---

### 1. Court Order and/or Agreement?

It is not uncommon for parties to a separation agreement to enter into a court order by consent, in terms that are consistent with their agreement. In some cases where parties are less concerned about compliance/enforcement, they may choose to rely on their separation agreement, and if married, obtain a bare divorce (without a court order for corollary relief).

In determining whether or not a court order, a separation agreement, or some combination of the two will be the most suitable vehicle for concluding the case, various considerations should be taken into account, including:

#### a) Enforcement

Court orders may be more easily and more immediately enforced than separation agreements. Separation agreements are contracts and like any other contracts they give rise to certain remedies in the event that they are breached.

Depending on the type of the order, court orders may be enforced by police action, or the Maintenance Enforcement Program, among other remedies, or an application to court for an order of contempt might be made. Separation agreements may also be registered with the Maintenance Enforcement Program if they contain specific provisions to that effect, or if the parties agree.

Where there are concerns as to violence or as to a party potentially absconding with children or assets, the client will need a more readily enforceable remedy than that provided by a separation agreement. Such situations will not necessarily preclude agreements, but may make it wise to have court orders to protect the client's interests.

In matters involving concerns of child abduction and *The Child Custody Enforcement Act*, there should be a court order for parenting. *The Child Custody Enforcement Act* does not provide a remedy for enforcement of parenting agreements. That act only provides remedies to enforce custody or access orders from a Canadian or foreign court.

Note that section 36 of *The Family Law Act* provides that parents who have cohabited after the birth of their child each have joint rights to exercise parental responsibilities with respect to their child. As these rights arise by operation of law, parents cannot by agreement override them.

Section 37 of *The Family Law Act* provides that the court may make an order respecting parental responsibilities for a child, on application by either parent or a person who stands or intends to stand in place of a parent.

Note that *The Enforcement of Canadian Judgments Act* recognizes and provides enforcement of monetary and non-monetary civil judgments from other Canadian jurisdictions. It also has specific provisions for Manitoba to recognize and enforce civil protection orders originating in other Canadian jurisdictions.

## **b) Variation**

Separation agreements can, to a great degree, resolve matters between parties on a final basis. Parties often wish to know that matters relating to the division of their property, the disposition of their home and the division of pension credits have been concluded. Clients often want matters settled and want assurance that they will not be faced with further claims or litigation. While no absolute guarantees can be given, virtually every separation agreement will contain both general and specific property releases intended by the parties to finalize the division of property.

It is usually possible to enter into variation agreements or amending agreements, if both parties consent. Agreements can provide for variation of issues such as child support, when circumstances such as incomes change. The Child Support Service can also recalculate child support provided the agreement contains a clause so directing.

Parties frequently seek to finalize the issue of spousal support. Many separation agreements contain provisions that neither party will seek or pay spousal support in the future. Other agreements may provide for support that is fixed and non-variable. A court is unlikely to be willing to pronounce an order that is non-variable.

The law has continued to develop as the *Divorce Act* has been amended from time to time. The most important authority on this point is the Supreme Court of Canada decision in *Miglin v. Miglin*, [2003] S.C.J. No. 21. The parties in that case had entered into a final agreement that sought to settle all of their financial and personal affairs. In addition to terms providing for property equalization, parenting and support arrangements for their children, the parties agreed to release one another from any claims to spousal support.

At trial and in the Ontario Court of Appeal, the court awarded spousal support to the wife, despite the existence of the release in the agreement. The trial judge held that the separation agreement was not consistent with the social policies and objectives set out in the *Divorce Act*. The Ontario Court of Appeal found that there was jurisdiction to award support because there had been a material change in the circumstances of the parties since the execution of the agreement.

The Supreme Court of Canada allowed the further appeal by the husband stating that a fairly negotiated settlement that represents the intentions and expectations of the parties and complies substantially with the objectives of the *Divorce Act*, should

receive considerable weight. The Supreme Court found that among the objectives of the *Divorce Act* were the goals of certainty, finality and autonomy.

Accordingly, the Supreme Court stated that any court should be loath to interfere with a pre-existing, fairly negotiated agreement. While the court has the jurisdiction to order support in a way that is different than that to which the parties agreed, the court should consider interfering with the agreement only if the court is convinced that a fairly negotiated agreement does not comply substantially with the overall objectives of the *Divorce Act*.

Accordingly, it is crucial that if the parties intend their agreement as to support to be respected, that the releases be detailed and attempt to set out for the purposes of a potential future support request, evidence that the parties' agreement meets the tests required to be respected. This includes an awareness of the factors and objectives for spousal support.

The court still retains the jurisdiction to award spousal support that is different than that to which the parties agreed in an appropriate case. The court always retains the jurisdiction to make orders relating to children including parenting matters and support.

Note that in the case of spousal support provisions in an agreement, the court is not being asked to vary the agreement, but rather to make an initial support order that is different than the support provisions of the agreement. If the terms contained in the agreement have been duplicated in a court order, it is a variation of the order that will be sought, and the variation provisions of the governing statute will apply.

In [Rick v. Brandsema](#), 2009 SCC 10, the Supreme Court extended the *Miglin* principles (which concerned spousal support) to agreements on property division. The court found that the parties' negotiated separation agreement was unconscionable due to the husband's defective financial disclosure and exploitation of his wife's known mental vulnerabilities.

The court held that the parties have a duty to make full and honest disclosure of all relevant financial information. Failing to do so may "render the agreement vulnerable to judicial intervention."

See also [Anderson v. Anderson](#), 2023 SCC 13, where the court considered a separation agreement dealing with property and Saskatchewan provincial property legislation. The Court declined to "transpose the *Miglin* framework, which arose within a different statutory context, into provincial family property legislation". The Court found that "useful general principles emerge from *Miglin* to guide courts in approaching domestic contracts" but held that "the judge's interpretive exercise is statute-specific,

and differences between property division and spousal support, division of powers concerns, and the distinctive features of the Saskatchewan statute mandate a tailored analytical approach.”

### **c) Scope**

A court order is limited in scope by the provisions of the applicable statute and the court’s own jurisdiction. An agreement is subject only to the general limitations of contractual freedom, such as illegality and public policy. An agreement, therefore, may cover many areas that a court order cannot.

Pursuant to section 16.9 of the *Divorce Act*, and sections 49 – 55 of *The Family Law Act*, a person with parental responsibilities pursuant to a court order has obligations with respect to relocation which include notice provisions, regardless of whether the order contains those specific terms. Under *The Family Law Act*, these obligations also apply to parents who have parental responsibilities by operation of law, for example under section 36 of *The Family Law Act* (joint rights of parents respecting children).

Parties to an agreement may want to specifically include and detail any provisions in that regard. This may include provisions respecting the geographical location in which a child is to reside, one of the factors that is to be considered by the court in determining the child’s best interest in the event of a request to relocate (see s. 16.92(1) of the *Divorce Act*.)

### **d) Satisfaction**

In a contested situation, a court order is a court-imposed solution to the parties’ difficulties. As such, the court’s decision may not satisfy either party. By contrast, the parties to an agreement must know exactly what the nature of their bargain is and may compromise on matters which are less important to obtain concessions on issues which are of more significance to them.

### **e) Collateral Attack**

Agreements are open to collateral attack on grounds such as undue influence, duress, unconscionability, mistake and other contractual principles, etc. which are not normally available to challenge the validity of a court order or judgment.

### **f) Structure**

An agreement is a contract by whose terms each party must abide. Neither party can be forced to negotiate in good faith, adopt reasonable positions or, ultimately, enter into an agreement. Court action may be necessary simply because the litigation process imposes deadlines and structure on parties who otherwise might be incapable of or unwilling to negotiate.

## **g) Costs**

### **i. Emotional Costs**

Generally, negotiating a separation agreement or participating in a process such as mediation or collaborative law is less stressful on the parties than litigating a case in court. Instead of having a solution imposed by a court, the parties are more in control of the process and the result. At the same time, negotiating a separation agreement takes time and requires that both parties are emotionally ready to negotiate.

Parties cannot be forced to negotiate on a timely or reasonable basis. Potential delays and a sense of being subject to the other party's agenda may put added pressure on the client, particularly if the client perceives the other party as stronger or dominant.

Court processes, along with requirements to fulfill pre-requisites and the attendant deadlines also put pressure on parties. Once set, trial dates will generally not be adjourned, often motivating settlement due to the pressure of a looming date.

### **ii. Financial Costs**

An out of court process leading to an agreement can be less expensive than a contested court proceeding, particularly in a complex case.

The court now requires, as a pre-requisite to triage, that the parties attempt to resolve matters outside court. If it becomes clear that settlement is not possible, steps should be taken to move to the court process so that the client is not burdened with costs for a long and fruitless attempt at settlement along with the costs of proceeding through court.

### **iii. Possible Prejudice to Client**

Consider whether the other party is negotiating in good faith or is simply stalling to gain or enhance an advantage. For example, is the client's position with respect to parenting being prejudiced? Is your client unhappy with the status quo? Are funds being dissipated? Is sufficient child and/or spousal support being paid while negotiations are ongoing?

## **2. Combination of Court Order and Agreement**

It is common for parties to enter into a court order by consent in terms that are consistent with their agreement.

The agreement can be a more comprehensive document and will deal with all of the issues which the parties wish to resolve, whether they are within the court's jurisdiction or not.

The order will contain the provisions of the agreement that are within the court's jurisdiction and which the parties may be particularly anxious to enforce. It will be helpful to use the standard clauses required for court orders in your agreement, for ease of drafting.

Section 92 of *The Family Law Act* specifically provides:

***Order may incorporate agreement***

*A court may incorporate into an order made under this Act all or part of a written agreement made by the parties to the proceeding and, unless the court orders otherwise,*

- (a) the order replaces the part of the agreement that is incorporated; and*
- (b) the rest of the agreement remains in effect.*

Whether parties opt for a court order and/or an agreement, the more detailed and specific the order or agreement is, the easier it will be for the parties to comply. A detailed, multi-directional order or agreement sets out clear expectations and does not leave matters ambiguous or open to different reasonable interpretations.

In addition to assisting compliance by setting out exactly what the parties are to do, in the case of an order, specific and detailed terms also aid in establishing a breach for a contempt application in the event of non-compliance.

Where there are some issues "to be agreed" in future, the agreement or order should contain a mechanism for resolving the issue in the event that future agreement proves elusive.

## C. PRE-NEGOTIATION CONSIDERATIONS

---

### 1. Financial Disclosure

Before attempting to negotiate a settlement, you should obtain complete disclosure and documentary proof of your client's assets and liabilities and as much information as your client knows of the other party's financial circumstances.

Obtain complete legal or other descriptions of assets and detailed information with respect to liabilities (i.e., the name of the creditor, the amount outstanding, the interest rate, the date payments are due, when it was incurred, the purpose for which it was incurred and which party is obligated to pay). Determine whether shares or other assets have been pledged as security.

Consider whether any assets are exempt or otherwise non-shareable and/or whether a claim should be advanced for unequal division of assets, a negative accounting or for equitable relief by way of constructive trust, unjust enrichment, etc.

Consider what steps must be taken to secure assets to avoid the possibility of the other party dissipating them.

It may be in the client's best interest to inform their bank, credit card issuer and lenders of the separation. However, be mindful that the officials of banks and lending institutions may be very concerned about the security of their loans and may not understand their status as creditors. Therefore, they may react negatively or impulsively in a way that may limit the possibilities for resolving the financial issues between the parties. For example, if a loan is required to pay out a spouse, or if one or both parties might remain indebted to the lending institution, cooperation between the parties and the lending institution should be encouraged.

The client is unlikely to know the complete details of their spouse's financial circumstances even if they believe they do. This information must be obtained from or confirmed by the other spouse through their counsel. If the information is provided piecemeal during the course of negotiation, a summary of the information and documents that have been received should be sent to the opposing counsel in order to clearly record the factual basis upon which the settlement is made. A sworn financial statement from the other party should be obtained. It may be helpful to also exchange comparative property statements.

The information provided by the client alone as to the value of any particular asset or the manner in which title to it is held cannot be solely relied upon. It is important to:

- conduct property searches to ascertain exactly how title is held, when the property was obtained, the consideration given, and the particulars of any encumbrances;



- conduct corporate searches to ascertain the officers, directors and shareholdings in any private companies, when the shares were obtained and the particulars of any encumbrances;
- obtain copies of trust declarations, trust tax returns and information with respect to any distributions from the trust to any beneficiaries;
- confirm with creditors, directly or by other objective means, the nature and details of debts and liabilities; and
- obtain valuations or appraisals where required, jointly if possible. This will minimize disputes over the valuation and concerns that the valuator was in some way partial to the party who retained them.

## 2. Obtain Information for Parenting and Support Issues

Complete financial information as to the source(s) and the total amount of all income of the client and the other spouse or common-law partner must be obtained where support is at issue.

Section 21 of both the Federal and Manitoba *Child Support Guidelines* lists the financial disclosure necessary for a child support order where the guidelines apply. The Manitoba *Child Support Guidelines* also require a sworn financial statement as required by the King's Bench Rules.

For example, Income tax returns and notices of assessment and reassessment for the last three years and recent statements of earnings from all sources are required from each parent whose income information is necessary in order to determine support or section 7 expenses. Where a parent is self-employed, a partner in a partnership, controls a corporation or is a beneficiary under a trust, detailed additional information is required. This same information should be obtained for the purposes of an agreement.

Claims under section 7 of the guidelines require additional financial disclosure. Extra expenses such as child care, medical and dental premiums attributable to the children, health-related expenses, extraordinary expenses for primary or secondary school education, expenses for post-secondary education and extraordinary expenses for extracurricular activities are potentially shareable between the parents under the guidelines. Information about these expenses (and their net costs) should be obtained.

A list of usual monthly expenses may also be helpful in circumstances where the tables may not apply, including shared parenting, adult children, incomes over \$150,000 and undue hardship, as well as in relation to spousal support.

If parenting is at issue, background information on both parents should be obtained. Specific information regarding each one's education and employment, mental and physical health, and any limitations on either's ability to care for the children should particularly be obtained.

The background of each child should also be investigated, particularly with respect to the relationship between the child and the parents, and the child with their siblings, the child's abilities and special needs at school, the existence of any physical or mental health problems and the reliance on the neighbourhood for school, entertainment and friends. The parent who has historically had the major role in parenting or the majority of parenting time should be identified, and the other parent's role should be considered.

### **3. Analyze the Facts and Issues**

Once the facts are reasonably clear, you should assess what outcome the client is seeking to achieve, discuss the possible costs and results of litigation, and obtain instructions from the client to open negotiations. You should formulate an approach to achieving the client's goals.

Any offer intended to be sent to opposing counsel should be thoroughly reviewed with the client and approved by them. Ideally, the client should sign a copy of the letter containing the offer or otherwise indicate their approval in writing before it is sent out. The letter should be sent on a without prejudice basis.

Explain to the client that once a position is taken that is attractive to the other side, it is difficult to retreat from it. Once an offer is accepted, it cannot be withdrawn or changed except by agreement.

### **4. Relationship with the Client**

Every client is concerned about the possible outcome of their case. It is a mistake to alleviate these fears by giving your client unrealistic expectations and is contrary to the *Code of Professional Conduct* ("the Code") which advises lawyers to be "wary of making bold and over-confident assurances to the client (*Rule 3.1-2* Commentary [9]). To do so may very well raise an insurmountable obstacle to settlement.

The client must have objective information to assist them in accepting the inevitable changes, whether financial, emotional, or both, which result from a separation. It is important for the client to obtain a realistic opinion from you as to the likely outcome of their matter in court in order to let them assess the wisdom of a potential settlement, and what may be their best alternative to a negotiated agreement.

## 5. Relationship with Other Counsel

Do not argue with opposing counsel or discuss why their client is worse than yours. You should avoid discussions with your client about the strengths and weaknesses of opposing counsel, or your personal feelings about that counsel. These statements often find their way to the other spouse and their counsel and are counterproductive. Negotiations may become strained as a result of a personal clash between counsel.

Such comments breach [Rule 7.2-1](#) of the *Code* which states that “A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.” (See the Commentary on this Rule.)

## 6. Relationship Between Spouses

In some cases, clients are best able to solve their own problems and may be encouraged to discuss possible solutions with their spouse or partner during negotiations. However, if clients are not able to discuss matters productively due to mistrust, animosity, emotions, etc., they should not do so, as matters may become inflamed. It should be emphasized that any such discussions that take place are without prejudice and cannot form the basis of an agreement until confirmed with counsel.

The parties may choose or be referred to mediation, which may be a productive and less expensive means for them to reach their own agreement.

Counsel should take care to screen for domestic violence to attempt to ensure that imbalances in bargaining power can be addressed and the parties can communicate without fear. The Federal Department of Justice has more information about family violence in the [HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisers](#), to assist in screening for violence.

Parties should be strongly encouraged to obtain legal advice as mediation progresses even though agreements reached in mediation are often stated to be non-binding until an agreement is signed. Having legal advice while mediation is ongoing helps the parties understand the relevant legal principles and the ramifications of the settlement they are discussing. It will allow them to consider the merits of the potential settlement compared to the likely outcome in court.

As well, once parties have reached an agreement, they are psychologically committed and may be reluctant to upset the agreement, even if they have second thoughts after obtaining legal advice. They may also fear that asking for a change in one area may lead their spouse to ask for changes in another area.

If an agreement is reached at mediation, the mediator will draft a memorandum of agreement for the parties to review with their own counsel. The lawyers will draft the agreement, ensure that it is properly executed and that each party has obtained independent legal advice (or has been advised to do so). Mediation is discussed in more detail in Chapter 1 - Initial Considerations.

## **7. Interim Separation Agreements**

If negotiations might take some time, it may be important to have an interim agreement dealing with matters such as parenting, child support, spousal support, preservation and management of assets, occupancy and maintenance of the family home, on a basis that will not prejudice the final settlement.

An interim agreement can be useful in giving the parties security and in setting the ground rules for the relationship between them until a final settlement is achieved. Carefully consider any potential income tax implications when drafting an interim agreement.

A payor who has been making or will make payments to their spouse or common-law partner or to third parties for the benefit of their spouse or partner (other than child support), without a court order or final agreement, may wish an interim agreement to have these payments treated as spousal support for the purposes of taxation.

Provided the payments meet the requirements of the Canada Revenue Agency ("CRA"), they will be tax deductible to the payor and taxable as income to the recipient. Requirements include that payments made in the past were made in the calendar year the agreement is signed or the immediately preceding calendar year, or that the payments are to be made in the future pursuant to the agreement, which must be in writing.

## D. SPECIFIC ISSUES

---

### 1. Spousal Support

One of the objectives of spousal support listed in the *Divorce Act* is the promotion of economic self-sufficiency of each spouse within a reasonable period of time (s. 15.2(6)). Among the factors that affects a support order for a spouse or common-law partner under *The Family Law Act* are the measures available for a financially dependent spouse or partner to become financially independent, and the length of time and cost involved in taking those measures (s. 70(1) 8.(a) and (b) of *The Family Law Act*).

When spousal support is at issue for a non-working spouse or partner, retraining may be necessary. If the client does not have any special expertise, education or a profession, it may be useful to send them to a career counsellor for aptitude testing and to discuss future employment possibilities.

With respect to support, particularly if it is to be time limited or non-variable, be realistic about the spouse's future ability to earn income, and to meet their needs with the support agreed. State in the agreement the basis upon which the amount or duration of support was determined.

For example, if more assets or a greater value of assets are given to a spouse to compensate for a smaller amount of support, that should be made clear in the agreement. If the support amount or duration is agreed in light of certain anticipated circumstances, consider what will happen if those circumstances do not occur.

Also consider the case of *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. In that case, the Supreme Court of Canada held that an ill spouse was entitled to support after a short-term marriage, and remitted the matter back to the trial judge for determination as to quantum.

It is also crucial to consider all elements of the *Spousal Support Advisory Guidelines* (the "SSAGs") as they would be considered by the court if matters proceeded there.

### 2. Parenting

Parenting issues may be the most difficult to negotiate. If there is a problem, consider a referral to mediation to assist the parties in resolving the dispute. If the situation is emotionally charged, both parties will likely distort it. This makes it very difficult for them to compromise.

It is important to direct the clients to attend the Parent Education Program at the Family Resolution Service and to remind them of their obligations, now codified in the *Divorce Act* and *The Family Law Act*, to protect children from conflict and make parenting decisions in their best interests.

Some parties may seek, or resist, a regime of shared parenting time in order to obtain, or avoid, an adjustment to child support under section 9 of the *Child Support Guidelines*. It will be important to refocus the issue on the parenting time that is in the children's best interests.

Avoid negotiating a loosely defined parenting arrangement if the temperament of the parties demands a more structured one. The ability of the parties to cooperate is the key. It is pointless to simply specify "reasonable parenting time" if one or both of the parties is unreasonable.

Instead, the agreement might provide reasonable parenting time as agreed, and define minimum specified times, thereby allowing a degree of flexibility yet assuring a defined general schedule for parenting time at a minimum level. An agreement should almost always include "such further and other times as may be agreed", to allow for adjustments to the schedule by agreement.

The lawyer acting for a parent who does not have the majority of parenting time or decision-making responsibility should be extremely careful in defining that parent's rights and responsibilities. Unless the agreement provides for decision-making responsibility, that parent will not have the right to participate in determining the religious upbringing of the child, the educational future of the child, or even to authorize medical treatment.

Whether or not an order respecting parenting will be pronounced, consider including provisions in the agreement with respect to relocation. Further consider whether a clause prohibiting the removal of the child without the other parent's consent or the court's permission is required, as this is one of the factors the court is to consider in deciding whether to permit a relocation (*Divorce Act* s. 16.92 and *The Family Law Act* s. 52(2)(e)).

Where one party will have the majority of the parenting time, that party may want to be able to make major decisions affecting the child. The other parent may also wish to share in the decision-making responsibility. It may be useful in such a situation to provide that one parent may make certain decisions in the event that the parties do not agree after consultation. Other parties may have no difficulty in agreeing to joint decision-making responsibility.

In a shared parenting situation, where time with the children is to be shared with each parent having at least 40% of the parenting time with the child, the parties must be able to cooperate enough to agree on the many aspects of parenting to ensure proper care of the children.

Consider also the tax implications of shared parenting. This includes how child support provisions should be drafted to avoid creating a situation where a parent cannot claim a child as a dependent, which parent may claim which child as a dependant (or whether a claim for a single child can be alternated) and that parents who share care will each receive half of the Canada Child Benefit, if applicable.

It may be useful to name a parenting coach to make a decision, or name a particular person or organization to be a mediator, or to agree to return to a mediation, collaborative law or arbitration process in the event of a future parenting dispute.

### 3. Child Support

The Federal *Child Support Guidelines* under the *Divorce Act* and Manitoba's *Child Support Guidelines Regulation* set out rules and tables to be used for calculating the amount of support that a paying parent should contribute towards their children's support.

The *Child Support Guidelines* were designed to protect the best interests of children and to provide children across the country with appropriate and consistent support from both parents. A court is required by the *Divorce Act* and *The Family Law Act* to apply the guidelines in almost every case, with few and limited exceptions. The guidelines and table amounts for each province make it easier for parties wishing to settle out of court to determine in advance what a court would order for child support in each individual case.

Pursuant to an order made by the Governor in Council under section 2(5) of the *Divorce Act*, Manitoba's *Child Support Guidelines Regulation* made under *The Family Law Act* has been designated as the "applicable guidelines" for the Province of Manitoba. This means that the Manitoba guidelines apply to child support orders under both *The Family Law Act* and the federal *Divorce Act*, where both parties reside in Manitoba. If the matter is proceeding under the *Divorce Act*, and one of the parents lives outside Manitoba, the federal *Child Support Guidelines* apply.

The guidelines deal with court orders and, therefore, are not strictly "mandatory" for separation agreements. However, in granting a divorce, the court must be satisfied that reasonable arrangements have been made for the support of children, having reference to the *Child Support Guidelines*, and to stay the divorce if such arrangements have not been made. It is therefore critical to ensure that agreements as to child support comport with the *Child Support Guidelines*, whether or not the court is being asked to grant a child support order.

If the separation agreement calls for support that does not accord with the tables, but that is based on special provisions, reasonable arrangements, adult children or undue hardship, it should clearly document the reasons for the amount agreed and the departure from the table amount.

### 4. Real Estate

Most often, the family home is the most valuable asset that the parties own and forms an important part of the negotiations. While both parties are normally familiar with any real property at issue, to avoid the many pitfalls that exist, the lawyer should view the transaction as if the parties were unrelated.

- **Transfers between spouses/partners.** The most common method of dealing with real estate is a direct transfer between spouses or common-law partners. The lawyer acting for the party who will retain the home should first confirm that the client has determined that they have a sufficient cash flow to pay for the maintenance and upkeep of the property, including major repairs. Potential increases in such costs should be brought to the client's attention. For example, the client should consider

possible increases in the interest rate on mortgage financing and the effect that an increase would have on the monthly mortgage payments if refinancing is required.

- The lawyer acting for the party who will own the home should review all encumbrances and charges against the property with the client. The terms of the mortgage registered against the property should be examined. Is the mortgage assumable? If it is assumable but refinancing will be required at the end of the term of the mortgage, does the purchaser qualify for the required financing? Will the client qualify to borrow additional funds if needed?

A mortgagee must be notified of any transfer. One party should not simply agree to transfer property to the other spouse, with that other spouse agreeing to assuming obligations under the mortgage registered against the property.

If the existing mortgage is to be paid out, check to see if there will be a pre-payment penalty or costs associated with discharging the mortgage.

Further, the tax consequences of the transfer must be ascertained. This is especially important where the parties own two residences. Only one can be designated as the principal residence for any particular period of time. Therefore, if there are two properties, it is possible that the party who sells one first will designate that property as principal residence, and avoid capital gains tax for the period in which the home was owned.

The parties cannot each have a separate principal residence simply by virtue of separation. In such circumstances it is wise for the agreement to confirm which home shall be designated as the principal residence and call for the appropriate designation form to be executed under the *Income Tax Act*. See section 54 of the *Income Tax Act* for the definition of principal residence and section 2300 of the Income Tax Regulations.

- **Occupancy by one or both spouses/partners.** In negotiating a separation agreement in which one spouse or common-law partner is to reside in jointly owned property or in the property of the other spouse or common-law partner until the property is sold, or until a specified event in the future, the following matters should be considered:
  - Who will pay general maintenance and upkeep costs?
  - Who will make the decisions about and pay for major repairs?
  - Who will be responsible for keeping the property adequately insured?
  - Who will pay the monthly mortgage payments, insurance premiums and the property taxes?
  - Can any other person reside in the premises?
  - Does the party residing in the premises have to pay occupation rent?



- Does the non-residing party have to contribute towards mortgage, insurance or property taxes? Can the residing party make a claim for those amounts in the future?
- Has the non-residing party purchased a home of their own prior to transfer of the former family home to the party residing in the home? If so, then use caution when dealing with the principal residence issue.
- If the property is to be sold, who will be responsible to ready the home for sale and for showings?
- **Sale to a third party.** If jointly owned property is to be listed and sold, the agreement should address such matters as the listing agent, listing price, terms of sale and the sale price, division of proceeds, and payment of real estate fees and legal costs for the sale.
  - Division of proceeds should normally be specified to be net proceeds (after deducting mortgages, other encumbrances, real estate commission and legal fees). How the proceeds are to be divided should be specified.
  - Will the proceeds be divided equally, or in some other fashion?
  - Will one party owe the other an equalization payment in relation to other assets that will come from their share of the sale proceeds?
  - Are there other monetary adjustments to be made for other reasons? (for example, one party may have paid for a major expense to prepare the home for sale such as a new roof, to be repaid from the sale proceeds, or there may be a payment to be made to compensate for support unpaid or monies overdrawn by one party.)
  - If there is a possibility of a shortfall, the responsibility for payment of the shortfall should be specified in the agreement.
  - Consideration should be given to occupation/possession of the premises pending sale as noted above.

## 5. Corporate Assets

Prior to negotiating any settlement that deals with corporate assets, the lawyer must obtain the pertinent corporate information and have considered the problem from a corporate perspective. Failure to do so may result in the lawyer negotiating a separation agreement that obliges the client to sell shares to the other spouse or common-law partner, which the client is obliged under a prior existing shareholder agreement to offer first to the other shareholders or may create other problems.

There are endless planning possibilities for structuring the division of assets between spouses or partners if one or both of them own shares. As an alternative to a direct transfer of shares between spouses, the transaction can take the form of a sale of assets, or involve

the reorganization of the capital of the company. Normally, income tax consequences will be of great importance in determining the form of the transaction.

When acting for a client who is a shareholder of a corporation and financial disclosure is requested of the client that relates to the corporation (for example, financial statements, minute books, corporate income tax returns), it is important to consider:

- Whether the consent of other shareholders is required before such disclosure can be made;
- Whether the corporation itself requires its own independent counsel to provide advice as to disclosure; and
- If disclosure is to be made, whether same should be made under trust conditions or pursuant to a confidentiality agreement pertaining to keeping the documentation confidential, and/or if a request should be made to court to have the court pocket sealed or to keep the information confidential. (See *The Family Law Act* s. 58(3). For example, having such information in the public domain and available to third party competitors could be prejudicial to the corporation. Note that the possibility of accessing what is in the court pocket is limited; see King's Bench Rule 4.10(1)).

When there are shareholders of a company in addition to the spouses or common-law partners, the transaction must be reviewed in light of the rights of those other shareholders. Where there are only a few shareholders, the articles may contain restrictions on the right to transfer shares or set out the mechanism to determine the shares' value. Such restrictions may be found in a shareholder agreement or the Articles of Incorporation. A copy of the articles and any shareholder agreements should be obtained prior to negotiating a settlement.

If the company has creditors, the rights of the creditors must be reviewed. There may be an agreement which restricts the company from altering its capital or incurring any debt to be repaid before payment of the creditors' debt.

In many cases, the purchasing spouse or common-law partner will not have or be able to raise sufficient funds to pay the entire amount of the purchase price at the time that the agreement is signed. In such circumstances, the lawyer acting for the vendor spouse or common-law partner will want to ensure that there is adequate security to protect the client. The lawyer for the purchaser will want to ensure that the client has an adequate cash flow to meet other obligations and that the security does not interfere with the operations of the company, nor limit the client's ability to obtain any additional financing which may be required.

It is crucial that advice be sought from corporate counsel in every case where shares in a corporation are at issue, regardless of whether you act for the party who owns or does not own corporate shares.

## 6. Income Tax Aspects of Income and Property Division

The income tax laws are extremely complex and their application to separation and divorce is often not readily understood. Some of the issues to be considered are:

- spousal or common-law partner support;
- third party payments;
- payments made prior to an order or written agreement;
- child support;
- transfer of property (including commercial assets and RRSP funds).

Payments of spousal support (which includes support for a common-law partner) are tax deductible by the payor and must be included as income by the recipient provided the payments are periodic and paid pursuant to a written agreement or court order.

For the purposes of tax deductibility, an agreement can also include payments made in the current calendar year in which the agreement is signed, or in the previous calendar year that were made prior to, but in specific contemplation of the agreement. Certain third-party payments may also qualify for tax deductibility. In each case specific criteria must be met and the appropriate sections of the *Income Tax Act* mentioned.

Great care should be taken to ensure CRA requirements are met. See [Income Tax Folio S1-F3-C3 Support Payments](#) for more specific guidance.

Child support is not tax deductible by the payor nor taxable in the hands of the recipient. The parent who pays child support cannot claim the child as a dependant. Where parents have shared parenting time and each parent pays child support to the other, such that neither would otherwise be able to claim the child, there is an exception and the claim may be shared, provided the parties agree.

For additional guidance see Child custody and the amount for an eligible dependant and [Guide P102 Support Payments](#).

As discussed in Chapter 4 – Property and Pensions, there are special requirements for the transfer of RRSPs. The transfer of commercial assets can be extremely complex and involve issues such as capital gains exemptions, CNIL accounts, adjusted cost base, butterfly transactions and tax consequences. Advice from corporate and tax counsel is essential.

## 7. Estate Considerations

### a) Binding the Estate

A contractual obligation to pay support may continue after the death of the supporting spouse or common-law partner, if that is a term of the agreement. Before including a clause making the obligation binding on or enforceable against the estate of the supporting spouse/partner, consider the following matters:

- the clause may create hardship for beneficiaries and be a source of difficulty to the personal representative of the estate;
- the continuing obligation to pay support is in the nature of a debt, therefore, the estate receives no tax deduction and the supported spouse/partner receives the payments tax-free;
- while support is to be paid, distribution of the estate may have to be postponed;
- if a cost of living allowance clause (COLA clause) is used, this will add to the difficulty of setting aside a fund to provide for continued support payments because the proper amount of the fund cannot be determined;
- if the estate has insufficient assets, the recipient may not receive the support expected.

Consideration should be given to the decision in *Dagg v. Cameron Estate*, 2017 ONCA 366 which deals with life insurance as security for spousal support and child support.

Note also the provisions of section 79 of *The Family Support Enforcement Act*, which deal with enforcement actions under that Act following the death of the support payor, support recipient, or child.

### b) Alternatives to Binding the Estate

Where there is to be provision for continuing payments of support by a spouse or common-law partner after death, in addition to or as an alternative to binding the estate, one can require:

- That the payor keep a policy of insurance in force on their life in an agreed amount, with the recipient (or the child) as the irrevocable beneficiary. It is important that the designation be irrevocable (i.e., the payor cannot change the designation without the payee's consent).
- That the payee be the owner of the policy so that it cannot be cancelled, or lapse for non-payment of premiums, without notice to the payee. The issue of who should pay the premiums is a matter for negotiations, but it is normally the obligation of the payor as an incident of the support obligation.

- That the payor make the irrevocable designation, register it at the head office of the insurer and provide proof. See *The Insurance Act*, section 168. Term insurance policies cannot be designated irrevocably as they will terminate upon the expiry of the term.
- The inclusion of a provision that a designation will be revocable upon the payor's support obligation ending or that the recipient will consent to the revocation of the designation at that time.
- The inclusion of a clause stipulating that the payee has the right to contact the administrator of the insurance policy directly to obtain confirmation that the payor is complying with their obligations under the agreement.
- That the payor bequeath certain monies to the payee in their will. This can either be by way of direction in the will that support be paid by the executors as if the testator were still alive or can be by payment of a specific lump sum which can vary depending upon the ages of the children or some other factor.
  - The difficulty with the former approach is that it may be impossible for the executor to wind-up an estate or pay other bequests where support is a continuing obligation, the final amount of which may be unknown.
  - With respect to a will, keep in mind that if the payor re-marries, *The Wills Act* provides that their will would be revoked upon the marriage. Section 17 contains some exceptions, including where there is a declaration that the will is made in contemplation of the marriage or a common-law relationship with a person the testator later marries, or where the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.
  - Additionally, *The Wills Act* provides that a bequest to a spouse or common-law partner is revoked by divorce or by termination of the common-law relationship unless a contrary intention is shown in the will. (See s. 18(2) and s. 18(4))
  - It is also possible that at the time of the death, the payor's estate will have insufficient funds to fulfill the bequest, or that the payor may have changed their will prior to death.

Clients should be advised to update their wills immediately and change beneficiary designations of RRSPs, insurance policies and the like and not wait to do so after the execution of a separation agreement.

However, if parties are engaged in a collaborative family law process, the participation agreement generally requires that no changes be made while the process is ongoing, absent consent.

In the event that the spouses are separated and the will has not been changed, in spite of an estate release in a separation agreement, the surviving spouse may still be entitled to take pursuant to a specific provision in the will. In *Pearson v. Pearson's Estate* (1980), 3 Man. R. (2d) 404 (C.A.), it was held that a wife was entitled to take under her husband's 47-year-old will despite the fact that she had released the deceased from any and all claims against his estate.

## E. AGREEMENT NEGOTIATION

---

### 1. Preparing for Negotiation

Before commencing negotiations, you should discuss matters thoroughly with your client. You must ensure that your client is capable of giving you instructions and that they are free of duress. This is something to which your mind should always be directed.

A client who is anxious to enter into an agreement that is well outside the ballpark of reasonability may need more information and explanation, or may be under a psychological disadvantage or pressure you must explore.

It is important to have all the information you need to properly advise your client, including complete financial disclosure. To ensure that your negotiations cover all issues, you must learn all of the important facts and details about the client's case. You should discuss with your client not only what they want, but what they might obtain in court. All negotiations occur in the long shadow of the law.

Prior to commencing negotiations, you should help your client to have realistic expectations. Honesty and objectivity are two of the most important attributes you bring to the process when advising clients. This includes explaining the law to your client, which may require you to look at legislation with the client and provide information on important precedential cases.

You should discuss the strengths and weaknesses of your client's case, and the case of the opposite party. You should know the range of settlement your client will accept, and which points are of the most importance or even non-negotiable.

While the goal may be to reach agreement, it should be to reach a fair and reasonable resolution for your client, not to settle at all costs. Know when you should not recommend a settlement. On the other hand, if you are confident that the other side should have accepted your client's proposal, consider serving a formal offer to settle. Should your client be equally or more successful in litigation, you can rely on the offer when seeking costs.

### 2. Negotiation Processes

#### a) Meetings

When you are ready to commence negotiations, consider which negotiation process may be most appropriate. Clients might meet and negotiate directly, or with the assistance of a third party, such as a mediator.

The collaborative law model requires that both parties and counsel enter into a contract which specifies the ground rules for the negotiation. Parties promise to treat

each other respectfully, to provide all relevant financial disclosure and other information and to deal with each other fairly. They promise to work collaboratively together to search for a resolution that will meet the needs of all parties. This requires an attitudinal shift.

The parties also make a commitment not to take court action. This commitment is central to the true collaborative process and includes the requirement to seek new counsel should the process fail and litigation be required. Collaborative law is discussed in Chapter 1 - Initial Considerations.

Negotiation can also take place in multi-party meetings, in meetings between counsel, or by correspondence. Each of these methods may prove useful at various times during the course of a file.

Meetings should be conducted in a manner that is conducive to settlement. Clients should be commended for seeking consensual solutions. Use words that build bridges and try to speak in positives. Look for areas in which clients can agree on goals - such as timesharing regimes that will be in the best interests of their children.

Ensure that the parties are aware that your discussions are without prejudice, so they can freely express themselves and a range of possible solutions can be considered. Creative possibilities may include an unsuitable idea that can act as a springboard for a good idea.

Interest-based negotiations often prove fruitful. When you are able to discover the reasons behind a party's wants and needs, a creative solution that is acceptable to both parties might be found that meets those objectives. It is often beneficial for a party to have a chance to express their needs which may allow the other party to gain some understanding.

If meeting, it is often useful to help the parties develop an agenda. All issues that require determination can be listed and then prioritized. Consider dealing first with items with respect to which it will likely be easier to reach agreement. This may give the parties a feeling of cooperation and accomplishment and build the likelihood of future success. However, if one item is of crucial importance, you may need to deal with it first simply because of its overwhelming nature.

Consider whether some items can be grouped together for resolution as part of a "package deal". That may permit a satisfactory global settlement without the necessity of reaching consensus on numerous individual items.

If you are dealing with a long list of small items such as household contents to be divided, or a calendar full of special occasions to be shared, consider putting issues that turn out to be contentious to the bottom of the list. That may prevent parties from getting bogged down in the discussion of Halloween or the Oriental rug which may then impair agreements on other items. Leaving the contentious issues for later



discussion can permit you to reach other agreements. Later, the difficult issues may turn out to be easier to resolve in the context of the whole.

Negotiations can also be fruitful even if all issues cannot be resolved. Limiting the issues that require litigation can be a success.

If an agreement is reached during a meeting, consider writing out the points agreed and having each party sign. If you do this, consider whether that is the agreement, or whether a more complete agreement will follow. Consider recording the settlement terms and having each party voice their concurrence.

At the very least, make detailed notes and review them with all parties to ensure that your notes accurately reflect everyone's understanding. This should be followed by a confirming letter. These suggestions will prove helpful when preparing the documentation to finalize the settlement, or if it is later necessary to bring a motion for summary judgment under King's Bench Rules 20 and 49.

## **b) Negotiation in Writing**

If you are negotiating in writing, obtain your client's instructions and draft your offer or letter. It is wise to send the draft to your client to reconsider and discuss again before the offer is issued to the other party. This gives the client an opportunity for sober second thought. It gives you another opportunity to review the offer with your client to ensure that they understand its implications. Do some reality testing, and present "what-if" scenarios to the client so that they understand how the proposed settlement will operate.

Having the client approve the draft offer in writing also ensures you have correctly understood the client's instructions and that you are acting in accordance with their wishes. This is crucial as an agreement made between counsel is binding upon the client.

Even in situations where the client's original instructions were clear, another look at the offer in writing frequently generates questions resulting in changes, additions and deletions.

An offer might be all-inclusive and non-severable, or might be crafted to permit a party to accept settlement on only some of the issues.

When making offers, keep your credibility. You should not express something as a "final offer" if it isn't, or threaten action you do not intend to take.

## F. FINISHING THE FILE

---

Once you have reached agreement you may think you are finished, but some of the most crucial work remains to be done. The agreement must be drafted and implemented and/or the pronouncement of a divorce and/or Final Order may need to be sought.

### 1. Drafting Agreements

In drafting, you may often be faced with contradictory considerations. The skills of a commercial lawyer are required, particularly where the parties own significant corporate assets or real estate. In that situation, the transfer of assets between spouses often requires consideration of many of the same issues as transfers between business associates (income tax, protection for liability to creditors, etc.).

At the same time, specific legislation governs many of the matters dealt with in family law agreements and complying with the relevant law is crucial in properly drafting the agreement. To further complicate matters, most agreements also deal with matters relevant to the day-to-day lives of the parties, requiring the agreement to be drawn so that the parties can easily understand and follow it.

Ideally, an agreement must clearly and completely outline the obligations of both parties now and in the future. Provisions for parenting and financial support may continue for long periods of time and, therefore, must withstand the passage of time. You cannot assume that the parties will easily, if at all, reach agreement on matters which will require future agreement or cooperation, agree upon changes to the agreement or upon matters not dealt with clearly.

The following are a few points that are relevant to drafting agreements. Some of these points may be inconsistent with one another and/or impossible to achieve in any given set of facts. There is always a conflict between certainty (which may require an exhaustive spelling out of every detail) and flexibility (which may only require a brief statement of broad principles and much less detail).

- **Be clear.** Clauses in an agreement should be clearly drafted so that there is no room for ambiguity. A provision that is vague may be open to more than one reasonable interpretation and may lead to misunderstanding or conflict between the parties.
- **Avoid repetition.** Repetition can lead to misunderstanding, particularly if not all of the covenants are subsequently repeated.

- **Avoid legalese.** While certain words or phrases have specific legal intent and must be used, other terms can be replaced with plain language which will be more familiar and understandable to the parties.
- **Tie up loose ends.** Try to consider all reasonable contingencies to avoid possible future disputes. For example, where the parties have agreed to sell the family home at a future time, the agreement should deal with such detailed matters as how they will determine the listing price, the sale price and the real estate agent, as well as who will pay for the maintenance and upkeep of the home until sale.
- **Use proper and complete descriptions.** Care should be taken to use the proper descriptions of assets. Confusion may result from describing assets improperly, incompletely, or inconsistently.
- **Avoid agreements to agree.** Do not draft clauses providing that the parties are to agree upon a matter unless the clause also provides for the method of determination of the matter in the event that the parties fail to agree.
- **Use definitions.** Definitions should be used when the defined thing is referred to more than once in the agreement. Identifying assets, individuals, events or other things by a word or phrase is useful. The definition may be placed in the body of the agreement immediately after the first full description of the thing being identified, or it can be included in a list of definitions placed at the beginning of the agreement.
- **Use schedules.** To avoid lengthy descriptions of property or long lists of items in the body of the agreement, set out this type of information in schedules.
- **Use a preamble.** Factual information relevant to the agreement may be set out in a preamble so that it will be more readily understood and may be used in the interpretation of the agreement. However, care must be taken to ensure that matters intended to bind one or both parties are not addressed solely in the preamble. Matters set out in the preamble are not binding unless a clause is included in the body of the agreement providing that the preamble forms part of the agreement and that the matters set out in the preamble are binding on the parties.
- **Be practical.** The parties must abide by the terms of the agreement and as such, it should contain obligations with which the parties can reasonably comply. A dispute is bound to arise if one party agrees to something that they cannot possibly fulfill. The time to address this issue is before offers are made, not after an offer is accepted.
- **Be correct.** All statements made in the agreement should set out the facts correctly or they may be of no value or invite judicial intervention. If an agreement states that full disclosure of assets has been made, then full disclosure should, in fact, have been made to avoid a later claim by one of the parties that they were not aware of the extent of the other party's assets at the time of the agreement.

- **Use precedents with caution.** Consulting precedents can provide ideas to the drafter and can be extremely timesaving. However, precedents should never be used blindly. Parts of precedents will often be helpful and can be incorporated into new agreements, but each agreement should be tailor-made to a certain extent to suit the facts of the case at hand. Be certain of the exact meaning and the full implication of any precedent.

- **Carefully consider the typical “boiler plate” clauses that are near the end of many agreements.** Ensure that such clauses do apply to the parties’ situation. For example, many agreements include a “severance” clause, providing that if any clause of the agreement is invalid for some reason, nevertheless the rest of the agreement remains effective. This may well be the desired intention of the parties in many cases, but in some situations the parties only intend the agreement to be effective if all clauses are valid, or certain clauses may be inextricably linked. In such cases, a severance clause would be inappropriate, and portions that are inextricably linked should be identified.

## 2. Follow Through

In order to complete the file you also must ensure that each element of the agreement is implemented. Read the agreement carefully and make a list of everything each client is required to do. It is generally best to attempt to take care of all matters concurrently with the execution of the agreement, or where that is not possible or appropriate, at a specified time. Set timelines for implementation of the terms of the agreement, including:

- Provincial pension waivers (which may require the provision of a commuted value statement and independent legal advice, depending on the date of separation. Even where this is not strictly required, it is still the best practice. For further information, see Chapter 4 - Property and Pensions);
- Requests to divide a pension and/or CPP;
- Homestead release;
- Transfer of land;
- Release of insurance interest;
- T-2220 RRSP rollover forms;
- Financing requirements for loans or mortgages. If there is some doubt whether financing will be obtainable, ask for a confirming letter from the lender, set deadlines and/or consider what will take place if financing cannot be arranged;
- If payments will be made over time, security for the client such as a second mortgage or an unpaid vendor's caveat;

- Payments to be made to third parties;
- Assumption or payment of debts;
- Releases of liability from third parties;
- Cancellation of joint credit cards;
- Cancellation of joint accounts and safety deposit boxes;
- Cancellation of pre-authorized withdrawals or debits;
- Placement of insurance, including the appropriate beneficiary designations;
- Imposing appropriate trust conditions (and complying with trust conditions and undertakings) to ensure matters are completed;
- Registering the order or agreement with the Maintenance Enforcement Program and the Child Support Service;
- If a hearing or case conference is pending, consider attending and asking the court to put the terms on the record or (even better) pronounce an order. Contact the court in advance to advise you would like to do so, or to cancel the appearance.

It is important to take all of these steps as promptly as possible. Remember that both clients will be anxious to conclude their matters and their motivation to take the necessary steps will be high. Finalizing your client's matters with concluding documentation will let them finally move on, and will let you discover a little more space in your filing cabinet.

## G. VARIATION AND FINALITY OF AGREEMENTS

---

### 1. Generally

Often, when one of the parties seeks to change a term of the separation agreement, it will be a term relating to spousal support. The process will usually take place in the context of a divorce proceeding.

For many years, the leading authorities were the three decisions *Pelech*, *Caron*, and *Richardson* known as the “trilogy.” The Supreme Court of Canada dismissed all three applications for support. The court stated that agreements between parties should be respected and not be overridden by the courts except in cases of radical changes in circumstances connected to patterns of economic dependence originally generated by the marriage relationship.

On the basis of the trilogy, many lawyers had concluded that spousal support releases would only rarely be challenged in the court and would therefore offer their clients a high degree of certainty.

The trilogy cases were based upon the *Divorce Act (1968)*. The current *Divorce Act (1985)* provides that the existence of a separation agreement is only one of the factors a court is to consider when determining spousal support. In *Miglin v. Miglin*, 2003 SCC 24, the Supreme Court of Canada held that the test prescribed by the trilogy cases is no longer applicable.

The Supreme Court held that an application for spousal support that is inconsistent with a pre-existing agreement requires a two-stage consideration; first at the time it was entered into; and second at the time of the application to set aside or seek support that is inconsistent with the agreement.

In the first stage, the court is to look at the circumstances under which the agreement was negotiated and executed in order to determine whether there is any reason to set the agreement aside, including any circumstances of duress, undue influence, etc. See *Rick v. Brandsema*, 2009 SCC 10 for an example of an agreement which was found to be unconscionable due to the flawed negotiation process.

In the second stage, the court must assess whether the agreement still reflects the original intentions of the parties, and the extent to which it is still in substantial compliance with the objectives of the Act. The party seeking support that is different than that provided for in the agreement has to show that their new circumstances (or those of their former spouse) were not reasonably anticipated and have led to a situation which makes the existing spousal support release or arrangement so untenable that it ought not to be upheld.

Note that within agreements, the parties themselves may provide that the agreement may be varied and may specify the circumstances that will lead to a variation. In those circumstances, the agreement will clearly not be a final settlement of all matters between them.

Many agreements contemplate that the parties will attempt to resolve the variation through arbitration or through negotiation, mediation or collaborative law and contemplate that if not successful either party may initiate court action.

If the terms of the agreement have been incorporated into a final order, the variation provisions of the appropriate legislation will govern.

## **2. Judicial Intervention: Separation and Spousal Agreements**

The basic proposition from which the court starts is that they will be slow to disturb the terms of a separation agreement.

There are a number of cases in which the court has been asked to set aside various separation agreements or to order relief contrary to or inconsistent with the terms of a separation agreement. It appears that the court will intervene to set aside an agreement or to order relief contrary to its terms when:

- the agreement is void because of some common law defect existing at the time of its execution;
- there is evidence that the agreement should not stand on the basis of a fundamental flaw in the negotiation process;
- there is express legislation conferring a power on the court to order support notwithstanding the terms of an agreement;
- the best interests of children require a change as to parenting;
- a change is required in relation to child support.

### **a) Common Law Defects**

Separation agreements and spousal or common-law relationship agreements, like other contracts, can be set aside on the basis that there was some common law defect existing at the time that the agreement was entered into. Examples include duress, undue influence, unconscionability, fraud, lack of capacity, lack of consideration, etc.

The more likely defects include:

**i. Duress**

Duress is often raised, but the circumstances that will constitute duress are quite extreme. Duress is said to occur when there is:

- a physical compulsion of the person;
- a threat to the person's life or limb;
- a threat of physical beating; or
- a threat of imprisonment.

**ii. Undue Influence**

Undue influence relates to the sufficiency of the consent required in the execution of an agreement. Undue influence exists without violence against the victim. It depends upon the existence of a relationship between two parties which causes one to place confidence in the other, allowing the dominant party to abuse their influence to take advantage of the other party.

**iii. Unconscionable Bargains**

Unconscionability relates to an unfair advantage gained through an unconscionable use of power by a stronger party against a weaker party. In [Rick v. Brandsema](#), 2009 SCC 10, for example, the Supreme Court upheld the trial court's finding that misleading informational deficits and psychologically exploitative conduct by the husband rendered the negotiated separation agreement unconscionable and therefore unenforceable.

In a Manitoba decision, [Lindsay v. Lindsay](#) (1989), 21 R.F.L. (3d) 34 at 42 (Man. K.B.), Kroft J. extracted a number of guidelines concerning the setting aside of separation agreements:

1. *The court should generally give effect to settlement agreements that have been reached by the parties. If spousal agreements are permitted to be varied at will, it will be much more difficult to persuade parties to resolve their differences through discussion or conciliation.*
2. *When parties have resolved their own financial and property disputes by agreement, the reluctance of the court to interfere will be even greater if it is clear that they acted after consultation with independent legal counsel.*
3. *Notwithstanding the foregoing, a court may and should interfere where an agreement is found to be unconscionable by reason of the fact that it was brought about through duress or undue influence.*



4. *The fact that an agreement is unwise is not tantamount to unconscionability. No court should relieve a person from responsibility for a contract entered into willingly and knowingly, even where the contract is an act of folly.*
5. *The essence of an unconscionable contract was described in Morrison v. Coast Fin. Ltd. (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.). Although that case did not involve a domestic dispute, a number of family law cases have adopted the following words of Davey J.A. (as he then was), at 259:*

*On such a claim the material ingredients are proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable...*

See also [Anderson v. Anderson](#) 2023 SCC 13.

## **b) Statutory Restrictions on the Right to Enter into Binding Contracts**

### **i. Children**

An agreement will not prevent a court from later determining issues as to parenting based on the best interests of the child. The court's jurisdiction flows from its *parens patriae* jurisdiction and pursuant to section 16 of the *Divorce Act* and section 35 of *The Family Law Act*, which provides that the court shall take into consideration only the best interests of the child in making a parenting order or a contact order.

Sections 16(2) through 16(7) of the *Divorce Act* and sections 35(2) and (3) of *The Family Law Act* provide a lengthy list of considerations and factors.

The court is directed to give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

The factors to consider include:

- the child's needs, including the need for stability;
- the nature of the child's relationship with each parent, siblings and grandparents;
- each parent's willingness to support the child's relationship with the other parent;

- the history of care;
- the child's views and preferences;
- the child's cultural, linguistic, religious and spiritual upbringing and heritage; and
- the ability of each parent to care for the child and communicate and cooperate with each other in relation to the child.

Sections 16(3)(j) and 16(4) of the *Divorce Act* and sections 35(3)(j) and 35(4) of *The Family Law Act* deal particularly with family violence and its impact on the parent, child and other family members.

Both the *Divorce Act* (s. 16(6)) and *The Family Law Act* (s. 38(1)) provide that the child shall have as much time with each spouse/parent as is consistent with the child's best interests.

Section 7.1 of the *Divorce Act* and section 3 of *The Family Law Act* specifies a new statutory duty for any person who has parental responsibilities for, or contact with, a child to exercise their parental responsibilities or contact in a manner that is consistent with the best interests of the child.

Before granting a divorce, the court has an overriding duty to satisfy itself that reasonable arrangements have been made for the support of any child of the marriage and if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made (*Divorce Act* s. 11(1)(b)).

The court is obligated to ensure that the quantum of child support is in accordance with the provisions of the *Child Support Guidelines*. It can award an amount that is different from the guidelines if special provisions have been made for the benefit of the child or with the consent of both spouses, only if the court is satisfied that reasonable arrangements have been made (*Divorce Act* ss. 15.1(1) to 15.1(8)).

Circumstances which could lead to a variation of child support are detailed in section 14 of the *Child Support Guidelines*, being:

- where the amount of child support has been made in accordance with the applicable table, any change that would result in a different child support order;

- where the amount of child support has not been made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; or
- any case where an order under the *Divorce Act* predates May 1, 1997, or an order under *The Family Maintenance Act* predates June 1, 1998, both exceedingly unlikely by this time.

## ii. Spousal Support

As discussed above, under the *Divorce Act*, an agreement is only one factor which the court is to take into account (s. 15.2(4)) in making an order for spousal support.

*The Family Law Act* definition of “spouse” includes a common-law partner and also includes a former spouse (see ss. 63 and 64).

*The Family Law Act* provides, in section 68, that where spouses have entered into a written agreement for spousal support in which one of them has agreed to release the other from liability for support or to accept from the other a specified amount for support, no support order shall be made under that Act. This is subject to section 68(2) of the Act which provides for exceptions:

- where the payor spouse is in default under the agreement;
- where the support was inadequate having regard to the circumstances of both parties at the date of the agreement; or
- where the spouse who released the other from liability for support or agreed to accept specified amounts has become in need of public assistance.

## iii. Pension Legislation

The *Canada Pension Plan* provides for mandatory sharing of CPP pension benefit credits, irrespective of any agreement between the parties.

Provincially and federally regulated pensions are complex and are discussed in Chapter 4 - Property and Pensions.

## c) Miscellaneous Defects

### i. Independent Legal Advice

There is no requirement that the parties to a separation agreement receive independent legal advice. Normally, the lack of independent advice will not, in itself, jeopardize the validity of an agreement. Nor will independent legal advice protect a defective agreement.

The significance of independent legal advice relates to redressing inequality of bargaining power. A person properly advised of their rights and the significance of a contemplated agreement is less likely to be the victim of duress or undue influence or to enter into an unfair bargain.

The parties to an agreement are best served if their agreement is binding and can be relied upon. They should be fully aware of their rights and obligations. It is wise to strongly encourage a self-represented party to obtain independent legal advice.

The agreement should reflect that each party has obtained independent legal advice (or has refused to do so), that they understand the agreement, accept it as a fair settlement of their rights and obligations and that they are entering into it voluntarily and without duress or undue influence.

The court may set aside an agreement where the lawyer's advice can be challenged as to its adequacy or independence.

Independent legal advice may be required under *The Pension Benefits Act*, if division of the pension is being waived, depending on the date of separation.

## **ii. Failure to Disclose**

It has been held that a spouse owes a duty of utmost good faith to the other spouse. If a spouse fails to disclose all facts pertaining to their assets, the agreement may be set aside. A general release clause in a family law agreement is unlikely to protect an agreement from being set aside due to a failure to disclose. However, the fact of non-disclosure will not necessarily lead to an agreement being set aside.

The issue of financial disclosure is discussed earlier in these materials in more detail.

## H. ETHICAL CONSIDERATIONS

---

No matter how amicable the parties, no matter how straightforward the agreement, do not act for both parties in the preparation of an agreement.

To act for both parties means you cannot provide independent advice to either, and is an invitation to litigation which might find you as a witness, or worse, a defendant. The purpose of an agreement is to finally resolve all matters between the parties. Acting for both creates the potential for the agreement being set aside.

The best and only practice is to act for only one party to the agreement. Based on the instructions you receive from your client you can draft an agreement which you can forward to the other party, who should see their own lawyer for independent legal advice.

In your opening letter to an unrepresented other party, you should advise that they should seek independent legal advice and provide their counsel with your correspondence.

If the other party refuses to obtain independent legal advice, it is essential to confirm in writing that you are not acting for or purporting to give legal advice to that other party and to urge that they obtain independent legal advice.

Once you are aware that the other party is represented by a lawyer, under no circumstances should you communicate with the other party, directly or indirectly. However, no party is bound to hire a lawyer.

If the other party is self-represented, you can negotiate with them directly. It is best that your communications be in writing only. If you must speak or meet with a self-represented party, you should take copious notes, have a witness and confirm your discussions in writing. Once negotiations have concluded and the agreement is drawn, you should again endeavour to have the self-represented party obtain independent legal advice.

What if your client insists on entering into an agreement contrary to your advice? It is essential that once your client's intentions become clear to you, you immediately confirm in writing your advice that the agreement is not in the client's interests, why it is not in the client's interests and that if the client signs the agreement, it will be very difficult, if not impossible, to change.

If you feel that your client is suffering from guilt or stress to such a degree that their ability to deal with the situation is compromised, there is nothing wrong with suggesting that the

client see a psychologist or a psychiatrist for an assessment and perhaps therapy. Sometimes all that a client needs is the time and the support to regroup emotionally and physically.

It is often useful to suggest that the client take some time to think about your advice. Sometimes clients are so tired and emotionally wrung out by the process that they simply surrender and are prepared to sign whatever is put in front of them. The possible benefit of a letter confirming your advice is that it allows the client to consider it at leisure. For most people, written communications carry more weight and significance than verbal communications.

By sending the letter you indicate exactly how seriously you view the step which the client wishes to take. If you couple this with giving the client some time to think, the client may reconsider. If nothing else, this letter will form your first line of defence in your protection if the client later alleges that you were negligent or that you did not advise against entering the agreement.

However, your client is ultimately free to make their own decisions and is entitled to act contrary to your advice. The issue here is one of degree.

Is the client incapable of dealing with the situation because of emotional or financial pressure or is the client making a conscious and informed decision, albeit one with which you do not agree? Your response and your responsibility will be different in each case.

Assuming that your client is unmoved by your letter, you have a number of choices:

1. You can take written instructions from the client confirming the advice that you gave as to why the agreement is not in the client's interests, and that it will be difficult, if not impossible, to change the agreement in the future. You would then have your client sign the written instructions and give the client a copy, also referring to the written instructions in your reporting letter. The purpose of written instructions is two-fold:
  - a) to emphasize to the client that they are proceeding contrary to your advice (with the hope that being asked to sign written instructions will cause the client to reconsider); and
  - b) failing that, to protect yourself against a client who at some later time may realize that the separation agreement was indeed not in their best interest and then look around for a remedy. All too often, the remedy that leaps to mind is to allege that the lawyer was negligent or incompetent. As it may be years before the client comes to this unhappy realization, written instructions are your best protection. Your memory will inevitably fade over time. Written instructions are powerful evidence as to what was said by you and when it was said.
2. You can refuse to continue to act for your client on the basis that your client has clearly lost confidence in you. This action definitely brings home to the client how seriously you take the matter.

If the issue on which your client is ignoring your advice is relatively minor, written instructions may be quite sufficient. If, on the other hand, the client wants to do something which in your view is hopelessly misguided, why continue acting? By continuing to act, you give credence to the agreement and likely make the agreement more enforceable. If the agreement is indeed contrary to your client's best interests, is this of any benefit to your client?

If you do continue to act in a situation where your client has declined to accept your advice, read any certificate of legal advice you may be prepared to sign very carefully and amend it to reflect your understanding of the facts. For example, if you feel that your client is acting under pressure from their spouse, you do not want to certify that no pressure is being exerted on your client. Be certain that what you are certifying reflects the facts as you know them.

# I. GIVING INDEPENDENT LEGAL ADVICE

---

The purpose of independent legal advice is to ensure that a client is able to decide upon a course of action in an informed manner. This means that the client should receive adequate information and advice concerning legal rights and obligations, the strengths and weaknesses of their position and the possible courses of action, as well as the potential consequences of those courses of action. Before giving any legal advice, the lawyer must have a complete appreciation of the client's situation.

The *Code of Professional Conduct* is quite specific that the provision of independent legal advice is not a duty to be taken lightly. The duty here is the same as it would be for any other client. See [Rule 3.2-2](#) and Commentary [2] and [3] and [Rule 3.2-2C](#).

A lawyer would be wise to decline the retainer if they are approached to provide independent legal advice by a client who wishes only a cursory review of the matter, and who refuses to allow the lawyer to make an adequate investigation and analysis so as to be able to provide complete advice. To proceed to give legal advice under such conditions could potentially leave the lawyer open to the client later complaining to the Law Society for breach of the *Code*. As well, the lawyer could be held liable and negligent should the matter which was the subject of the independent legal advice go awry.

There is no requirement that your client act upon your advice, no matter how sensible it might be. If, however, there is later an issue concerning independent legal advice, the onus will be on the lawyer to establish that the client actually received such advice and that the client's decision was the result of the exercise of independent will.

Since these situations are invariably reviewed after the fact, documentation needs to be available on the file which will satisfy an impartial third party that the client was acting independently and with full appreciation of what they were doing. A complete paper trail will serve you well. The most prudent course of action is to prepare a detailed account of what advice was given to the client, at least by way of a memorandum to file and preferably in the form of a letter to the client.

The courts have consistently held that independent legal advice must be meaningful and must be adequate. Independent advice does not mean approval of what the client has done.

It is helpful to have the proposed agreement prior to the meeting with the client. The following list includes matters which a lawyer might consider when being called upon to give independent legal advice. The list is not exhaustive.



- Meet with the client alone. Never meet with the client in the company of the client's spouse or common-law partner. As well, be alert to the possibility of other members of the client's family being more supportive of the other party's position than that of the client. The mere fact that the client is accompanied by another family member does not rule out the possibility of duress or undue influence.
- Consider the client's facility with the language. Is the client sufficiently fluent to communicate and understand what is being said or is an interpreter necessary?
- How sophisticated is the client in knowledge of the law and knowledge of the facts? Does the client know the extent of the parties' assets? Does the client appear to understand the workings of *The Family Property Act*? What is the client's understanding with respect to support? It is your job to ensure the client understands the law and how it would be applied in their specific facts and circumstances.
- Is there any suggestion of duress or undue influence? Why did the parties separate? Is there any suggestion of violence or coercion?
- Confirm that the written agreement reflects the entire agreement between the parties, i.e., that there are no side deals, or representations which do not form part of the agreement. The agreement should reflect this fact. Any "side deals" that are not included in the agreement will not be capable of enforcement.
- Look at the agreement itself, particularly the provisions relating to parenting, support and division of assets. On its face, are there any provisions which cause you concern or which appear to be unfair or unreasonable? Explore with the client the reason that provision is in the agreement. Consider whether the bargain is or might be unconscionable.
- With respect to income, consider whether the income set out is appropriate, or whether imputation or other adjustments to income might be required.
- With respect to spousal support, look at the quantum and whether the support is time limited or reviewable. Consider the parties' means. Does the support appear reasonable? Does it comport with the *Spousal Support Advisory Guidelines*?
- With respect to child support, look at the quantum. Again, consider the parties' means. Does the amount of support appear reasonable? Does it coincide with the amounts indicated in the *Child Support Guidelines*? Have additional expenses (such as childcare, extracurricular expenses, education, and medical and dental costs) been considered? Are there terms covering health, medical and life insurance?
- In short, know the facts of the client's circumstances. Analyze each element of the agreement and consider whether it accords with how you believe the case would reasonably be resolved if the matter were determined by a court. Each provision of the agreement should be discussed with the client with this in mind.

- Each provision should also be explained to the client to ensure they understand its implications and the potential consequences. Be prepared to do some reality checking with the client to ensure they understand and agree with how the agreement may operate in the future in various situations.
- If any concerns arise, ensure they are dealt with by speaking to the other counsel and seeking whatever revisions are required.

# J. CHECKLIST: DRAFTING COHABITATION, PRENUPTIAL AND SPOUSAL AGREEMENTS

---

Consideration should be given to the inclusion of the following terms. Many potential provisions will not have been contemplated by the client, and should be discussed to ensure that the client is aware of the operation of law in the absence of agreement otherwise and that the agreement encompasses future eventualities in the way the client wishes.

## 1. Preamble

- Marriage and cohabitation particulars:
  - a) parties intend to marry and, if so, when
  - b) if married, date and place of marriage
  - c) periods of cohabitation or commencement of cohabitation
  - d) parties are cohabitating or intend to cohabit
  - e) parties envision the possibility of marriage although no promises yet made
  - f) current marital status (i.e., separated, divorced, widowed, never married)
- Statement of occupations and incomes of parties
- Children:
  - a) names and ages
  - b) whether children are of a previous marriage or relationship
  - c) if children from previous relationship:
    - i) whether intention for new partner to stand *in loco parentis*
    - ii) whether biological parent has parenting time, decision-making responsibility or others have contact
    - iii) whether biological parent pays/receives child support amount
- Reasons for agreement:
  - a) spousal agreement or common-law relationship agreement
  - b) prenuptial agreement
  - c) cohabitation agreement
  - d) statutes to which the agreement applies – *Divorce Act, The Family Law Act, The Family Support Enforcement Act, The Family Property Act, The Law of Property Act*, etc. and common law
- Issues to be settled by the agreement:
  - a) ownership of, title to, and division of assets
  - b) spousal support after separation
  - c) management of household expenses during marriage/cohabitation
  - d) estate issues

- Previous agreements
- Previous and current court orders
- Previous and current legal proceedings
- Family residence
- List or schedules showing assets and liabilities and their values
- Joint assets
- Full financial disclosure
- Particulars of any assets excluded by law from shareability (gifts from third parties, inheritances, etc.)

## **2. Ownership of Property**

- General provisions:
  - a) shareability or non-shareability of the increase or decrease in value of property owned by either spouse or common-law partner prior to (cohabitation or) marriage
  - b) shareability or non-shareability of the proceeds of sale of any asset owned prior to (cohabitation or) marriage or an asset acquired in exchange
  - c) gifts or inheritances
  - d) how parties will deal with assets acquired after marriage or while cohabiting:
    - i) shareable
    - ii) solely owned by the party who purchases
    - iii) registration or title determinative as between the parties
    - iv) each party to share in asset according to percentage of contribution to cost of acquisition
    - v) any terms as to payment of expenses in relation to each particular asset
  - e) any assets that will be deemed to be “jointly owned” (i.e., household items, furniture) and how they or their values will be divided
- Family residence:
  - a) particulars of any current residence and owner
  - b) acquisition by the other spouse or common-law partner of an interest in the property
  - c) provisions if the property is to be transferred, in part, from one spouse or common-law partner to another
  - d) responsibility for paying or discharging associated encumbrances and obligations
  - e) responsibility for payment of current expenses such as taxes, insurance, utilities, general upkeep
  - f) exclusive occupancy in the event of separation
  - g) homestead rights for the non-owning spouse (if not, deal with formal homestead release)
  - h) mechanisms to acquire future residences
  - i) mechanisms for disposal of residences

- Life insurance:
  - a) requirement for one or both parties to maintain policies as specified for a specified period of time
  - b) requirement to designate the other partner or the children irrevocably as a sole beneficiary or beneficiaries under the policy
  - c) requirement for each party to provide the other with evidence that the policy is being maintained as required or to provide authorization to the insurer to provide information on the policy to the other spouse or common-law partner, on written request
- RRSP:
  - a) to be shareable or to be the separate property of the spouse or common-law partner in whose name each is registered
  - b) any obligation to purchase spousal RRSPs for the other
- Pension plans:
  - a) description of any pension plan and the legislation which governs it (*The Pension Benefits Act, Pension Benefits Standards Act*, specific legislation)
  - b) opting out of sharing pensions may be possible in limited circumstances
  - c) Canada Pension Plan credits to be divided
- Bank accounts:
  - a) each party to have their own personal account or not; shareable or exempt
  - b) contributions to be made to a joint account to be used for joint expenses
- Release under *The Family Property Act*:
  - a) total release, parties to be totally separate as to property
  - b) partial release with respect to certain specified assets
- Release re claims in equity
- Release of any claims/retention of rights against the other spouse's or partner's property other than those arising under the agreement
- Estate releases or estate promises

### **3. Debts**

- Neither spouse or common-law partner to contract in the name of the other or bind the other for any debts or obligations without consent, otherwise will indemnify the other spouse or partner from any claims arising from those debts or obligations
- Existing debts and responsibility for payment
- Existing/joint obligations and responsibility for payments

- Credit cards:
  - a) to be used by both parties
  - b) parties to have separate cards
  - c) responsibility for payment
- Future debts

#### **4. Management of Household Affairs**

- Deposit of a certain sum each month into a joint account by each party
- Responsibility for payment of usual household and family expenses or specific expenses
- Payment for expenses of one party's children

#### **5. Provision for Incompetency and/or Death**

- Ability of the competent party to make decisions for the incompetent party
- Health decisions proxy
- Obligation to maintain wills making the other party sole beneficiary or beneficiary of certain items or amounts
- Renunciation of any right to the other's estate upon death
- Renunciation of rights under *The Family Property Act*, *The Homesteads Act*, *The Dependents Relief Act* (not binding), and/or *The Intestate Succession Act*

#### **6. Spousal or Common-Law Partner Support**

- Total release of right to claim support from the other
- Specified lump sum:
  - a) quantum to vary depending on length of cohabitation or other factors
- Specified periodic sum:
  - a) quantum to vary depending on length of cohabitation or other factors
  - b) events terminating periodic payments
  - c) finite duration
- No provisions re: support, effectively leaving issue of support open, or specific paragraph so stating
- Waiver of support void in certain circumstances, for example waiver of support that is void in the event of children of the relationship
- Circumstances in which you should recommend against a release of spousal or common-law partner support

## **7. General Clauses**

- Effect of failure to marry, or effect of future marriage on a cohabitation agreement
- Effect of separation
- Severability or certain provisions inextricably linked and not severable
- No alteration except by signed agreement, with independent legal advice
- Costs
- Binding on estates
- Preamble is accurate and forms part of the agreement
- Governing law
- Each party has been advised of their rights and has obtained independent legal advice, understands the agreement and accepts it as fairly dealing with their rights and responsibilities
- Parties executed the agreement of their own free will without duress
- Agreement constitutes a full and final settlement of all issues
- Agreement may be amended only by written agreement, with independent legal advice

## **8. Certificates**

- Some counsel attach certificates of acknowledgment to be signed by the parties (which confirm that each has received independent legal advice, is signing the agreement voluntarily, etc.) and/or certificates of independent legal advice (to be signed by counsel) and/or affidavits of execution to the agreement. These matters are typically also confirmed within the body of the agreement.

# K. CHECKLIST: DRAFTING SEPARATION AGREEMENTS

---

Consideration should be given to the inclusion of the following terms. Many potential provisions will not have been contemplated by the client, and should be discussed to ensure that the client is aware of the operation of law in the absence of agreement otherwise and that the agreement encompasses future eventualities in the way the client wishes.

## 1. Preamble

- Full names of the parties (including all given names and including the names as they appear on the parties' marriage certificate and/or any certificates of title for properties owned by the parties)
- Date and place of marriage and commencement of any period of cohabitation
- Children (including full names, ages and birth dates)
- Children of prior relationships (including full names, ages and birth dates)
- Date of separation
- Type of agreement; one or more of the following:
  - a) separation agreement with final settlement of rights
  - b) interim agreement or partial final settlement; one or more of the following issues settled:
    - i) ownership of, title to, and division of assets
    - ii) support
    - iii) parenting
- Previous agreements:
  - a) identify any prior agreements
  - b) rescind or replace prior agreement
  - c) confirm prior agreement
- Previous and current court orders
- Previous and current legal proceedings
- Legal description of family residence and/or other real property
- Complete financial disclosure:
  - a) statement of assets and debts including values (can attach schedules)
  - b) statement of occupations and incomes of parties



## 2. Separation

- No reasonable prospect of reconciliation
- Each spouse intends to live separate and apart from the other
- Neither party will interfere with the other party
- Neither party will take any action against the other except to enforce the agreement or for divorce in terms consistent with the agreement

## 3. Parenting Matters

- Parenting and responsibility:
  - a) parenting time:
    - i) how divided
    - ii) shared
    - iii) split
  - b) decision-making responsibility:
    - i) specified
    - ii) joint
    - iii) divided
- Statement by parties of cooperation and support for each other in their respective parenting roles
- Provisions covering type of education, type of religious instruction, other aspects of child's upbringing, extra-curricular activities and other section 7 special or extraordinary expenses
- Statement of consistent pattern re: dealing with children's needs and wants
- Views of children (if appropriate, a statement that the children are to be consulted on certain issues)
- Provisions dealing with no adoption, no change of child's surname
- Provisions for access by both parents to health, school and other child-related records
- No relocation and/or restrictions on geographical area in which child may live
- Variation:
  - a) circumstances for variation
  - b) what will/will not constitute a material change
  - c) provision for counseling, mediation, collaborative law or arbitration in the absence of agreement prior to initiating court application

#### **4. Specific Parenting Time Matters**

- Specific periods of parenting time:
  - a) liberal times
  - b) reasonable times
  - c) specified times (including “regular” schedule and schedule of holidays and other important days, such as birthdays, Mothers’/Fathers’ Day, etc.) (include detailed schedule)
  - d) correspondence
  - e) telephone calls
  - f) extended periods of time (i.e., Christmas, spring break, summer holidays)
  - g) electronic communications, e-mail or video call (i.e., FaceTime)
- Limitations:
  - a) specified places (geographical limitations)
  - b) specified conditions including drug/alcohol prohibitions
- Parenting time obligations, if specified:
  - a) beginning and end of parenting times/by date and hour
  - b) advance notice of circumstances requiring change in schedule
  - c) right to first call to care for child if scheduled parent unavailable
- Such further and other times as the parties agree
- Neither party to remove the children from the jurisdiction, nor to an area remote from the residence of the other party (perhaps except for vacation purposes):
  - a) statement that the parties will continue to live within a specified radius from their present location, or within present school division
  - b) statement of who is to bear the cost of exercising parenting time if a parent moves to or lives in a different community
  - c) relocation not permitted and/or relocation terms in *Divorce Act* and/or *The Family Law Act* to apply
- Provisions for taking the child out of the jurisdiction for vacation purposes:
  - a) signed consent of both parents required before obtaining a passport for the child
  - b) who will hold the passport
  - c) written consent of both parents required for travel
  - d) information to be provided to non-travelling parent

#### **5. Child Support**

- Specify the following:
  - a) name and birth date of each child to whom the agreement relates
  - b) name and birth date of any child who is an adult and independent (for whom support is not payable)

- c) income of any parent whose income is used to determine the amount of the child support payments or the proportional sharing of section 7 expenses
- d) amount (determined under paragraph 3(1)(a) of the *Child Support Guidelines*) for the number of children to whom the agreement relates and the amount (determined under paragraph 3(2)(b) of the *Child Support Guidelines*) for a child the age of majority or over
- e) the date on which the first periodic payment is payable and the day of the month or other time period upon which all subsequent payments are to be made
- f) manner of payment
- g) the particulars of any special expenses described in section 7 of the guidelines, the child to whom the expense relates, and the amount of the expense or proportion to be paid in relation to the expense by the paying parent
- h) how certain expenses will be shared between the parents:
  - i) section 7 special expenses
  - ii) other agreed upon expenses
- i) how payments for certain expenses will be made:
  - i) one parent to provide receipts, other to reimburse their portion within certain time period
  - ii) quarterly reconciliation of payments made by each parent
  - iii) payments directly to service provider
  - iv) provisions for submission to group insurance plans
- j) variation clause
- k) support enforceable by the Maintenance Enforcement Program
- l) support subject to recalculation by the Child Support Service
- m) annual disclosure of income tax returns/notices of assessment/reassessment etc.
- n) events upon which the obligation to pay support is to terminate, such as:
  - i) child no longer “child of the marriage” as defined
  - ii) child completes first university degree, 4 years of university or college program leading to a certificate
  - iii) child ceases to attend an educational institution on a full-time basis (define “full-time” and consider what to do in situation where child takes a year off from studies)
  - iv) child takes full-time employment
  - v) child ceases to live with the recipient parent and is not living away from home in order to be able to attend an educational institution on a full-time basis
  - vi) child marries or cohabits with a partner
- o) extra costs which parent is required to pay, such as (some may already be included as s. 7 expense):
  - i) dental care

- ii) education costs
  - iii) services such as orthodontics, eyeglasses, contact lenses and supplies
  - iv) expenses for vehicle, insurance and maintenance
  - v) expenses for cell phone purchase and ongoing charges, internet, electronics
  - vi) pet expenses, insurance, veterinary care
  - vii) prior approval required for expenditures for certain items above a particular amount
- p) living expenses for child attending school away from home:
- i) expenses to be shared
  - ii) child to contribute
  - iii) RESP to be used
  - iv) child support to continue for all or part of the year
  - v) child support to be paid directly to child
- q) dental and medical insurance:
- i) payment of premiums
  - ii) payment of non-insured portion or services
- r) where there is shared parenting of a child or children, which parent is entitled to claim:
- i) child tax benefit
  - ii) tax deduction for eligible dependent credit
  - iii) childcare expenses deduction (must be in that parent's care during that period. Check the *Income Tax Act* carefully. Currently a parent paying support for that child cannot claim this deduction. This is particularly important to bear in mind in shared parenting situations.
- s) provision upon the death of the supporting parent:
- i) obligation on supporting parent to maintain life insurance including:
    - o irrevocable designation of the children as beneficiaries
    - o length of time for insurance to be provided
    - o insured parent to provide evidence from time to time that insurance is in effect or authorization for non-insured parent to obtain information directly from the insurer
  - ii) non-insured parent may pay the premiums and charge them to the defaulting parent if premiums unpaid
  - iii) obligation to pay child support is binding on the supporting parent's estate
  - iv) insurance on the life of the recipient parent to assist the surviving parent in raising the children in the event of the recipient's death, with same considerations as above

## 6. Spousal/Common-Law Partner Support

- Specify amount, beginning date, and continuing dates of all payments
- Type of payment: monthly amount, lump sum payment
- Amount of payment
- Manner of payment
- Variation clause:
  - a) what is/is not a change of circumstance
  - b) formula for change in support amount:
    - i) based on income
    - ii) based on event/time/step down scale
    - iii) based on other specified factors
- Effect of *Spousal Support Advisory Guidelines* or *Child Support Guidelines* on amount, if any. (i.e., as child support takes priority over spousal support, spousal amount may be lower than otherwise)
- Review
  - a) When review will take place
  - b) What are the parameters for the review
- Payment through the Maintenance Enforcement Program
- Events upon which obligation to pay support is to terminate or be varied:
  - a) recipient earns certain level of income
  - b) certain length of time
  - c) remarriage or cohabitation of payee (this may not accord with the *Spousal Support Advisory Guidelines*, for example in a long marriage with a strong compensatory claim)
- Provision upon the death of the payor:
  - a) see commentary re: life insurance provisions above
  - b) obligation to make provisions for the recipient in the payor's will
  - c) provision that the obligation to pay support is binding on the payor's estate
- Be wary as estate may be insufficient to fund support or fulfil provisions in will. Will or bequest may also be invalid if it does not accord with *The Wills Act*. Payor might also change will.

## 7. Tax Considerations

- Taxable periodic payments (for spousal/common-law partner support)
- Payments made prior to the execution of the agreement
- Lump sum payments
- Transfer of assets
- Attribution rules
- Capital gains rules and exemptions
- Principal residence designation
- Potential changes to the *Income Tax Act* (Canada). Check the *Income Tax Act* carefully, particularly re: payments in advance of agreement and third-party payments. It is imperative to reflect actual sections of the *Income Tax Act*. Other issues relate to claiming children as dependants, deduction of certain expenses for children such as childcare, etc.

## 8. Responsibility for Debts

- List of present debts:
  - a) who pays present debts
  - b) security for payment
  - c) release of and/or indemnity to the other party
  - d) release from lenders
  - e) responsibility for undisclosed debts
- Return of credit cards to spouse or common-law partner responsible for payment or cancellation of accounts
- Each spouse or common-law partner solely responsible for debts and liabilities incurred after the date of the agreement

## 9. Division of Property

- Family residence:
  - a) transfer of title to one spouse or common-law partner:
    - i) transferor to be released from liability under existing mortgage (need agreement by the mortgagee)
    - ii) if transferee is to pay off old mortgage and/or pay the spouse for their interest in the home from proceeds of a new mortgage, need to clarify logistics and clarify that funds will not be available until after title transfers, as in a third-party house sale (consider interest if payment is not made by specific date)
    - iii) Homestead Release, and Release of Interest in home insurance policy

- b) deferred sale:
  - i) state of title pending sale:
    - o obligation not to sell or encumber interest
    - o potential severance of joint tenancy
  - ii) events upon which right to exclusive occupancy to terminate:
    - o spouse ceases to live in the family residence
    - o youngest child reaches the age of 18
    - o specified date
    - o mortgage in arrears and support not in default
  - iii) during sole occupancy, payment of costs including:
    - o mortgage instalments
    - o property taxes
    - o insurance premiums
    - o utility charges
    - o maintenance and repair
  - iv) right to claim for occupation rent or contribution re: costs of operation of the property during sole occupancy
  
  - v) notification to other spouse required:
    - o if property vacant for more than 30 days
    - o if mortgage, property taxes or insurance in arrears
  - vi) procedure for evaluation, listing and sale:
    - o earliest/latest date for listing and/or possession by purchaser
    - o method for determining sale price
    - o costs of sale
    - o failure to find buyer within stipulated time
  - vii) application of proceeds of sale:
    - o removal of registered encumbrances
    - o real estate agent's commission
    - o legal fees and disbursements
  - viii) division of net proceeds of sale
  - ix) any adjustments from one party to the other or payment of debt from proceeds

## **10. Other Real Property**

- a) consider principal residence designation issues
- b) other issues as above

## **11. Personal Property**

- All contents already divided
- Division of contents listed in attached schedule

- Deferred division or receipt:
  - a) which items to be delivered/picked up later
  - b) date and manner of delivery/pick up
  - c) risk until delivery/pick up

## **12. Automobiles**

- Right to sole title
- Transfer of title (Deed of Gift or Bill of Sale - there are different tax implications)
- Responsibility for payments such as lease
- Release of liability re: loans from lender

## **13. Insurance**

- Disposition of policies
- Obligation for insurance and beneficiary designations, payment of premiums, prohibition against borrowing:
  - (a) see checklist for life insurance provisions, where insured has obligation to pay support
- Division of cash surrender value

## **14. RRSPs**

- Institution, account number(s) and present value of fund
- Discount for taxes if appropriate, or division in specie
- See the *Income Tax Act* for rollover provisions (s. 146(16) and form T2220)
- Retention by owner

## **15. Pension Plans**

- Division based on *The Pension Benefits Act* - provincial provisions
- No division of pension. Include statement of value or amount spouse would receive if no waiver as a schedule. Independent legal advice may be required.
- Division based on the *Pension Benefits Division Act* for certain federal pensions
- Check for special superannuation acts, particular governing legislation



- If not a provincial pension governed by the PBA, check with specific institution for requirements, forms, wording of the agreement
- CPP division of pension credits which currently cannot be waived in Manitoba

## **16. Securities including Stocks, Bonds and Shares**

- Present division or deferred division until a specified event takes place
- Disposition of shares in private company:
  - a) restrictions on transfer or restrictions on voting rights of transferring spouse
- Check with specific institution and/or corporate counsel for requirements, forms, documents to be signed, wording of the agreement

## **17. Provisions on Death**

- Provision for support out of the estate (be wary as estate may be insufficient to fund)
- Provision for dependent spouse/parent and children in will and covenant to maintain will accordingly (caution as will might be changed)
- Mutual provisions in wills
- Release of rights under *The Homesteads Act*, *The Family Property Act Part IV*, *The Dependents Relief Act*, and *The Intestate Succession Act*
- If provision by way of insurance, authorization to obtain information from insurer as to status of policy, beneficiary designation, currency of premium payments, potential irrevocable designation

## **18. Releases**

- Mutual releases of all claims except those set out in the agreement
- Release of support, except as agreed
- *The Family Property Act*, *The Married Women's Property Act*, *Law of Property Act* and otherwise
- Release of rights on death
- Equitable remedies
- Full and final settlement

## **19. General Clauses**

- Effect of reconciliation or resumption of cohabitation for 90 days or more
- Severability of void or voidable clauses, if applicable
- Further undertaking to do all things necessary to carry out the terms of the agreement
- No waiver or amendment except in writing and signed, with independent legal advice
- Costs
- Binding on parties and their heirs, executors, administrators and assigns
- Binding on estate
- Provision for agreement to survive divorce and/or incorporation of parenting or support provisions in order
- Statement that preamble forms part of the agreement and the statements in the preamble are accurate
- Statement of governing law
- Statement that each party has/has not had independent legal advice, and understands agreement, accepts it as a fair settlement of rights and responsibilities, is signing voluntarily and without undue influence or duress
- See similar considerations in checklist for drafting cohabitation, prenuptial; and spousal agreements.

## **20. Certificates**

- Some counsel attach certificates of acknowledgment to be signed by the parties (which confirm that each has received independent legal advice, is signing the agreement voluntarily, etc.) and/or certificates of independent legal advice (to be signed by counsel) and/or affidavits of execution to the agreement. These matters are typically also confirmed within the body of the agreement.

## L. PRECEDENTS

---

These precedents are samples only and may not be applicable in any given circumstance.

Always use caution and double-check the requirements of all statutes including but not limited to the *Divorce Act*, *The Family Law Act*, *The Family Support Enforcement Act*, applicable pension legislation and the *Income Tax Act*.

The current version of the Standard Clauses which is available on the Court of King's Bench website may also offer useful assistance in drafting clauses that appear in both court orders (where it is mandatory) and separation agreements. The use of standard clauses often helps avoid disagreements between counsel as to appropriate wording. At the time of writing, the use of Version 6 clauses is permitted, until such time as Version 7 becomes available.

**1. Cohabitation and Prenuptial Agreement (agreement intending to be separate as to property, spousal support, child of prior relationship)**

**THIS COHABITATION AND PRENUPTIAL AGREEMENT** made in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

BETWEEN:

**NICHOLAS GREEN**  
of the City of Winnipeg,  
in the Province of Manitoba  
(hereinafter referred to as "Nick").

OF THE FIRST PART,

-and-

**PENNY COPPER**  
of the City of Winnipeg,  
in the Province of Manitoba  
(hereinafter referred to as "Penny").

OF THE SECOND PART.

THE PARTIES ACKNOWLEDGE THAT:

A. Nick and Penny intend to commence their cohabitation on or about \_\_\_\_\_ (hereinafter referred to as the "cohabitation date"). They acknowledge and agree that they are not presently cohabitating, nor did they at any time reside together in a common-law relationship, common-law-like relationship, or a marriage-like relationship. The parties contemplate marriage to each other in the future, although no date has been set.

B. Nick has not been married previously and has no children. Nick was born on \_\_\_\_\_.

C. Penny has been previously married and has one child of that marriage, namely: Elizabeth Alice Border born \_\_\_\_\_. Elizabeth lives primarily with her mother Penny.

Penny receives child support from Elizabeth's father, George Border in the present amount of \$987.00 per month. Penny was born on \_\_\_\_\_.

D. Nick is self-employed through The Paper Clip, a business in which he is the sole shareholder. Nick draws variable income from The Paper Clip as he may determine from time to time in his sole discretion. Nick's earnings are in the estimated minimum amount of \$\_\_\_\_, and have the potential to be significant.

E. Penny is employed as a salesperson at Big Drug Co. Her income is variable. She earns approximately \$\_\_\_\_\_ per year.

F. Each of the parties is the owner of certain assets which have been acquired prior to their cohabitation and intended marriage and each party intends to maintain all of their assets as their sole and separate property free from any claim thereon by the other now and in the future, except as may be varied by the terms of this agreement.

G. A listing of Nick's significant assets acquired prior to his cohabitation with and intended marriage to Penny, along with an estimate of their values, is attached hereto as **Schedule "A"** (hereinafter referred to as "Nick's pre-acquired assets").

H. Nick has no significant personal debts.

I. A listing of Penny's significant assets acquired prior to her cohabitation with and intended marriage to Nick, along with an estimate of their values, is attached hereto as **Schedule "B"** (hereinafter referred to as "Penny's pre-acquired assets").

J. Penny has certain debts acquired prior to her cohabitation with and intended marriage to Nick. A listing of the said debts is attached hereto as **Schedule "C"** (hereinafter referred to as "Penny's pre-acquired debts").

K. Nick does not have an employment pension. Penny is a member of a pension plan in condition with her employment at Big Drug Co.

L. Nick and Penny intend to have the totality of their financial affairs and the consequences of any subsequent cohabitation or separation or dissolution of their relationship whether or not they ever marry each other, governed by this Agreement. They intend to make inapplicable to their relationship, or its dissolution, insofar as the law permits, all laws and statutes which would affect their rights and responsibilities to each other. Without restricting the generality of the foregoing, the parties intend to make inapplicable to their relationship the terms and provisions of *The Law of Property Act* (Manitoba), *The Married Women's Property Act* (Manitoba), *The Family Property Act* (Manitoba), *The Wills Act* (Manitoba), *The Intestate Succession Act* (Manitoba) and any other statutes or acts wherein or whereby rights may be conferred or responsibilities imposed upon cohabitating or married partners, as any such legislation, act or regulation is currently constituted or may in future be amended or replaced or enacted by subsequent legislation.

M. Nick acquired his interest in The Paper Clip prior to his cohabitation and intended marriage to Penny, and each party intends that Nick's interest in The Paper Clip shall include any and all assets currently, or in the future, owned by The Paper Clip and any business currently, or in the future, undertaken by The Paper Clip or any successor thereto, notwithstanding any transfer or other disposition of such assets by The Paper Clip or the reorganization or restructuring of The Paper Clip, and further notwithstanding the entity (including, without limitation, any corporation yet to be incorporated or any partnership yet to be established) which is the ultimate transferee, recipient or beneficiary of such assets or undertaking (hereinafter collectively referred to as "The Paper Clip").

N. Each party's counsel has advised them that the laws of Manitoba, the province in which they currently reside, and the law of other jurisdictions where they may live or have property or which may govern the disposition of their property, may impose on each of them certain rights and obligations as a result of their cohabitation and/or marriage. Each party's counsel has advised them that these rights and obligations may be altered by agreement. Neither Penny nor Nick wishes to have legislation, either provincial or federal, dictate what their proprietary financial rights against, and obligations to, the other will be. Therefore,

each has decided to waive, except as provided in this Agreement, whatever rights they acquire upon cohabitation and/or marriage and to determine by this Agreement the extent of their economic obligations to each other.

O. The parties wish to provide by this Agreement for a scheme of property ownership, disposition, sharing and entitlement governing each of their assets, debts and liabilities which presently exist or which may exist in the future, and to settle by agreement their financial rights and obligations with respect to each other and with respect to the rights that will accrue to each party in the property and estate of the other by reason of their cohabitation and/or marriage, and to waive and release their rights that exist pursuant to various statutes and at common-law, and to accept in lieu of and in full satisfaction and discharge of all such rights the provisions of the within Agreement.

P. Nick and Penny desire and intend this Cohabitation and Prenuptial Agreement to determine their respective rights, obligations and present or future claims against the other, and/or the estate of the other, arising out of their relationship during cohabitation, marriage and upon separation, divorce, annulment and/or death, and any rights they may have against the other as a result of their relationship prior to commencing their cohabitation notwithstanding any change, material or otherwise, in their individual or mutual circumstances in the future, including their states of health and economic wellbeing, and whether or not any such changes are foreseeable at the date of the execution hereof.

Q. The parties wish to confirm that:

- (a) each of them relies on this Agreement to be enforced according to its terms;
- (b) neither of them would have entered into this Agreement, or continued their relationship in accordance with the terms of this Agreement had it been anticipated that the other would ever apply to set aside this Agreement; and
- (c) either of them may choose to pursue or not to pursue economic opportunities because of their relationship but each party recognizes that certain sacrifices

will be made within, and because of, the relationship, and the consequences of those choices will not be used to avoid the terms of this Agreement.

R. The parties acknowledge that each of them is prepared to abide by the terms of this Agreement because each recognizes that:

- (a) the importance to each of them of being able to rely on the Agreement far outweighs the risk that it may operate unfairly at some future date;
- (b) they wish to provide certainty as to their rights and obligations, one to the other, even though they recognize and acknowledge that it is impossible to know what their future circumstances will be;
- (c) the impossibility of returning the parties to the positions they occupied before they entered this Agreement would make any variation, however fair viewed solely in the changed circumstances, unfair on the whole, because all dealings with their property during the course of their relationship will have been based on the binding nature of this Agreement.

S. Nick and Penny intend and agree that each party's separate property shall not be shareable nor subject to any legislation, including *The Family Property Act* as it exists or as it may be amended and/or any subsequent statute which may take its place, nor to any rule of law which provides or which may provide either of them with rights or obligations in respect of the separate property of the other and do not intend that their separate property shall form part of the estate upon which the other may make a claim, except as set out herein.

T. Each party intends by this Agreement:

- (a) except as specifically provided in this Agreement, to waive any rights and to avoid any obligations relating to property which have arisen or which may in the future arise at law or in equity from their cohabitation, marriage and relationship;



- (b) to provide their own scheme for the orderly division of their property if a breakdown of the relationship occurs;
- (c) most particularly, to deem the property owned by a party at the date of cohabitation and/or marriage to have been acquired by way of gift from a third party intended to benefit the recipient alone;
- (d) to waive any rights and to avoid any obligations relating to support which have arisen or which may in the future arise at law or in equity from their cohabitation, marriage and relationship.

U. The parties acknowledge that this Agreement is a “common-law relationship agreement” and a “spousal agreement” as those terms are defined in *The Family Property Act*.

V. **THE PARTIES** have a clear understanding of the terms of this Agreement and of the binding nature of the covenants contained herein and they freely and in good faith choose to enter into this Cohabitation and Prenuptial Agreement and fully intend it to be legally binding.

**NOW THEREFORE THIS AGREEMENT WITNESSES THAT** in consideration of the premises, and of the mutual covenants and agreements herein set forth, the parties hereby covenant and agree each with the other as follows:

#### **1.00 PREAMBLE**

1.01 The terms and representations contained in the Preamble form an integral part of this Agreement.

#### **2.00 EFFECTIVE DATE**

2.01 This Agreement shall become effective as of the date of the commencement of cohabitation of Nick and Penny.

### **3.00 DEFINITION OF “SEPARATION”**

3.01 In this Agreement the following definitions shall apply and prevail over the equivalent definitions in all family property legislation including the *Divorce Act*, 1985 and *The Family Property Act*, C.C.S.M. c. F25 and, if there is any inconsistency between this Agreement and any of the said legislation, the terms of this Agreement shall prevail:

- (a) “separation” means the first of the following events to occur:
  - (i) the parties commence living separate and apart from one another with one party having communicated to the other that they are separated;
  - (ii) the date a Court grants an order recognizing that the parties’ relationship has ended;
  - (iii) the date a Court determines to be the parties’ date of separation;
  - (iv) the date either party advises the other in writing personally or through counsel that they have terminated their relationship;
  - (v) the date either party files an application in any jurisdiction seeking an order of separation, divorce or division of property;
  - (vi) the parties’ relationship will not be deemed to have ended as a result of a mere geographical separation, including a physical separation due to one party residing in an assisted living or healthcare facility as a result of medical, physical or psychological needs.

### **4.00 DISCLOSURE OF ASSETS**

4.01 The parties acknowledge and agree that each has fully disclosed to the other the real and personal property of any significant value in which they have any interest and each party acknowledges the sufficiency of such disclosure, both as to form and as to substance. Each has offered to provide the other with any additional financial information, corroboration of

the said information and a full opportunity to independently evaluate same. Each party waives and releases any and all rights to any further or better disclosure, and agrees that the disclosure provided is, and shall be deemed to be, full and complete disclosure with respect to the income, assets and debts of the other.

## **5.00 DEFINITION OF SEPARATE PROPERTY**

5.01 In this Agreement, the following definition of separate property shall apply and prevail over the equivalent definitions in all family property legislation. Wherever “separate property” is used in this Agreement, it shall mean:

- (a) (i) (1) Nick’s pre-acquired assets set out on Schedule “A” hereto, including his interests in The Paper Clip;
- (2) all property or income received or receivable at any time by Nick by way of a distribution of any kind, whether by salary (earned or unearned), interest, dividend of any kind whatsoever, return of capital, redemption of shares, proceeds of disposition or on winding-up, from, or of, any of his separate property;
- (3) any and all property of any kind whatsoever heretofore or hereafter received or acquired by Nick, by way of gift, bequest, devise, benefit or purchase from any of his family members, or any other third party or any corporate or commercial entity controlled by any of them, and all property received or receivable by Nick by way of distribution of any kind, interest, and in the case of shares, dividends of any kind whatsoever, return of capital, redemption of shares or on winding up;
- (4) any income from, or appreciation in the value of, any of the property aforementioned in sub-paragraphs 5.01(a)(i)(1) through 5.01(a)(i)(3), all proceeds of disposition of any of the

aforementioned property and any property acquired in exchange for or purchased with the proceeds of sale of any of the aforementioned property and, in the case of shares, any shares into which the same may be converted or substituted or exchanged for, whether pursuant to a reorganization of share capital, amalgamation, sale, agreement or otherwise;

- (ii) any appreciation or growth, including as a result of Nick's personal efforts or work product, and/or depreciation relating to Nick's pre-acquired assets and Nick's inherited and/or gifted assets including all items described in sub-paragraphs 5.01(a)(i)(1) through 5.01(a)(i)(4);
- (iii) any property acquired by Nick by one or more substitutions or further substitutions for Nick's property as set out in subparagraphs 5.01(a)(i) and 5.01(a)(ii);
- (iv) all proceeds from the sale, transfer or exchange of property identified in subparagraphs 5.01(a)(i), 5.01(a)(ii) and 5.01(a)(iii);
- (v) any assets which are obtained directly or indirectly from the property identified in subparagraphs 5.01(a)(i), 5.01(a)(ii), 5.01(a)(iii) and 5.01(a)(iv) whether by exchange, purchase, income or in any other fashion;
- (vi) all assets acquired by Nick from any of his separate property, which shall include but not limited to retained earnings held in any of Nick's corporate holdings and goodwill with respect to any of Nick's corporate holdings;
- (vii) all assets acquired by Nick from his own sources, including remuneration for personal services rendered, which shall include but not be limited to retained earnings held in The Paper Clip;

- (b) for the purpose of clarity, the parties acknowledge and agree that any revenue or potential revenue of The Paper Clip whether received by Nick, or not received by Nick and not included in his income for the purposes of his income tax return, and any loan or advance by Nick to The Paper Clip shall continue to form part of The Paper Clip and shall continue to be Nick's separate property.
- (c) (i) Penny's pre-acquired assets set out on Schedule "B" hereto:
- (ii) Penny's inherited or gifted assets, including any growth or appreciation thereon, including as a result of Penny's personal efforts or work product;
- (iii) all proceeds from the sale, transfer or exchange of property identified in subparagraphs 5.01(c)(i) and 5.01(c)(ii);
- (iv) any assets which are obtained directly or indirectly from the property identified in 5.01(c)(i), 5.01(c)(ii) and 5.01(c)(iii) whether by exchange, purchase, income or in any other fashion;
- (v) all assets acquired by Penny from her own sources, including remuneration for personal services rendered.

## **6.00 FAMILY PROPERTY ACT NOT TO APPLY**

6.01 *The Family Property Act* and amendments thereto and specifically each provision therein shall be inapplicable to Nick's separate property and to Penny's separate property. Wherever there is a conflict between *The Family Property Act* and this Agreement, this Agreement shall prevail. The parties intend that this Agreement shall be and be deemed to be a common-law relationship agreement and a spousal agreement as defined in *The Family Property Act*.

6.02 Except as specifically provided for by this Agreement, neither party shall have in any circumstances whatsoever, an interest or claim against, in or to the separate property of the other party, or any part or parts thereof. Neither Nick nor Penny will acquire any interest in the separate property of the other by way of constructive, resulting or implied trust or by any right or use or enjoyment allowed by the other with respect to any property, or by operation of law. Without limiting the generality of the foregoing:

- (a) each party agrees that they will neither expect nor require from the other financial compensation of any type at any time in return for the performance of tasks and favors for the other;
- (b) each party agrees that inherent in their relationship is a sharing of the use of property owned by the other; however, no such sharing shall give a right to any ownership of such property nor a right of possession of such property;
- (c) each party agrees that during cohabitation, each may undertake responsibilities and perform tasks and favours to improve or maintain the property of the other; however, no such responsibilities, tasks or favours shall give a right to any ownership of such property nor a right of possession of such property;

6.03 For the purposes of further clarity, the parties acknowledge and agree that each of them shall be at liberty to maintain bank accounts, credit union accounts, savings accounts, investment accounts, R.R.S.P. accounts and/or stock accounts, bonds and/or other savings vehicles containing or purchased with their separate property or proceeds or income thereof, in their sole name, free from any claim thereon by the other. Any such asset shall remain separate property and shall be retained by the owner, free from any claim thereon by the other. Any such assets shall be deemed for all purposes not to be family assets, and shall remain the separate property of the owner, free from any claim thereon by the other.

## **7.00 OTHER ASSETS**

7.01 Any registration of title or bill of sale shall be irrefutable and absolute proof of ownership of the particular asset, as between Nick and Penny.

7.02 In the absence of registration of title or bill of sale, any assets acquired from the funds of any separate bank account shall belong exclusively to the person registered as maintaining the said bank account and shall be that person's separate asset.

7.03 Should Nick and Penny choose to operate one or more joint bank account(s), any assets acquired therefrom shall be joint property and shall be shared equally between the parties.

## **8.00 17 BLISS STREET, WINNIPEG, MANITOBA**

8.01 The parties acknowledge and agree that Nick is the sole registered owner of the home municipality known as 17 Bliss Street, Winnipeg, Manitoba, Title No. \_\_\_\_\_ and which is legally described as follows: \_\_\_\_\_

(hereafter referred to as "Nick's home")

which the parties acknowledge and agree is valued at approximately \$1,200,000.00.

8.02 There is no mortgage registered against Nick's home.

8.03 The parties acknowledge and agree that Nick shall be entitled to retain Nick's home and/or any other home registered in his sole name as his sole and separate property, free from any claim thereon by Penny.

8.04 Penny shall execute, forthwith after the parties' marriage or forthwith after the parties attain the status of common-law partners pursuant to *The Homesteads Act*, or upon Nick's request, a Release of Homestead Rights in relation to any home(s) registered in the sole name of Nick, releasing homestead rights as may be applicable at that time, and registerable in the appropriate Land Titles Office.

8.05 For so long as the parties reside in a home owned solely by Nick, should they separate, Nick shall have the sole right of exclusive occupancy and Penny shall vacate said property upon Nick's request and in any event within forty-five (45) days of the parties' separation. Penny shall not have the right to bring an application for exclusive occupancy of any home owned solely by Nick pursuant to *The Family Law Act*, *The Domestic Violence and Stalking Act* or otherwise, in any circumstance or for any period of time, and Penny hereby irrevocably waives and releases her right to make any such claim.

8.06 For so long as the parties continue to cohabit and have not separated, Nick shall maintain a Will containing a devise for Penny such that, provided that at the time of his death he and Penny continue to cohabit in Nick's home or any other home in Nick's sole name as their primary residence, the said home shall be left to Penny.

#### **9.00 SHARING OF EXPENSES**

9.01 The parties acknowledge and agree that Nick shall be responsible for the costs of Nick's home or any other home in Nick's sole name which is his sole and separate property, including but not limited to the costs of taxes, insurance, utilities and any mortgage that might be registered thereon.

9.02 The parties shall contribute to the costs of their household for groceries and other household items as they may agree from time to time.

9.03 The parties shall each be solely responsible to pay for the costs of their own clothing, automobiles (including purchase, lease, maintenance, insurance and repairs), disability insurance, life insurance, travel, entertainment, health and medical costs including health and medical insurance and miscellaneous costs.

9.04 Penny shall be solely responsible for any direct costs in relation to her daughter, Elizabeth Alice Border.



## **10.00 PENNY'S PENSION**

10.01 Nick and Penny acknowledge that Penny is a member of an employee pension plan in connection with her employment with Big Drug Co., which pension is governed by *The Pension Benefits Act*, and which is a family asset within the meaning of *The Family Property Act* ("Penny's pension plan").

10.02 The parties agree that Penny's pension plan forms part of Penny's separate property. Nick shall receive 0% (zero percent) of Penny's pension benefits and credits. Nick hereby quits claim to any right to a share in, or entitlement to any portion of Penny's pension benefits and credits and undertakes never to claim any interest, whether by way of statutory entitlement or otherwise. If any benefit is received by Nick from any pension funds or pension of Penny, Nick shall reimburse Penny to the full extent of such benefits received, together with any tax ramifications to Penny. Nick and Penny undertake to execute such documents as may be necessary and required under *The Pension Benefits Act* to give effect to this agreement.

10.03 The basis for this release is the case known as *Dundas v. Schafer* reported in 2012 MBQB 87, a decision of Madam Justice MacPhail pronounced on March 20, 2012, in which it was held that provisions of *The Pension Benefits Act* of Manitoba, when considered with other relevant legislative provisions, did not bar pension benefit credits splitting releases in Prenuptial Agreements. Justice MacPhail's decision (as it concerns pension waivers) was affirmed by the Court of Appeal in 2014 MBCA 92.

## **11.00 DEBTS OR LIABILITIES**

11.01 Nick shall not incur any debts or liabilities on the credit of Penny and Nick shall pay his own debts and will at all times hereafter keep and indemnify Penny from all debts and liabilities contracted or incurred by him under this Agreement or otherwise, and from all actions, proceedings, claims, demands, costs, damages and expenses whatsoever in respect of such debts or liabilities or any of them.

11.02 Penny shall not incur any debts or liabilities on the credit of Nick and Penny shall pay her own debts and will at all times hereafter keep and indemnify Nick from all debts and liabilities contracted or incurred by her under this Agreement or otherwise, and from all actions, proceedings, claims, demands, costs, damages and expenses whatsoever in respect of such debts or liabilities or any of them.

11.03 Should Penny and Nick choose to incur any debts or liabilities jointly, the parties agree that each shall be equally responsible for same.

## **12.00 ELIZABETH ALICE BORDER**

12.01 The parties acknowledge and agree that the intention of each party is that Nick will not stand in *loco parentis* or in place of a parent to Elizabeth Alice Border nor have any obligation to her now or in the future. Penny agrees that she will take no steps or actions which could lead to Nick having any obligation to Elizabeth Alice Border.

12.02 The parties acknowledge and agree that Nick shall not in future have any rights or responsibilities with respect to Elizabeth Alice Border, including any responsibility for her support, nor shall Nick stand in *loco parentis* or in place of a parent to Elizabeth Alice Border in any circumstance whatsoever.

## **13.00 SPOUSAL AND COMMON-LAW PARTNER SUPPORT**

13.01 In the event that the parties separate Nick shall provide periodic common-law partner support or spousal support to Penny on the following basis:

- (a) in the event the parties have cohabited for less than three (3) complete years, Nick shall pay no support to Penny;
- (b) in the event the parties have cohabited for a period of three (3) full years or more, but less than nine (9) full years, Nick shall pay to Penny the sum of \$\_\_\_\_\_ per month for a period of six (6) months per full year of the duration of the parties' cohabitation;

(c) in the event the parties have cohabited nine (9) full years or more, Nick shall pay Penny the sum of \$\_\_\_\_\_ per month for the duration of nine (9) months per full year of the duration of the parties' cohabitation to a maximum payment duration of ten (10) years.

13.02 (a) For the purposes of clarity and by way of example only, in the event the parties cohabit for thirty-four (34) months, the period of the parties' cohabitation would be less than three (3) full years and Nick shall pay no support to Penny;

(b) For the purposes of clarity and by way of example only, in the event the parties cohabit for five (5) years and six (6) months the period of the parties' cohabitation would be five (5) full years. The amount of support would be \$\_\_\_\_\_ per month and the duration would be six (6) months per full year of cohabitation, being thirty (30) months (2.5 years);

(c) (i) By way of further example, in the event the parties cohabit for twelve (12) years and four (4) months, the period of the parties' cohabitation would be twelve (12) full years. The amount of support would be \$\_\_\_\_\_ per month and the duration would be nine (9) months per full year of cohabitation, being one hundred and eight (108) months (9 years);

(ii) By way of further example, in the event the parties cohabit for fifteen (15) years and one (1) month, the amount of support would be \$\_\_\_\_\_ per month for the duration of ten (10) years, being the maximum duration for support.

13.03 The parties acknowledge and agree that should they experience a separation, they will consent to a Court Order and/or enter into a Separation Agreement which will provide for periodic support as set out herein, such that the said periodic support will be taxable to Penny and tax deductible to Nick. In the event that Penny predeceases Nick prior to the

completion of the payments of periodic support as set out herein, the obligation for support shall terminate immediately upon the death of Penny.

13.04 The parties acknowledge and agree that the support set out herein is based upon their expectation that Nick's annual income shall be a minimum of \$\_\_\_\_\_. Should Nick's income be less than \$\_\_\_\_\_, Nick shall be entitled to seek a reduction in the said amount of spousal support, in which case the onus shall be on Nick to prove that his income is less than \$\_\_\_\_\_.

**NOTE: With some modification, clauses 13.05 – 13.20 may be useful where the parties intend total waivers of spousal support. See also the Sample Separation Agreement.**

13.05 Except as set out herein, neither party shall pay any past, present, future or ongoing support to the other in any circumstances whatsoever, whether or not those circumstances are foreseen or foreseeable or unforeseen or unforeseeable and whatever the nature of those circumstances. The parties hereto intend that, except as set out herein, no support of any kind shall be paid by either of them to the other for the other's support whatever Nick's or Penny's circumstances might be or have been, including but not limited to their financial, emotional, social, physical and psychological circumstances, including any economic hardship arising from a change in the conditions, means, needs or other circumstances that may occur in the future that is or is not related to the marriage or relationship, which if known or if in existence at the time of the making of this Agreement, may or may not likely have altered the terms of this Agreement.

13.06 Except as set out herein, each party irrevocably releases the other from any demands or claims whatsoever in respect of their rights, now or in the future, to support by the other, whether such rights arise by common law or pursuant to any legislation presently in force or which may come into force at any time in the future.

13.07 Each party is hereby forever and absolutely barred and estopped from bringing any application or claim against the other for spousal support under the *Divorce Act* (Canada), including *inter alia* both sections 15 and 17, or any other similar legislation, both federal and

provincial including *The Family Law Act*, or successor legislation, except as set out herein. This Agreement shall be a complete bar, answer and defence to any such application or claim if commenced.

13.08 The parties covenant and agree that the waiver of support except as contained herein shall not be variable by either party, regardless of any changes in the circumstances of either of them or the cumulative effect of any changes, even if such changes are material, radical or beyond imagination, except as set out in paragraph 13.04. No change (nor the cumulative effect of such changes) in the financial position or other changes in the circumstances of either party no matter how significant, material or immaterial, foreseen or unforeseen, and any change in the capital, debt or income or health or disability of either party shall constitute any grounds to vary this Agreement, even in the event that either party becomes impecunious at any time in the future, except as set out in paragraph 13.04.

13.09 Except as set out herein, neither party shall pay support to the other in any circumstances whatsoever whether or not those circumstances are foreseen or foreseeable or unforeseen or unforeseeable and whatever the nature of those circumstances. The parties hereto intend that except as set out herein no support of any kind shall be paid by either of them to the other for the other's support whatever Nick's or Penny's circumstances might be or have been, including but not limited to their financial, emotional, social, physical and psychological circumstances.

13.10 Except as set out herein, each party irrevocably releases the other from any demands or claims whatsoever in respect of their rights now or in the future, to support by the other, whether such rights arise by common law or pursuant to any legislation presently in force of which may come into force at any time in the future.

13.11 The parties covenant and agree that their agreement as to spousal support and common-law partner support as agreed to herein shall not be variable by either party, regardless of any changes in the circumstances of either of them, except as set out in paragraph 13.04 herein. No other change in the financial position or other changes in the

circumstances of either party no matter how significant, material or immaterial, foreseen or unforeseen, and any change in the capital, debt or income or health or disability of either party shall constitute any grounds to vary this Agreement.

13.12 (a) The parties have carefully considered, and have been advised by their legal representatives of, the ramifications, meaning, objectives, and intent of the provisions of the *Divorce Act, 1985* relating to spousal support and in particular those provisions set out in sections 15 and 17 of the *Divorce Act, 1985*, including:

- (i) the conditions, means, needs and other circumstances of each spouse;
- (ii) the length of time the spouses cohabited;
- (iii) the functions performed by the spouses during cohabitation; and
- (iv) the Order, agreement or arrangements relating to the support of the spouse.

(b) The parties have also carefully considered and have been advised by their legal representatives of the objectives for a spousal support order being:

- (i) the recognition of any economic advantages or disadvantages to the spouse arising from the marriage or its breakdown;
- (ii) the apportionment between the spouses of any financial consequences arising from the care of any child or children of the marriage over and above the child support obligation of each spouse;
- (iii) the relief of any economic hardship of the spouses arising from the breakdown of the marriage; and
- (iv) insofar as practicable, the promotion of the economic self-sufficiency of each spouse within a reasonable period of time.

- (c) The parties, having so considered the provisions of the *Divorce Act, 1985*, have concluded that this Agreement is fair and equitable to both and properly takes into account all of the relevant provisions of the *Divorce Act, 1985* including consideration of compensatory, non-compensatory and contractual basis for support, and that this Agreement is consistent with the support objectives set out in the *Divorce Act, 1985* and is equitable to them both.

13.13 The parties have also carefully considered and have been advised by their legal representatives of the ramifications, meaning, objectives and intent of the provisions of *The Family Law Act* (Manitoba) relating to support and in particular those provisions currently set out in section 70(1) of *The Family Law Act* (Manitoba) including:

1. The duration of the marriage or common-law relationship.
2. The functions performed by each spouse during the time they lived together.
3. The financial means, earnings and earning capacity of each spouse.
4. The household standard of living of each spouse.
5. The financial needs of each spouse.
6. Any contribution of a spouse within the meaning of subsection (2).
7. Any impairment of the income-earning capacity and financial status of either resulting from the marriage or common-law relationship.
8. If one of them is financially dependent upon the other,
  - (a) the measures available for the dependent spouse to become financially independent of the other, and the length of time and cost involved in taking those measures; and
  - (b) whether and to what extent the dependent spouse is complying with the duty to take all reasonable steps to become financially independent.
9. Any duty either has for the support of a child or of another person other than the other spouse.

10. Any previous court order relating to the support of the spouses.
11. The existence of any agreement or arrangement relating to the support of the spouses.
12. The amount of any property settlement made between them.

13.14 The parties having so considered the provisions of *The Family Law Act* (Manitoba), have concluded that this Agreement is fair and equitable to both and properly takes into account all of the relevant provisions of *The Family Law Act* (Manitoba) and this Agreement is consistent with the objectives of *The Family Law Act* (Manitoba).

13.15 The parties acknowledge and agree that the agreement as to spousal support or common-law partner support as agreed to by them herein recognizes all possible changes whether catastrophic or not, foreseen or unforeseen, or foreseeable or unforeseeable. The parties acknowledge that in reaching their agreement as to spousal support or common-law partner support that they have recognized that there likely will be material changes in circumstances from time to time that will affect either or both of them, and that this likelihood has also been considered and taken into account by them.

13.16 The parties acknowledge and agree that they fully expect and intend that all the terms of this Agreement will be binding upon each of them. The parties acknowledge that the overriding principle accepted by them is the sanctity of their right to contract freely with one another. The parties acknowledge and agree that their agreement as to spousal support or common-law partner support has specifically considered the factors set out in the *Divorce Act* (Canada) and *The Family Law Act* (Manitoba) and that they have specifically considered future contingencies including but not limited to the fact that the parties may or may not have children together, that either party may or may not obtain further education, may or may not obtain employment, may or may not have physical or emotional problems or disabilities in the future, and that the parties may have very disparate lifestyles. The parties acknowledge their clear and unequivocal intention to insulate their agreement from review or variation and acknowledge and agree that their agreement is fair and satisfies the



objectives of the *Divorce Act* (Canada) and *The Family Law Act* (Manitoba), including consideration of compensatory, non-compensatory and contractual basis for support.

13.17 Both parties have been made aware of the possibilities of fluctuation of their respective incomes and assets, and that they may have disparate lifestyles and are cognizant of the possible increases and decreases in the cost of living and each is prepared to accept the terms of this Agreement as a full and final settlement and waive all further claims as set out herein.

13.18 Each of the parties acknowledge and agree that they are aware and have contemplated that either one of them may at some point in the future become impecunious and not have the financial means to support themselves on their own. They have also considered the possibility that either one of them may become impoverished relative to the other party or an objective basis. In acknowledging these possibilities in addition to the other possibilities of varied or disparate economic lifestyles, the parties have agreed that any and all such possibilities have been contemplated by them and that they wish to prioritize the sanctity of this contract between them as well as certainty and finality. Nick and Penny each further acknowledge and agree that the terms hereof are and are fair and valid at the time this Agreement is being entered, and that they intend that this Agreement shall be upheld and that no relief shall be sought inconsistent with the terms hereof or to set aside this Agreement at any time in the future by either one of them.

13.19 The parties hereto covenant and agree that this Agreement has been negotiated thoroughly and fairly by the parties over many months with counsel and represents their own intentions and expectations and agree that this Agreement is and shall be deemed to be in full compliance with the objectives of the *Divorce Act* (Canada) and *The Family Law Act* (Manitoba) as a whole. The parties acknowledge that this Agreement has been negotiated in unimpeachable circumstances.

13.20 The parties acknowledge that they have been advised by their respective lawyers as to the decision by the Supreme Court of Canada in *Miglin v. Miglin*. The parties further

acknowledge and agree that this Agreement reached between them including mutual releases of the obligation to pay spousal support except as set out herein is an agreement that they each expect to be endorsed, accepted and respected because it is their intention that the spousal or common-law partner support agreement contained herein be unimpeachable.

#### **14.00 RELEASES**

14.01 Each party hereby waives and renounces any and all rights and claims which they may have now or in the future, to advance a claim in equity against the separate property and assets of the other, and more particularly, each party hereby waives and renounces the right to advance a claim by way of constructive trust, resulting trust, unjust enrichment, quantum meruit or other equitable remedy as against the other. This provision may be plead as a specific bar and complete defence to any such action.

14.02 The parties specifically intend and agree that *The Family Property Act* including Part IV thereof, *The Intestate Succession Act*, *The Family Law Act*, *The Married Women's Property Act*, and corollary relief under the *Divorce Act* or any like legislation or law of Manitoba or Government of Canada shall not apply to them, their estates and their property, except as specifically provided herein.

14.03 The parties hereto confirm and agree that no circumstances will arise as a result of their cohabitation, marriage and/or separation that will give rise to a claim for or by either party under *The Dependants Relief Act*. The parties hereby waive forever and discharge fully and completely any and all claims either of them have or may in future have pursuant to *The Dependants Relief Act*. Both parties acknowledge that they have been made aware of the law respecting such a waiver and the Court's jurisdiction to grant an Order under the statute, notwithstanding their waivers. Notwithstanding that, both parties intend this paragraph to evidence their mutual intentions and desire to waive and discharge fully and completely any and all such claims now and forever, and further agree that this paragraph and/or this Agreement as a whole may be plead as a full defence to any such claims in the future.

14.04 Neither of the parties, nor their heirs, executors, administrators, trustees or assigns, nor any person or persons, corporation or corporations, whatsoever for either or on their behalf, or on behalf of their estate, shall at any time hereafter bring or carry on or prosecute any or in any manner acts, causes of action, suits, proceedings, claims or demands whatsoever or howsoever against the other, their heirs, executors, administrators, trustees or assigns, for or by reason of or in respect of any act, matter, cause or thing waived or renounced by this Agreement.

#### **15.00 EXECUTION OF FURTHER DOCUMENTS**

15.01 The parties shall, as and when required, execute and deliver to the other any document or documents that the other reasonably requires to give effect to the terms of this Agreement.

#### **16.00 SEVERABILITY**

16.01 Each and every term and provision of this Agreement shall be severable, one from the other, and should any Court of competent jurisdiction determine any terms or provisions hereto to be void, voidable, or unenforceable, then same may be struck from this Agreement without in any way affecting the validity of any other term or provision of this Agreement.

#### **17.00 INDEMNIFICATION**

17.01 The parties hereto mutually covenant and agree each with the other that each shall save harmless and shall indemnify the other with respect to all and/or any breach or breaches of this Agreement including but not restricted to any fees, costs or disbursements incurred by the other party in defending or prosecuting any action resulting from the action of the other inconsistent with the provisions hereof, including any attempts to set aside, invalidate or vary any of the provisions herein, except where mutually agreed to in writing and executed with the same formality as this Agreement, and with independent legal advice.

## **18.00 ENUREMENT**

18.01 This Agreement and every covenant, provision and term herein contained shall enure to the benefit of and be binding upon Penny and Nick and each of them, and their respective heirs, executors, administrators and assigns.

## **19.00 NO MODIFICATION**

19.01 No modification or waiver or any of the terms of this Agreement shall be valid unless in writing and executed with the same formality of this Agreement, and with independent legal advice. No waiver of any breach or default hereunder shall be deemed a waiver of any subsequent breach or default of the same or similar nature.

19.02 The failure of any party hereto to insist in any one or more instances on the strict performance of one or more of the covenants or provisions of this Agreement shall not be and is not evidence of any amendment of this Agreement or of any waiver of any rights under this Agreement or of any waiver of a breach in the future of such covenants or provisions, which shall continue in full force and effect.

19.03 The parties further covenant and agree that neither of the parties shall be bound by any representation, promise, covenant or statement of any kind which has been made at any time prior to the execution of this contract.

## **20.00 FULL AND FINAL AGREEMENT**

20.01 Nick and Penny agree that this Agreement constitutes a complete and final financial and property settlement as between each of them as to their past, present and future claims against one another, whether at common-law or pursuant to any legislation presently in force or which may come into force, or otherwise. Each of Nick and Penny is aware that this is a final agreement and that no further claims will be made against either party by the other arising from the marriage and/or the cohabitation of the parties, or the dissolution of their marriage or their cohabitation or common-law relationship. Nick and Penny accept the terms of this Agreement as a full and final settlement and waive all further claims against

the other save and except those arising under this Agreement. It is further covenanted and agreed by each party that in any action whatsoever including a divorce action, either of them shall be at liberty to enter this Agreement in full and complete answer to any and all claims whatsoever inconsistent with the terms hereof.

20.02 The parties agree that there are no other agreements between them, whether oral or in writing, that modify, alter or vary the provisions of this Agreement which the parties acknowledge contains the full and complete agreement between them.

20.03 The parties accept the terms of this Agreement in full and final satisfaction and discharge of all legal rights, claims and demands of every nature and kind whatsoever which either of them has or hereafter can, shall or may have against the other, excepting always any claim arising under this Agreement, providing that nothing herein contained shall preclude any action or proceedings by either party to enforce any of the terms of this Agreement or to dissolve their marriage.

20.04 The parties hereto covenant and agree that they have negotiated this Agreement freely with full autonomy and have structured this Agreement in a manner that reflects their own objectives and concerns, including finality and certainty.

## **21.00 SEPARATION, DIVORCE, ANNULMENT OR DEATH**

21.01 Nick and Penny agree that in the event of any separation and/or divorce or annulment proceedings between them, the within Agreement shall survive and remain in full force and effect, and the terms of this Agreement will continue in force notwithstanding the issuance of a Divorce Judgment, Declaration of Nullity and/or a Final Order. Each party undertakes that in such proceedings between them, they shall not request relief inconsistent with the terms and intent of this Agreement.

21.02 The parties agree that in the event of the death of either or both of them, this Agreement shall survive and shall remain in full force and effect. Each party undertakes that upon happening of the aforesaid event, neither party shall request relief inconsistent with the terms and intent of this Agreement. The parties specifically confirm that they hereby are

releasing their rights to seek an accounting and an equalization of assets on the death of their spouse or common-law partner pursuant to Part IV of *The Family Property Act*.

21.03 It is understood and agreed that each party may make their Will leaving no portion of their estate to the other except as set out herein, and that neither shall take any proceedings to attack or set aside the Last Will and Testament of the other in any fashion. The parties acknowledge and agree that no representations or promises of any kind whatsoever, save as set forth herein, have been made by either of them to the other with respect to a bequest or legacy, however nothing herein shall prevent either Nick or Penny from providing a bequest to the other in their Will or render a transfer or conveyance made in the other's favour invalid.

## **22.00 MENTAL INCOMPETENCE**

22.01 The parties acknowledge and agree that in the event of the mental incompetence of Nick or Penny, the other shall not seek to be named the attorney or the committee to manage the assets of the mentally incompetent party. Any Power of Attorney that may have been granted, one to the other, shall be deemed to be revoked and of no force and effect upon the mental incompetency of either party. *(Note to drafter: Consider if this is desired).*

22.02 In the event that either party makes the other their Power of Attorney for any purpose whatsoever, upon separation any such Power of Attorney shall immediately be deemed to be revoked and of no force and effect.

22.03 In the event that either party has appointed the other as a Health Care Proxy under a Health Care Directive or in a Living Will, upon separation the said appointment shall immediately be deemed to be revoked and of no force and effect.

## **23.00 CONFIDENTIALITY**

23.01 The parties acknowledge and agree that this Agreement, its contents and its terms, shall be kept confidential by each of the parties. Neither party shall disclose the existence, contents or terms hereof to any other party, save for the purpose of obtaining independent

legal or accounting advice. The parties agree that any breach of this provision shall not in any way affect the validity or enforceability of this Agreement or any provision thereof.

#### **24.00 CHOICE OF LAW**

24.01 This Agreement is made pursuant to the laws of the Province of Manitoba and shall be interpreted pursuant to the laws of the Province of Manitoba. The tribunal for any adjudication related to this Agreement shall be the Court of King's Bench, Family Division, Winnipeg Centre, Winnipeg, Manitoba. The parties acknowledge and agree that each is domiciled, ordinarily and habitually resident in Manitoba on the date of the signing of this Agreement.

#### **25.00 INTERPRETATION OR AGREEMENT**

25.01 This Agreement has been negotiated by the parties and by their respective counsel. If an ambiguity or question of intent arises with respect to any provisions of this Agreement, this Agreement will be interpreted as if drafted jointly by the parties and no presumption or burden of proof will arise favouring or disfavouring either party by virtue of authorship of any of the provisions of this Agreement.

#### **26.00 INDEPENDENT LEGAL ADVICE**

26.01 Each party acknowledges that each of them has had this Agreement read and explained to them by their respective lawyers and each party has confirmed to their lawyer that:

- (a) Nick and Penny have obtained independent legal advice with respect to their rights and obligations under the laws of Manitoba and Canada and in particular the laws respecting marriage, separation, divorce, spousal support or common-law partner support, child support and family property;
- (b) Each has read this Agreement in its entirety and has full knowledge and understanding of the contents hereof and signs the Agreement and accepts the same to be a satisfactory and fair settlement of the rights of the parties;

- (c) Each understands their respective rights and obligations under this Agreement, the nature of this Agreement and the consequences of this Agreement;
- (d) Each is signing this Agreement freely and voluntarily without undue influence, duress, fraud, coercion or misrepresentation, and believes that the provisions of this Agreement adequately discharge the present and future responsibilities of the parties to one another, and this Agreement will not result in circumstances that are either unconscionable or unfair to either party;
- (e) Each party represents that they are not suffering from any psychiatric, psychological or emotional impairment nor any diseases or condition of the mind that would impact upon their ability to understand the nature, meaning, effect or consequences of this Agreement.

26.02 This Agreement and every covenant, provision and term herein contained shall enure to the benefit of and be binding upon Nick and Penny and each of them and their respective estates, heirs, executors, administrators and assigns.

**IN WITNESS WHEREOF, PENNY COPPER** has hereunto set her hand and seal this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

**AND IN WITNESS WHEREOF, NICHOLAS GREEN** has hereunto set his hand and seal this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

SIGNED, SEALED AND DELIVERED )  
 in the presence of: )  
 )  
 \_\_\_\_\_ )  
**WITNESS** )

\_\_\_\_\_  
**NICHOLAS GREEN**



SIGNED, SEALED AND DELIVERED )  
in the presence of: )

)  
)

\_\_\_\_\_)  
**WITNESS** )

\_\_\_\_\_)  
**PENNY COPPER**

**NOTE:** Certificates of Acknowledgement and Independent Legal Advice and/or Affidavits of Execution might be attached to the Agreement.

## 2. Interim Separation Agreement

**THIS AGREEMENT** made in duplicate this \_\_\_\_\_ day of September, 20\_\_.

**BETWEEN:**

\_\_\_\_\_, of the  
City of Winnipeg, in the Province of Manitoba,  
(hereinafter referred to as "the Husband")

OF THE FIRST PART,

- and -

\_\_\_\_\_, of the  
City of Winnipeg, in the Province of Manitoba,  
(hereinafter referred to as "the Wife")

OF THE SECOND PART.

### INTERIM AGREEMENT

WHEREAS:

- A. The parties hereto are husband and wife. They were married on \_\_\_\_\_ at the City of Winnipeg, in the Province of Manitoba;
- B. The parties have two children of the marriage, namely:  
\_\_\_\_\_, born \_\_\_\_\_, and \_\_\_\_\_, born \_\_\_\_\_,  
(hereinafter referred to as the "Children").
- C. The parties separated on or about June 1, 20\_\_;
- D. The Wife has had the majority of the parenting time with the Children and they have resided with her in the family home since the date of separation;

E. The Husband has an annual income of \$50,000.00;

F. The Wife has an annual income of \$25,000.00;

G. The parties own, as joint tenants and not as tenants in common, the home municipally known as \_\_\_\_\_, Winnipeg, Manitoba, which property is legally described as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
("the Family Home")

H. The parties wish to record certain interim matters in writing, to be without prejudice to either party's position in the future on an interim or final basis, with respect to the sufficiency or insufficiency of the payments set out herein below.

NOW THEREFORE THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. The preamble hereto shall form an integral part of this Agreement and shall be used in its interpretation.

2. The Husband and Wife acknowledge that they have been living separate and apart from one another since June 1, 20\_\_ and that they agree to continue to live separate and apart from one another.

3. The Husband and Wife shall have joint decision-making responsibility for the Children. The Wife shall have the majority of the parenting time with the Children. The Husband shall have parenting time with the Children as the parties may agree.

4. Neither the Husband nor the Wife shall remove the Children from the City of Winnipeg without the written consent of the other.

5. The Husband shall pay, for the support of the Wife, at her direction, the monthly mortgage payments in connection with the family home, including principal, interest and taxes in the amount of \$290.06 on a bi-weekly basis, commencing October 1, 20\_\_\_. Subsections 56.1(2) and 60.1(2) of the *Income Tax Act* (Canada) shall apply to such third-party payments and, accordingly, the Wife shall include such payments in her income, and the Husband shall deduct such payments from his income for the purposes of taxation.

6. The Husband shall pay to the Wife support for the Children as follows:

(a) pursuant to the Manitoba Table of the Child Support Guidelines, the sum of \$707.00 per month, on the first day of each month, commencing October 1, 20\_\_; and

(b) an additional sum for the following special or extraordinary expenses:

(i) \$100.00 per month for tennis lessons and equipment for the child \_\_\_\_\_, and;

(ii) \$200.00 per month for the net daycare cost for the child \_\_\_\_\_, which sums are payable on the first day of each month, commencing October 1, 20\_\_.

7. The Wife shall have sole occupation of the family home and shall pay all utilities and the house insurance premiums.

8. The parties agree that this Agreement shall terminate upon the earlier of:

(a) the signing of a subsequent written Separation Agreement; or

(b) the granting of a final Order.

9. The Husband and the Wife, respectively, acknowledge that each:
- (a) has obtained independent legal advice;
  - (b) has read this Agreement in its entirety and has full knowledge of its contents;
  - (c) understands their respective obligations pursuant to this Agreement; and
  - (d) is signing this Agreement voluntarily.

IN WITNESS WHEREOF the husband has set his hand and seal at the City of Winnipeg, in the province of Manitoba, this \_\_\_\_\_ day of September, 20\_\_.

IN WITNESS WHEREOF the wife has set her hand and seal at the City of Winnipeg, in the Province of Manitoba, this \_\_\_\_\_ day of September, 20\_\_.

SIGNED, SEALED AND DELIVERED	)	
in the presence of:	)	
	)	
_____	)	_____
As to the signature of the Husband	)	
	)	
_____	)	_____
As to the signature of the Wife	)	

**NOTE:** Certificates of Independent Legal Advice and Certificates of Acknowledgment and/or Affidavits of Execution might be attached.

### 3. Interim Separation Agreement (to acknowledge tax deductibility of spousal/common-law partner support)

**NOTE:** Such an agreement cannot include payments made earlier than the **calendar year** prior to the signing of the agreement.

**THIS AGREEMENT** made in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

BETWEEN:

**Patricia Cook,**  
of the City of Winnipeg,  
in the Province of Manitoba,  
(hereinafter referred to as "Patricia"),

OF THE FIRST PART,

- and -

**Paul Young,**  
of the City of Winnipeg,  
in the Province of Manitoba,  
(hereinafter referred to as "Paul"),

OF THE SECOND PART.

---

#### INTERIM AGREEMENT

---

**Solicitors for Patricia Cook:**

**LAW CO.**  
Barristers and Solicitors  
5 - 99 Main Street  
Winnipeg, Manitoba  
R3P 5B1  
**Susan Johnson**

Telephone No.  
Facsimile No.  
(File No. 223344)

**THIS AGREEMENT** made in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

BETWEEN:

**Patricia Cook,**  
of the City of Winnipeg,  
in the Province of Manitoba,  
(hereinafter referred to as "Patricia"),

OF THE FIRST PART,

- and -

**Paul Young,**  
of the City of Winnipeg,  
in the Province of Manitoba,  
(hereinafter referred to as "Paul"),

OF THE SECOND PART.

### **INTERIM AGREEMENT**

#### **WHEREAS:**

The parties hereto are not married, but commenced cohabiting in a conjugal relationship on or about July 15, 20\_\_\_\_.

The parties separated on or about November 19, 20\_\_\_\_.

The parties confirm that they executed an Interim Agreement on March 2, 20\_\_\_\_, which dealt with common-law partner support paid by Patricia to Paul from December 20\_\_\_\_ until March 20\_\_\_\_, both months inclusive. The parties have agreed to enter into this further Interim Agreement to deal with common-law partner support paid by Patricia to Paul from April 20\_\_\_\_ to December 20\_\_\_\_, both months inclusive.

All other issues between the parties still remain outstanding.

NOW, THEREFORE, THIS AGREEMENT WITNESSES that, in consideration of the premises and of the mutual covenants herein set forth, Patricia and Paul agree with each other as follows:

## **PREAMBLE**

1. The preamble hereto shall form an integral part of this Agreement and shall be used in its interpretation.

## **LIVING SEPARATE AND APART**

2. The parties are living separate and apart and shall continue to live separate and apart from each other.

## **COMMON-LAW PARTNER SUPPORT**

3. Paul acknowledges that Patricia has, for each of April, May, June, July, August, September, October, November and December, 20\_\_\_\_, paid to him the sum of \$1,100.00, as common-law partner support for himself, and that such payments were made prior to, but in contemplation of the execution this Agreement.

4. The parties agree that the common-law partner support payments referred to in paragraph 3 hereof shall be taxable to Paul and tax deductible to Patricia, and that Sections 56.1(3) and 60.1(3) of the *Income Tax Act* of Canada shall apply to the parties, such that Patricia shall be entitled to deduct such payments and Paul shall be required to include such payments, for income tax purposes.

## **WITHOUT PREJUDICE NATURE OF AGREEMENT**

5. The parties agree that the terms of this Agreement are without prejudice to the right of either party to later take a position with respect to the issue of the quantum of common-law partner support inconsistent with the terms of this Interim Agreement.

## **INDEPENDENT LEGAL ADVICE**

6. Patricia and Paul each acknowledge for themselves that they:
- (a) have obtained independent legal advice with respect to the terms and content of this Agreement;
  - (b) have read this Agreement in its entirety and have full knowledge of its contents;



- (c) understands their respective rights and obligations under this Agreement; and
- (d) is signing this Agreement freely and voluntarily.

IN WITNESS WHEREOF Patricia has hereunto set her hand and seal this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

IN WITNESS WHEREOF Paul has hereunto set his hand and seal this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

SIGNED, SEALED and DELIVERED )  
 in the presence of: )  
 )  
 \_\_\_\_\_ )  
 Susan Johnson as to Patricia Cook's )  
 signature )  
 )  
 \_\_\_\_\_ )  
 George Belson as to Paul Young's )  
 Signature )

\_\_\_\_\_  
**PATRICIA COOK**  
  
 \_\_\_\_\_  
**PAUL YOUNG**

**NOTE:** Certificates of Acknowledgment and Independent Legal Advice and/or Affidavits of Execution might be attached.

## 4. Separation Agreement

**THIS SEPARATION AGREEMENT** made in duplicate this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

BETWEEN:

MARY NORTH,  
of the City of Winnipeg,  
in the Province of Manitoba,  
(hereinafter referred to as the "Wife"),

OF THE FIRST PART,

- and -

WILLIAM NORTH,  
of the City of Winnipeg,  
in the Province of Manitoba,  
(hereinafter referred to as the "Husband"),

OF THE SECOND PART.

THE PARTIES ACKNOWLEDGE THAT:

The Husband and the Wife were married at the City of Winnipeg, in the Province of Manitoba on the 15th day of April, 20\_\_\_\_.

There are two (2) children of the marriage, namely: Robert North born January 25, 20\_\_\_\_, and Andrea North born May 10, 20\_\_\_\_.

Unhappy differences have arisen between the parties in consequence whereof the parties have been living separate and apart since about the 3rd day of May, 20\_\_\_\_.

The husband is employed as a Chef at the Public Bar and Grill Inc. and earns approximately \$60,000 per year;

The wife is employed as a Secretary at the Bank of Montreal and earns approximately \$40,000 per year;

Both parties have provided each other with accurate statements of their current financial situations including income, expenses and assets and liabilities.

The parties are registered owners as joint tenants of the lands and premises commonly known as 14 Creek Drive, in the City of Winnipeg, in the Province of Manitoba and legally described as:\_\_\_\_\_

(the "home")

which the parties acknowledge and agree is valued at \$300,000. There is a mortgage registered against the home in favour of the Bank of Montreal which is in the amount of approximately \$150,000.

The parties have attended counselling and mediation with respect to what is in the best interests of their children.

The parties now wish to settle all matters arising between them insofar as is possible now and forever and for the Agreement herein to apply to their future dealings with each other in all respects.

The parties acknowledge that this agreement is a "spousal agreement" as that term is defined in *The Family Property Act*.

This Agreement witnesses that in consideration of the premises above and the mutual covenants herein set forth the parties covenant and agree with each other as follows:

## **1.00 PREAMBLE**

1.01 The preamble shall form an integral part of this Agreement and shall be used in its interpretation, and the parties hereby specifically acknowledge that they are each relying on the representations referred to in the preamble.

## **2.00 SEPARATE AND APART**

2.01 The parties shall henceforth live separate and apart from each other and neither of them shall take any proceedings against the other arising out of their statuses as Husband and Wife provided that nothing herein contained shall prevent any proceeding by either of the parties with respect to the dissolution of their marriage or to enforce this Agreement.

## **3.00 PARENTING ARRANGEMENTS**

3.01 The parties agree that decision-making responsibility for Robert and Andrea shall remain joint and that they shall share equally the parenting time with Robert and Andrea. The parties agree to maintain geographically close residences in order to facilitate the parenting arrangement that they have chosen to be in their children's best interests. In that regard, each of the parties shall remain residing within School Division No. 7.

3.02 The parties agree that parenting time with the children shall be on a 50/50 basis, and for the present time have agreed to the following schedule. On a two (2) week rotation, Robert and Andrea shall be with each of their parents as follows:

Week 1:       Monday and Tuesday with their mother.  
                  Wednesday and Thursday with their father.  
                  Friday, Saturday and Sunday with their mother.

Week 2:       Monday and Tuesday with their father.  
                  Wednesday and Thursday with their mother.  
                  Friday, Saturday and Sunday with their father.

3.03 As the children grow and as circumstances change from time to time, the parties acknowledge and agree that they shall restructure the actual scheduling of the children's parenting time as may be necessary in their best interests, but acknowledge that they shall always strive for an equal 50/50 time sharing arrangement.

3.04 Major holidays such as Christmas, Easter and birthdays will be divided between the parties on an equal basis as will extended periods of holidays and school vacations; the specifics of these times will be agreed upon by the parties. In the event that the parties are unable to agree, the parties shall attend at mediation to attempt to resolve the issue prior to seeking a determination from a court of competent jurisdiction.

3.05 All major decisions affecting the children will be discussed by the parties and a consensus arrived at before a decision is made. In the event that the parties are unable to agree, the parties shall attend at mediation to attempt to resolve the issue prior to seeking a determination from a court of competent jurisdiction.

#### **4.00 CHILD SUPPORT**

4.01 The parties acknowledge and agree that it is their intention that they shall have shared parenting of the children as defined by section 9 of the Child Support Guidelines and in accordance with the time sharing schedule set out herein. The parties acknowledge that it is their intention that each of the Husband and Wife shall have the children with them for fifty (50%) percent of the time over the course of the year. They acknowledge that they have considered the amounts set out in the Child Support Guidelines base table for the Province of Manitoba for two (2) children, the increased costs of the shared parenting arrangements that they have agreed upon, and the conditions, means, needs and other circumstances of each party and of the children.

4.02 The parties acknowledge and agree that they shall equally share the costs of Robert's and Andrea's extra-curricular activities and equipment, health, dental and medical costs, day care and future agreed upon post-secondary tuition expenses.

4.03 The parties acknowledge and agree that generally they shall each individually purchase clothes, toys, sporting goods and the like for the children to use in each individual party's home, and that each party will generally provide for the children's entertainment costs and miscellaneous needs when they are with them.

4.04 The parties acknowledge and agree that in light of the factors set out above, that the Husband shall pay to the Wife child support for Robert and Andrea pursuant to the Manitoba Table of the Child Support Guidelines for his income in the amount of \$850.00 per month, payable in equal installments of \$425.00 on the 1st and 15th days of each month, commencing June 1, 20\_\_\_\_ and continuing for so long as each child is a “child of the marriage” as defined in the *Divorce Act, 1985*.

4.05 The parties acknowledge and agree that in light of the factors set out above, that the Wife shall pay to the Husband child support for Robert and Andrea pursuant to the Manitoba Table of the Child Support Guidelines for her income in the amount of \$568.00 per month, payable in equal installments of \$284.00 on the 1st and 15th days of each month, commencing June 1, 20\_\_\_\_ and continuing for so long as each child is a “child of the marriage” as defined in the *Divorce Act, 1985*.

4.06 The parties acknowledge and agree that the Husband shall be entitled to claim Robert as his eligible dependent annually, and that the Wife shall be entitled to claim Andrea as her eligible dependent annually, for so long as same may be permitted under the *Income Tax Act*.

4.07 (a) The parties agree that this Separation Agreement shall be filed with the director of the Maintenance Enforcement Program.

(b) It is understood and agreed that solely for the purpose of enforcement by the director, the payment of the child support payable by Husband to the Wife after offsetting the payment of the child support payable by the Wife to the Husband pursuant to paragraphs 4.04 and 4.05 hereof shall be made by cash, electronic transfer of funds, pre-authorized debit from a financial institution, money order or bank draft payable to the Province of Manitoba – Minister of Finance and be sent to the Director, Maintenance Enforcement Program, Canada Building, 100 – 352 Donald Street, Winnipeg, Manitoba, R3B 2H8, pursuant to *The Family Support Enforcement Act*;

4.08 The parties agree that the child support payable by the Husband to the Wife, and the child support payable by the Wife to the Husband shall be recalculated by the Child Support Services in accordance with *The Child Support Services Act*. The parties agree to make Joint Requests for Calculation (Form CC) and to complete all such additional forms as may be required, including the Claim Entitlement to Child Support for children under 18 (Form B) and a Financial Statement of Applicant (Form E.1) by each party.

## **5.00 INSURANCE**

5.01 The Husband shall, as long as he is able, pursuant to his employment, maintain the children as beneficiaries under his dental plan and group insurance so that they may receive any and all benefits which may be available in the area of health, prescription drugs, dental or other insurance thereunder, and the parties shall co-operate and provide all documents and information which may be required from time to time in order to receive benefits from the plan.

## **6.00 SPOUSAL SUPPORT**

6.01 Neither party shall pay support to the other in any circumstances whatsoever, whether or not those circumstances are foreseen or foreseeable or unforeseen or unforeseeable and whatever the nature of those circumstances. The parties hereto intend that no support of any kind shall be paid by either of them to the other for the other's support whatever the Husband or Wife's circumstances might be or have been, including but not limited to their financial, emotional, social, physical, and psychological circumstances.

6.02 Each party irrevocably releases the other from any demands or claims whatsoever in respect of their rights, now or in the future, to support by the other, whether such rights arise by common law or pursuant to any legislation presently in force or which may come into force at any time in the future.

6.03 Each party is hereby forever and absolutely barred and estopped from bringing any application or claim against the other for spousal support under the *Divorce Act, 1985* including both sections 15 and 17 or any other similar legislation, both Federal and Provincial, or successor legislation.

6.04 The parties covenant and agree that the waiver of spousal support contained herein shall not be variable by either party, regardless of any changes in the circumstances of either of them. Any changes in the financial position or other changes in the circumstances of either party no matter how significant, material or immaterial, foreseen or unforeseen, and any change in the capital, debt or income or health or disability of either party shall not constitute any grounds to vary this Agreement.

6.05 (a) The parties have carefully considered, and have been advised by their legal representatives of, the ramifications, meaning, objectives, and intent of the provisions of the *Divorce Act, 1985* relating to spousal support and in particular those provisions set out in sections 15 and 17 of the *Divorce Act, 1985*, including:

- (i) the conditions, means, needs and other circumstances of each spouse;
- (ii) the length of time the spouses cohabited;
- (iii) the functions performed by the spouses during cohabitation; and
- (iv) the Order, agreement or arrangement relating to the support of the spouses;

(b) The parties have also carefully considered and have been advised by their legal representatives of the objectives for a spousal support Order being:

- (i) the recognition of any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;



- (ii) the apportionment between the spouses of any financial consequences arising from the care of any child or children of the marriage over and above the child support obligation of each spouse;
  - (iii) the relief of any economic hardship of the spouses arising from the breakdown of the marriage; and
  - (iv) insofar as practicable, the promotion of the economic self-sufficiency of each spouse within a reasonable period of time.
- (c) The parties, having so considered the provisions of the *Divorce Act, 1985*, have concluded that this Agreement is fair and equitable to both and properly takes into account all of the relevant provisions of the *Divorce Act, 1985* including consideration of compensatory, non-compensatory and contractual basis for support, and provides support in a manner consistent with the support objectives set out in the *Divorce Act, 1985*. The parties further acknowledge and agree that this Agreement fully and totally provides for an “equitable distribution of the economic consequences of the marriage and its breakdown”.

6.06 The parties have also carefully considered and have been advised by their legal representatives of the ramifications, meaning, objectives and intent of the provisions of *The Family Law Act* (Manitoba) relating to support and in particular those provisions currently set out in section 70(1) of *The Family Law Act* (Manitoba) including:

1. The duration of the marriage or common-law relationship.
2. The functions performed by each spouse during the time they lived together.
3. The financial means, earnings and earning capacity of each spouse.
4. The household standard of living of each spouse.
5. The financial needs of each spouse.
6. Any contribution of a spouse within the meaning of subsection (2).

7. Any impairment of the income-earning capacity and financial status of either resulting from the marriage or common-law relationship.
8. If one of them is financially dependent upon the other,
  - (a) the measures available for the dependent spouse to become financially independent of the other, and the length of time and cost involved in taking those measures; and
  - (b) whether and to what extent the dependent spouse is complying with the duty to take all reasonable steps to become financially independent.
9. Any duty either has for the support of a child or of another person other than the other spouse.
10. Any previous court order relating to the support of the spouses.
11. The existence of any agreement or arrangement relating to the support of the spouses.
12. The amount of any property settlement made between them.

6.07 The parties having so considered the provisions of *The Family Law Act*, have concluded that this agreement is fair and equitable to both and properly takes into account all of the relevant provisions of *The Family Law Act* and this agreement is consistent with the objectives of *The Family Law Act*, both now and in the future, and is equitable to them both.

6.08 The parties acknowledge and agree that the waiver of any and all rights to spousal support as agreed to by them herein recognizes all possible changes whether catastrophic or not, foreseen or unforeseen, or foreseeable or unforeseeable including the parties' health (both emotional and physical), disability, lack of employment and specifically recognizes the factors and objectives set out in the *Divorce Act, 1985* and *The Family Law Act*. The parties acknowledge that in reaching their agreement as to waiving spousal support that they have recognized that there likely will be material changes in circumstances from time to time that will affect either or both of them, and that this likelihood has also been considered and taken into account by them.

6.09 The parties acknowledge and agree that they have reached their agreement and fully expect and intend that it will be binding upon them. The parties acknowledge that the overriding principle accepted by them is the sanctity of their right to contract freely with one another. The parties acknowledge and agree that their agreement as to the waiver of spousal support has considered the factors set out in the *Divorce Act, 1985* and *The Family Law Act* and that they have specifically considered future contingencies including but not limited to the fact that either party may or may not obtain further education, may or may not obtain employment, may or may not have physical or emotional problems or disabilities in the future, and that the parties may have very disparate lifestyles. The parties acknowledge their clear and unequivocal intention to insulate their agreement from review or variation and acknowledge and agree that their agreement is fair and satisfies the objectives of the *Divorce Act, 1985* and *The Family Law Act*, including consideration of compensatory, non-compensatory and contractual bases for support.

6.10 Both parties have been made aware of the possibilities of fluctuation of their respective incomes (whether by virtue of employment or unemployment, interest, dividends, capital gains or any other sources or combinations thereof) and assets are cognizant that they may have disparate lifestyles and are cognizant of the possible increases and decreases in the cost of living and/or the possibility of the impoverishment of either one or both of them, and each is prepared to accept the terms of this Agreement as a full and final settlement and to waive all further claims as set out herein.

6.11 The parties hereto further covenant and agree that they negotiated their settlement freely and with full autonomy and have structured this agreement in a manner that reflects their own objectives and concerns including finality and the objective of allowing the parties to get on with their lives.

6.12 The parties further covenant and agree that they wish to prioritize the objective of certainty and finality of this, their negotiated settlement, and that the terms of their agreement reasonably compensate both parties in accordance with the terms of the

*Divorce Act* and *The Family Law Act*. The parties acknowledge that this agreement has been negotiated in unimpeachable circumstances.

6.13 The parties covenant and agree that this agreement has been negotiated thoroughly and fairly by the parties over many months with counsel and represents their own intentions and expectations and agree that this agreement is and shall be deemed to be in full compliance with the objectives of the *Divorce Act* and *The Family Law Act* as a whole.

6.14 The parties acknowledge that they have been advised by their respective lawyers as to the decision by the Supreme Court of Canada in *Miglin v. Miglin*. The parties further acknowledge and agree that this agreement reached between them including mutual releases of the obligation to pay spousal support is an agreement that they each expect to be endorsed, accepted and respected because it is their intention that the spousal support releases contained herein be unimpeachable.

## **7.00 THE HOME**

7.01 Concurrently with the execution of this Agreement, the Wife shall execute a Transfer of Land in favour of the Husband, together with a Release of Homestead Rights and Release of Insurance Interest in his favour, whereby she transfers to him all her right, title and interest in and to the home at 14 Creek Drive, Winnipeg, Manitoba, such that the Husband shall become the sole registered owner of the home.

7.02 There is a mortgage registered against the home in the sum of approximately \$150,000.00 in favor of the Bank of Montreal (hereinafter referred to as the "Mortgage"). The parties acknowledge and agree that the Husband has made all payments under the said Mortgage from the date of separation, that the Bank of Montreal has provided a release of the wife with respect to the said mortgage, and the Wife has no further obligation with respect to same.

7.03 The Husband shall henceforth be responsible for all taxes, mortgage payments and other costs and charges, expenses or liabilities, including heat, hydro, public utilities,

telephone and cable television, relating to and deriving from his occupation and/or ownership of the home, and in respect of the sums whether now owing or to be owing in the future, does hereby forever release, indemnify and save harmless the Wife from any liability for payment of said sums and from any claims arising from his or her obligations in respect to the home.

## **8.00 PERSONAL PROPERTY**

8.01 The parties have agreed upon the division of their furniture, chattels, bank accounts, investments, choses in action and other property, and have agreed that the Wife is to have sole and exclusive ownership of all such property presently in her possession or registered in her name, including her jewelry and the piano and the Husband is to have sole and exclusive ownership of all such property presently in his possession or registered in his name, including the remaining contents of the marital home.

## **9.00 REGISTERED RETIREMENT SAVINGS PLAN**

9.01 The Wife shall retain sole ownership of her RRSPs in the approximate amount of \$2,300.00, free of any claim from the Husband.

9.02 The parties acknowledge and agree that as part of the division of their property, the Husband shall transfer the sum of \$1,500.00 from his R.R.S.P. at the Royal Bank Account number 78659 to an R.R.S.P. in the name of the Wife. Such transfer shall be pursuant to section 146(16) of the *Income Tax Act* so as to be made without any income tax ramifications to the Husband transferor, and form T2220 issued by Canada Revenue Agency shall be completed by both parties and their respective financial institutions to effect such transfer within the required time limitations.

## **10.00 PENSION AND CANADA PENSION PLAN**

10.01 The parties acknowledge and agree that the Wife is a member of a pension plan in connection with her employment with the Bank of Montreal, which pension is governed by *The Pension Benefits Standards Act 1985*. The parties acknowledge and agree that the said

pension plan would be shareable pursuant to *The Family Property Act*, were it not for this Agreement. The Husband hereby renounces and waives any right or interest that he now has or may have in future in respect of the said pension plan, which the Wife shall retain, free from any claim thereon by the Husband.

10.02 The parties acknowledge that the Husband has a pension plan as a result of his employment with the Public Bar and Grill, Inc. The parties acknowledge that the pension credits accumulated in connection with the Husband's employment are shareable pursuant to the provisions of *The Pension Benefits Act* (Manitoba). The Wife further acknowledges that she has received independent legal advice with respect to the division of the said pension credits and has received a statement from the administrator of the Husband's pension plan showing a value of the pension benefit credit in the pension plan, or the amount of the payments under the pension plan, to which she would be entitled if *The Pension Benefits Act* (Manitoba) remains applicable. The parties agree that the Husband's pension benefit credit will not be divided between them. The parties acknowledge that they have signed all necessary documentation to confirm that there shall be no division of the Husband's pension benefit credits.

A statement from the administrator of the Husband's pension plan showing its value is attached hereto as Schedule "A", forming part of this Agreement.

10.03 The parties acknowledge that they are entitled to make an application for division of their unadjusted Canada Pension Plan credits as permitted by the terms of the Canada Pension Plan. It is expressly understood and agreed that such an application will be made and that neither party shall oppose any such application.

## **11.00 AUTOMOBILE**

11.01 The Wife shall retain sole ownership of the Pontiac Sunfire automobile currently in her possession. The Wife shall be solely responsible for the loan #6765 at the Bank of Montreal that relates to the automobile and shall obtain for the Husband a release of all liability from the Bank of Montreal in relation to the said loan.

## **12.00 DEBTS & LIABILITIES**

12.01 As part of the division of assets and debts as set out herein, the Husband shall be solely responsible for the joint line of credit # 124689 held at the Bank of Montreal in the approximate amount of \$6,000.00 and the Husband shall obtain a release from liability for the Wife from the lender forthwith.

12.02 Neither party shall incur any debt or liability on the credit of the other. Each shall pay their own debts and will at all times hereafter keep the other indemnified from all debts and liabilities contracted or incurred by them under this Agreement or otherwise, and from all actions, proceedings, claims, demands, costs, damages and expenses whatsoever in respect of such debts or liabilities.

## **13.00 EQUALIZATION PAYMENT**

13.01 The Husband shall pay to the Wife the sum of \$75,420.00 as an equalization payment to achieve the equal division of the values of their assets and debts covered by *The Family Property Act* and *The Law of Property Act* and otherwise and divided pursuant to the terms of this Agreement. The parties acknowledge and agree that in order to obtain the necessary funds to make the said payment, that the Husband shall be obtaining a second mortgage on the home. The equalization payment as set out herein shall be paid to the Wife, without interest, forthwith upon the Husband's receipt of the necessary funds from his mortgage lender.

## **14.00 RELEASE FROM CLAIMS**

14.01 Except as herein provided, the Husband and the Wife accept the terms of this Agreement in full and final settlement, satisfaction, discharge and adjudication of any and all legal rights, claims or demands of every nature and kind whatsoever which one of them has or hereinafter can, shall or may have against the other.

14.02 Except as otherwise provided herein, the parties hereto remise and release and forever discharge each other of and from all actions, causes of action, suits, debts, due sums of money, accounts, bonds, bills, covenants, contracts, promises, damages, judgments, expenses, executions, claims and demands whatsoever in law or in equity which either has or hereafter can, shall or may have against the other for, upon or by reason of any matter, cause or thing whatsoever and without limiting the generality of the foregoing, the parties accept the terms of this Agreement in full and final satisfaction, discharge and adjudication of any and all legal rights, claims or demands of every nature and kind whatsoever which one of them has or hereafter can, shall or may have against the other and more particularly:

- (a) claims for support or costs pursuant to *The Family Law Act*, the *Divorce Act, 1985* or any successor legislation or otherwise;
- (b) claims for homestead, inheritance or dower, and in particular the parties renounce all rights which they may have to the administration of the other's estate, and save and except where the Husband or Wife have named or may name the other as beneficiary whether by Will or pursuant to an insurance program, employee benefit retirement savings plan or the like, the parties do hereby renounce and release the other from any claims which they may hereafter have against the other's estate under *The Intestate Succession Act*, *The Homestead Act*, *The Family Property Act* including Part IV, and any other statutes whereby a person is or may be given a statutory claim against the estate of their spouse or any claims under any government or private pension plan for any death benefits payable to the surviving spouse, which but for this clause the other may be entitled to including *The Family Property Act* and any subsequent statute that may take its place;
- (c) claims as to property and in particular claims under *The Law of Property Act*, *The Married Women's Property Act*, *The Family Property Act* and any subsequent statute that may take its place or such successor legislation as may be passed from time to time. It is acknowledged that the parties have made full



disclosure of all of their assets, both family and commercial, and that any assets not specifically referred to in this Agreement are acknowledged to be in the possession of the proper party. In particular, this spousal agreement intends to make inapplicable each and every term of *The Family Property Act* as it relates to each and every asset presently owned by either party;

- (d) claims in equity against the assets of the other party and more particularly, each hereby waives and renounces the right to advance a claim by way of constructive trust, resulting trust, unjust enrichment, quantum meruit or any other equitable remedy as against the other party;
- (e) claims in a representative capacity and more particularly, without restricting the generality of the foregoing, each hereby releases the other from claims in any capacity whatsoever, including actions as officer, director, shareholder, employee, agent, trustee, partner or joint venturer.

14.03 The parties hereto confirm and agree that no circumstances have arisen as a result of their marriage and/or separation or this Agreement that will give rise to a claim for or by either party under *The Dependants Relief Act*. The parties hereby waive forever and discharge fully and completely any and all claims either of them have or may in future have pursuant to *The Dependants Relief Act*. Both parties acknowledge that they have been made aware of the law respecting such a waiver and the Court's jurisdiction to grant an Order under the statute, notwithstanding their waivers. Notwithstanding that, both parties hereto express their mutual intentions and desire to waive and discharge fully and completely any and all such claims now and forever. Both parties intend this paragraph to evidence their intention to waive forever all such claims and further agree that this paragraph and/or this Agreement as a whole may be plead as a full defence to any such claims in the future.

14.04 In the event either party has made the other a Power of Attorney for any purpose whatsoever, that Power to Attorney is hereby revoked.

14.05 In the event either party has appointed the other as a Health Care Proxy under a Health Care Directive or in a Living Will, the said appointment is hereby revoked.

## **15.00 FINAL AGREEMENT**

15.01 The parties agree that this Agreement constitutes a complete and final financial and property settlement as between each of them relating to any and all past, present and future claims against one another, whether pursuant to any legislation presently in force or which may come into force, or according to common law, or otherwise, provided that nothing herein contained shall preclude any action or proceedings by either the Husband or the Wife against the other of them to enforce any of the terms of this Agreement or to dissolve the marriage, provided that this Agreement shall survive the dissolution of the marriage, and the terms of this Agreement shall continue in full force notwithstanding the issuance of a Divorce Judgment. In such proceedings, neither party shall request relief inconsistent with the terms and intent of this Agreement. It is further covenanted and agreed that in any action whatsoever including a divorce action, the parties or either of them shall be at liberty to enter this Separation Agreement in full and complete answer to any and all claims whatsoever inconsistent with the terms hereof.

## **16.00 EXECUTION OF FURTHER DOCUMENTS**

16.01 The parties shall, as and when required, execute and deliver to the other any document or documents that the other reasonably requires to give effect to the terms of this Agreement.

## **17.00 FINANCIAL DISCLOSURE**

17.01 Each party acknowledges receiving from the other full financial disclosure and further acknowledges the sufficiency of such disclosure, both as to its form and content and each party waives any right to further and/or better financial disclosure.

## **18.00 RESUMPTION OF COHABITATION**

18.01 If the parties resume cohabitation during any single period of less than ninety (90) days, this Agreement shall continue in its entirety as a Separation Agreement in full force and effect. If the parties cohabit during any single period of ninety (90) days or more (a reconciliation), the terms of this Agreement shall become void except as they relate to management, ownership and division of assets, which terms shall become a Spousal Agreement as contemplated in *The Family Property Act* which shall finalize each party's interest in the assets to which the agreement refers. For greater clarity, should the parties reconcile, assets in his/her hands at the date of reconciliation shall be treated as pre-acquired property should there be a subsequent separation and further division of family property. The parties' entitlement to share in such property upon a subsequent separation will be limited to any increase in value between the date of reconciliation and the valuation date upon the subsequent separation.

## **19.00 SEVERABILITY**

19.01 The finding by a Court of competent jurisdiction that any part of this Agreement is void or unenforceable for any reason shall not of itself render the other terms and provisions of this Agreement void or unenforceable; and in the event that such a finding is made it is the intention of the parties hereto that the term or provision so impugned shall be severed from the rest of the agreement which shall then remain valid and enforceable.

## **20.00 INDEMNIFICATION**

20.01 The parties hereto mutually covenant and agree that each shall save harmless and shall indemnify the other with respect to all and/or any breach or breaches of this Agreement including but not restricted to any fees, costs or disbursements incurred by the other party in defending or prosecuting any action resulting from the action of the other inconsistent with the provisions hereof, including any attempt to set aside, invalidate or vary any of the provisions herein, except where mutually agreed to in writing and executed with the same formality as this agreement and with independent legal advice.

## **21.00 NO MODIFICATION**

21.01 No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement or pursuant to an Order of a Court of competent jurisdiction. No waiver of any breach or default hereunder shall be deemed the waiver of any subsequent breach or default of the same or similar nature.

21.02 The parties further acknowledge that there are no other collateral, oral or written agreements between the parties that modify, alter or vary the provisions of this Agreement which the parties acknowledge contains the full and complete agreement between them.

## **22.00 COURT PROCEEDINGS**

22.01 The parties intend to commence divorce proceedings in the Manitoba Court of King's Bench Winnipeg Center, as joint petitioners, and it is intended by the parties that the terms of this agreement shall continue in full force and effect subsequent to a divorce proceeding.

## **23.00 JURISDICTION**

23.01 This Agreement is made pursuant to the laws of Manitoba and shall be interpreted pursuant to the laws of Manitoba. The jurisdiction for any adjudication related to this Agreement shall be the King's Bench Family Division, Winnipeg Centre.

## **24.00 INDEPENDENT LEGAL ADVICE**

24.01 The parties each acknowledge that:

- (a) The Wife and the Husband have each had independent legal advice with respect to their rights and obligations under the laws of Manitoba and Canada and in particular the laws respecting marriage, separation, divorce, parenting, child support, spousal support and family property. Each has full knowledge as to the significant assets, debts and liabilities of the other;

- (b) Each has read this Agreement in its entirety and has full knowledge and understanding of the contents hereof and signs the Agreement and accepts the same to be a satisfactory and fair settlement of the rights of the parties;
- (c) Each understands their respective rights and obligations under this Agreement, the nature of this Agreement and the consequences of this Agreement;
- (d) In signing this Agreement, each does so voluntarily and without undue influence, duress, fraud, coercion or misrepresentation, and believes that the provisions of this agreement adequately and fairly discharge the present and future responsibilities of the parties to one another, and that this Agreement will not result in circumstances that are either unconscionable or unfair to either party.
- (e) Each party represents that they are not suffering from any psychiatric, psychological or emotional impairment nor any disease or condition that would impact upon their ability to understand the nature, meaning or consequences of this Agreement.

24.02 This Agreement and every covenant, provision and term herein contained shall enure to the benefit of and be binding upon the Husband and Wife and each of them and their respective estates, heirs, executors, administrators and assigns.

**IN WITNESS WHEREOF**, the Wife has hereunto set her hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

**AND IN WITNESS WHEREOF**, the Husband has hereunto set his hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

SIGNED, SEALED AND DELIVERED )  
in the presence of: )  
 )  
 )  
\_\_\_\_\_)  
**WITNESS** )

\_\_\_\_\_  
**MARY NORTH**

SIGNED, SEALED AND DELIVERED )  
in the presence of: )  
 )  
 )  
\_\_\_\_\_)  
**WITNESS** )

\_\_\_\_\_  
**WILLIAM NORTH**

**NOTE:** Certificates of Acknowledgment and Independent Legal Advice and/or Affidavits of Execution might be attached.

## 5. Sample Certificates

### a) Certificate of Acknowledgment

**ATTACHED HERETO AND FORMING PART OF AN AGREEMENT IN WRITING MADE**

**BETWEEN \_\_\_\_\_ AND \_\_\_\_\_**

This \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

#### **CERTIFICATE OF ACKNOWLEDGMENT**

I, \_\_\_\_\_, of the City of Winnipeg, in the Province of Manitoba, hereby acknowledge that I have had this Agreement explained to me by \_\_\_\_\_, a solicitor, independent of my spouse and their solicitor, and I have executed this agreement of my own free act without any compulsion, fear, threat or influence from or by my spouse or anyone acting on their behalf or any other person.

DATED at Winnipeg, in the Province of Manitoba, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

**b) Certificate of Acknowledgment (opposite party declines independent legal advice)**

I, (opposite party's name), of the City of Winnipeg, in the Province of Manitoba, hereby acknowledge that:

1. I am the person named as the husband/wife in the attached agreement dated (referred to herein as "the Separation Agreement").

2. The Separation Agreement was prepared by my husband's/wife's lawyer.

3. I have been advised by (lawyer's name), the lawyer for my husband/wife, that it is in my best interests to seek independent legal advice as to the meaning of the terms of the Separation Agreement and its present and future legal effect upon me. (Lawyer's name), the lawyer for my husband/wife has also requested that I obtain independent legal advice prior to my signing the Separation Agreement.

4. My husband's/wife's lawyer, (lawyer's name), has advised me that he/she is acting solely for my husband/wife in this matter and is in no way acting for me, advising me or protecting my interest.

5. Irrespective of the above, I do not wish to obtain legal advice.

6. I have not received legal advice from (lawyer's name), the lawyer for my husband/wife.

7. There are no other agreements, whether verbal or in writing, between my husband/wife and me. I hereby acknowledge that the Separation Agreement contains the full and complete agreement between us.

8. I have signed the Separation Agreement willingly and with sufficient understanding after having read it in its entirety.

9. I have signed the Separation Agreement voluntarily of my own free will and accord and without any compulsion on the part of my husband/wife or anyone on his/her behalf.



10. It can fairly be said that I am fully aware of the nature and effect of the Separation Agreement and that I have signed it because I felt it was fair and in my best interest to do so.

Dated at the City of Winnipeg, in Manitoba, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Husband/Wife

**c) Certificate of Independent Legal Advice**

**ATTACHED HERETO AND FORMING PART OF AN AGREEMENT IN WRITING MADE**

**BETWEEN \_\_\_\_\_ AND \_\_\_\_\_**

**CERTIFICATE OF INDEPENDENT LEGAL ADVICE**

I, \_\_\_\_\_, of the City of Winnipeg, in the Province of Manitoba, Barrister and Solicitor, have been consulted by \_\_\_\_\_ as to the advisability of him executing the Separation Agreement. I am not acting in any way on behalf of \_\_\_\_\_ the Wife herein, and have advised him independently of her and her solicitor and he has declared that he has executed the said agreement freely and voluntarily as his own act without any compulsion, fear, threat or influence from or by the said Wife or anyone acting on her behalf.

DATED at Winnipeg, in the Province of Manitoba, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

**6. Affidavit of Execution**

I, (lawyer’s name), of the City of Winnipeg, in the Province of Manitoba, lawyer, make oath and say that:

1. I was personally present and did see (client’s name) named in the within agreement who is personally known to me to be the person named therein, duly sign and execute the said agreement;

2. Prior to signing this agreement, (client’s name) read the agreement over and he/she appeared to understand it; **(NOTE: YOU MAY WISH TO OMIT THIS POINT)**

3. The agreement was executed at the City of Winnipeg, in Manitoba, and I am a subscribing witness thereto;

4. I know the said (client’s name) and he/she is, in my belief, the full age of 18 years.

SWORN before me at the )  
City of Winnipeg, in the )  
Province of Manitoba, )  
this \_\_\_\_\_ day of )  
\_\_\_\_\_, 20\_\_\_\_. ) \_\_\_\_\_  
) \_\_\_\_\_  
) \_\_\_\_\_

A Barrister-at-Law entitled to practice in and for the Province of Manitoba.