

Why a Prenuptial or Cohabitation Agreement?

Prenuptial agreements do not just protect those who have significant assets. They are not limited to this. Prenuptial agreements are legal contracts between two individuals who want to marry, but want certainty and predictability for their financial situation both during their marriage, and should the marriage break down.

More and more people want to control their 'financial fate' and not be caught by surprise of a law that affects their finances in a way they did not know of or understand. A Prenuptial agreement allows people to make decisions about the sensitive financial issues at a time when there is no conflict – at the beginning of the relationship. A difference of financial philosophy is one of the leading causes of marital breakdown, and it can be addressed at the beginning of a relationship with a Prenuptial agreement, instead of the end. The couple who has a Prenuptial agreement will know exactly the extent of their financial obligations, both during the relationship and at its end, should it ever happen.

A Cohabitation Agreement is identical to a Prenuptial agreement, except for the name. It deals with the same issues as a Prenuptial agreement, though it does not assume the two individuals will be marrying. Already married? A Marriage agreement can address these issues, just with a new title. The names change, but the terms of all three of these agreements look very similar.

There are three keys to creating a fair and enforceable Prenuptial agreement or Cohabitation agreement. First is good communication with your (future) spouse. Second is an understanding of the financial circumstances of your (future) family.

Third is legal advice – the law requires you to understand your legal entitlements, both now and in the future, before you waive them. A Prenuptial agreement is a legal contract that will take priority over the family law legislation in your jurisdiction or replace it entirely. Failure to obtain legal advice will be detrimental, if not fatal, to the enforcement of your agreement. Why go through the effort of putting together such an agreement just to have it later set aside?

Thinking about whether you need a Prenuptial Agreement? Here are the issues that you should consider. Remember, these are guidelines and are not the only options available to you. This is not meant to be a substitute for legal advice – talk to a lawyer. Your lawyer can assist you with determining the proper structure of your agreement that suits your intentions for you and your relationship, as well as give you options you did not consider.

Issues to be considered for a Prenuptial agreement (or a Cohabitation agreement, or a Marriage agreement):

1. Ownership of property, in general. This is often the first and most significant issue that is addressed. Do you want to protect the assets that you own now? What about any growth in value? How is property acquired during the relationship shared if the relationship breaks down? A Prenuptial agreement should have a general principle for the ownership of property, and then often sets out exceptions. Common examples include:
 - a. Spouses never obtain a claim against each other's property, unless they specifically decide to share it by placing it in joint names,
 - b. Spouses do not share in property that they own before the relationship, but share in any growth or new assets acquired during their relationship, and
 - c. Spouses start sharing in property after a specified period of time, for example 2 years after the date of marriage, or the date they move in to live together.
2. Specific property. Specific items can be identified for a treatment different than the general rule. A good example of this is the family home. If one spouse is moving into the other's home, how will this affect its ownership? Who will pay for the mortgage and maintenance costs? How will the equity be shared? Who has the keep the home if the relationship breaks down?
3. Day to day finances. The expectation for both spouses to contribute financially to the relationship, or not, is something that should be considered in your Prenuptial or Cohabitation agreement. Will you each be responsible for your own day to day finances? Is there to be an identified contribution to the joint living expenses? If you are living in your spouse's home owned prior to the relationship, are you obliged to help pay the mortgage?
4. Supporting each other if the relationship ends – i.e. Spousal Support. This is a sensitive topic, and is often omitted as either too difficult to address, or unnecessary as both spouses are happy in their new relationship. However, the issue of Spousal Support is one of the most vigorously litigated issues on separation, costs couples the most in legal fees, and causes the most hard feelings between spouses. It should be addressed in your Prenuptial agreement.

Consider whether or not both spouses are to remain fully employed and self-sufficient. If not, what type of compensation should be paid if one spouse sacrifices a career for lifestyle,

or the relationship. Being silent on this issue in the Prenuptial agreement may avoid an uncomfortable conversation at first, but may lead to a much greater problem in the future.

5. Estate matters. Will a death be treated the same way as a separation? Even if it is not, remember that a Will can be changed at any time at the decision of the individual. Your Prenuptial agreement can only be changed with a further agreement between both you and your spouse. Therefore, if you want to ensure that you keep the home on the death of your new spouse, put it in your Prenuptial. This issue is especially important to individuals approaching retirement, who have children, or anyone who wants to ensure that their intentions for estate matters match those of their spouse.

This is not an inclusive list, and you may be concerned about a very specific issue. Contact a lawyer to receive specific information and advice that relates to your circumstances. To make sure you are making the most of your investment of time and money with a lawyer, use the attached checklist to prepare for your meeting.

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Checklist of Information and Expectations for a Prenuptial or Cohabitation Agreement

Consider the following items and provide the information to your lawyer:

- A. Your full name, address, phone number(s), and email address.
- B. Your spouse's full name, address, phone number(s), and email address.
- C. Have either of you been previously married? If so, provide the date of marriage and the date of divorce.
- D. Do either of you have children from a previous relationship? If so, provide the children's names, birthdates, and with whom the children live.
- E. Both of your current employment status and incomes.
- F. Do either of you have any health issues that affect your ability to work or your day to day life?
- G. A summary of your assets and debts. When creating this list, please include an estimate of the value of the assets and balance of the debts. Remember to include any and all of the following:
 - a. Real estate
 - b. Retirement assets – RRSP's, LIRA's and pension plans
 - c. Savings and investments – investment accounts, GIC's, stocks
 - d. Debts – credit cards, mortgages, lines of credit, private loans
 - e. Valuable personal property – artwork, gold coins, collectibles
 - f. Privately owned business and corporations – who are the shareholders and directors
 - g. Are you a beneficiary under a trust? Provide details.
- H. Expectations of future gifts or inheritances. Do you expect to receive anything from a relative or anyone else in the future?
- I. Have a discussion about the following issues:
 - a. How will we own property? Will we keep it separate or share it in some fashion.
 - b. Where will we live? Who will own the residence? How will the residence be maintained – who pays for it?
 - c. Do we expect to have children?

- d. How will we operate our day to day finances? Are we both self-sufficient? Will we both continue to be self-sufficient? Is there a mandatory contribution to monthly expenses? Will we have separate bank accounts?
- e. How will we address debt? Will we keep our debts separate? When will we have joint debt? Will we review our cohabitation or prenuptial agreement? Will it change or end at a certain time?

This is just a guide to some of the considerations for a cohabitation or prenuptial agreement. You should discuss these issues and any questions you have with your lawyer.