

INTRODUCTION

Purpose and currency of checklist. This checklist is intended to be used with the FAMILY LAW AGREEMENT PROCEDURE checklist and the FAMILY PRACTICE INTERVIEW checklist. This checklist does not include provisions regarding separation, although they are common in marriage agreements. For the drafting of separation provisions, refer to the SEPARATION AGREEMENT DRAFTING checklist. Also, this checklist is not specifically designed to relate to cohabitation agreements, although many of the provisions will apply. The provisions suggested in this checklist must be considered in relation to the particular facts in the matter at hand, and augmented and revised as appropriate. This checklist is current to October 1, 2003.

Cohabiting parties. Registration of a domestic partnership can bring individuals within the application of the Matrimonial Property Act. Consider whether those who cohabit without registration of their partnership may wish a cohabitation agreement.

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CHECKLIST

1. **DATE OF AGREEMENT**

1.1 Depending on the use to which the document is put, it may be a fraud on either the court or the Canada Customs and Revenue Agency to indicate that an agreement was executed on an earlier date than the one on which it was actually signed.

2. NAMES AND ADDRESSES OF PARTIES

2.1 Wife/prospective wife/first partner in marriage-like relationship.

2.2 Husband/prospective husband/second partner in marriage-like relationship.

2.3 Others.

3. RECITALS

3.1 Particulars of marriage/marriage-like relationship.

.1 Parties are about to marry or enter into a marriage-like relationship.

.2 If married, date of marriage.

.3 If married, place of marriage.

3.2 Children.

.1 Names, ages and birth dates.

.2 Whether children are of a previous marriage/marriage-like relationship.

.3 If no children, are any expected?

3.3 Reasons for agreement.

.1 (If applicable) marriage agreement.

.2 Certainty, avoidance of controversy.

3.4 Issues to be settled by the agreement.

.1 Management of, ownership in, or division of matrimonial assets or other property during marriage/marriage-like relationship.

.2 Management of, ownership in, or division of matrimonial assets or other property after separation (refer to the SEPARATION AGREEMENT DRAFTING checklist for specific provisions).

.3 Management of affairs during marriage/marriage-like relationship or upon death of one of the parties (consider the effect of wills made after the marriage agreement).

.4 Support of spouses during marriage/marriage-like relationship or after separation.

PROVISIONS TO BE CONSIDERED

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.5 Support of children during marriage/marriage-like relationship or after separation.

.6 Guardianship, custody, and access of children, both during marriage/marriage-like relationship and after separation.

3.5 Previous agreements, including marriage agreements.

3.6 Previous and current court orders.

3.7 Previous and current legal proceedings.

3.8 Legal and municipal description of family residence.

3.9 Schedule of property (assets and liabilities).

.1 Wife/prospective wife/first partner in marriage-like relationship.

.2 Husband/prospective husband/second partner in marriage-like relationship.

3.10 Statement of awareness of assets and/or liabilities of other party; consider provision to ensure full disclosure or attach sworn statements of property.

3.11 Statement of what the parties acknowledge to be matrimonial assets (within the meaning of s. 4 of the *MPA*, if applicable); release of claim to, or statement of assets which are not to be treated as, matrimonial assets.

3.12 Statement of occupation and income of parties.

.1 Wife/prospective wife/first partner in marriage-like relationship.

.2 Husband/prospective husband/second partner in marriage-like relationship.

.3 Dependent children.

3.13 Statement relating the recitals to the rest of the agreement.

.1 Consider recitals as minimum standards of material representations.

.2 Consider warranty of accuracy of respective representations.

4. INTRODUCTORY CLAUSES

(Placement of general clauses is a matter of drafting style. They are variously placed at the beginning and the end of the agreement. See also item 11.)

4.1 Statement that recitals are correct and form part of the agreement.

- 4.2 Statement of governing law.
- 4.3 Statement that each party has been advised of his or her rights and has obtained independent legal advice, or has been advised of his or her rights and has chosen not to obtain independent legal advice.
- 4.4 Statement that parties executed the contract of their own free will.
- 4.5 Definitions.
- 4.6 Statement that the agreement constitutes the full and final settlement of all issues, except that it may be amended by written agreement of the parties (witnessed independently).
- 4.7 Statement that the parties intend to review the agreement in a certain period of time or in the event they have children together, although failure to do so will have no effect.
- 4.8 Release by both spouses of all claims arising out of the marriage, marriage-like relationship or joint ownership of property except as set out in the agreement.

5. NAMES, RELIGION, EDUCATION

- 5.1 Statement regarding use of surnames by spouses.
- 5.2 Statement regarding use of wife's surname in children's names.
- 5.3 Statement regarding religion governing the marriage/marriage-like relationship, or religious freedom of each spouse.
- 5.4 Statement regarding religious education of children.

6. SUPPORT OF SPOUSES AND CHILDREN

- 6.1 Support of spouses.
 - .1 Responsibility for support of each spouse or waiver.
 - .2 How responsibility is to be met (e.g., providing home, making monthly payments, setting up trust with life income).
 - .3 Effect of particular circumstances (e.g., young children at home, whether caregiver spouse is working, compensation for foregoing earned income).
 - .4 Statement as to circumstances under which responsibility for support is suspended or terminates (e.g., on separation, upon completion of a university degree, when disposable incomes become equal).
 - .5 Consider whether a spouse may acquire an increasing level of support over time.
- 6.2 Support of children.

- .1 Provisions regarding children of one spouse from previous marriage, such as: residence, support, education, adoption, role to be played by step-parent.
- .2 Provisions regarding responsibilities for support of children of the marriage/marriage-like relationship.
- .3 Effect of particular circumstances (e.g., age of children, whether caregiver spouse is working or intends to work after specific time period).
- .4 Statement as to circumstances under which responsibility for support is suspended or terminates (e.g., when children attain a certain age, when children cease to attend school, when children marry).
- .5 Statement as to responsibility for contributing to post-secondary education of children.
- .6 Statement as to responsibility for contributing to extraordinary expenses (e.g., orthodontic work, sporting activity costs/training).

7. OWNERSHIP OF PROPERTY

7.1 General provisions.

- .1 Whether all or some property owned by either spouse before marriage/marriage-like relationship is to remain as separate property.
- .2 Whether all or some property owned by either spouse is to be held as joint property.
- .3 Whether all or some property acquired by either spouse after marriage/marriage-like relationship is to be held as joint property and how that intention is to be shown (e.g., registration in joint names; held as tenants in common in proportion to contributions).
- .4 All property and liabilities of both parties are set out in schedules to this agreement.

7.2 Matrimonial home.

- .1 Whether there is currently a matrimonial home; if so, who is the owner.
- .2 Whether it is to be owned by one spouse or by both spouses as joint tenants or as tenants in common; if tenants in common, in what proportion. Consider tax implications (e.g., property transfer tax).
- .3 Whether it is to be transferred from one spouse to the other, or to a joint tenancy or tenancy in common; if tenancy in common, in what proportion. Consider tax

implications.

- .4 Whether a non-owner spouse may acquire an increasing interest (e.g., 5% every two years).
- .5 Responsibility for paying or discharging any associated encumbrances and obligations; indemnification of other spouse.
- .6 Responsibility for paying for repairs and maintenance.
- .7 Spouses will not sever the joint tenancy, encumber the title, or pledge their interests in it as security.
- .8 Whether home should be designated as matrimonial home under *MPA*, s. 7 and impact of designation on other homes.
- .9 Consider claim (in Rule 70 jurisdictions) for exclusive possession of family residence under *MCA*.

7.3 Other real property.

- .1 Whether to be owned by one spouse or by both spouses as joint tenants or tenants in common; if tenants in common, in what proportion. Consider tax implications.
- .2 Whether to be transferred from one spouse to the other or to a joint tenancy or tenancy in common; if tenancy in common, in what proportion.
- .3 Responsibility for paying or discharging any associated encumbrances and obligations; indemnification of other spouse.
- .4 Responsibility for paying for repairs and maintenance.
- .5 Spouses will not sever the joint tenancy, encumber the title, or pledge their interests in it as security.
- .6 Net value of items owned separately by each spouse, difference in net value; whether difference to be made up by cash payments or whether claim to be waived and released.

7.4 Automobiles.

- .1 Whether each spouse is entitled to have his or her own automobile and to be entitled to use it as he or she wishes, dispose of it, or encumber it.
- .2 Whether an automobile is to be designated as a family automobile with each spouse being entitled to equal shares and equal use.
- .3 Transfer of title. Consider tax implications (HST).

PROVISIONS TO BE CONSIDERED

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- .4 Obligations to pay lease/loan, insurance, upkeep and operating costs.
- .5 Whether there is an obligation not to dispose of or encumber the automobile without the consent of the other spouse.

7.5 Other chattels.

- .1 Specific chattels or types of chattels that are to be owned by one spouse and, where appropriate, circumstances, terms, and conditions. May include release of any claim under the *MPA*.
- .2 Specific chattels or types of chattels that are to be owned jointly.
 - (a) Payment obligations.
 - (b) Entitlement to use.
 - (c) Obligation not to dispose of or encumber without the consent of the other spouse.
- .3 Entitlement to use chattels that are owned by one spouse or owned jointly.
- .4 Designation of chattels acquired during marriage as matrimonial assets under the *MPA*.
- .5 Obligation to maintain and contribute to insurance on joint property.

7.6 Gifts, inheritances and windfalls.

- .1 Gifts from a spouse or third party are to be separate property of the donee.
- .2 Wedding gifts and property purchased from the proceeds of wedding gifts are to be owned jointly.
- .3 Inheritances are to be separate property of the donee.
- .4 Windfalls, damages from personal injury actions, etc., are to be separate property (or are to be divided equally between the spouses and thereafter to be the separate property of each).

7.7 Animals and pets.

- .1 Right to have animals and pets.
- .2 Responsibility for animals and pets.

7.8 Life insurance.

- .1 Each spouse (or one spouse) is required to maintain policies as specified until a specified time (e.g., until there is no longer a child dependent on the spouses).

PROVISIONS TO BE CONSIDERED

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- .2 Each spouse is required to designate irrevocably the other (or the children) as sole beneficiary(ies) under the policy until a specified time (e.g., until there are no longer dependent children).
 - .3 If the spouse defaults in payment, the other may make payment and recover it from the defaulting party, together with expenses necessarily incurred.
 - .4 Neither spouse may borrow money from the insurer on policy.
 - .5 Each spouse is required to provide the other with evidence that the policy is being maintained as required, or to provide the insurer with authorization to provide to the other spouse, on a written demand, information on the status of the policy.
 - .6 When the event occurs which terminates the obligation to maintain the policies, each party may deal with his or her policies as he or she wishes, free from any claim of the other.
- 7.9 RRSPs.
- .1 To be the separate property of the spouse in whose name each is registered, unless they are registered in the names of both spouses.
 - .2 Consider requirements for equal and/or spousal contributions.
- 7.10 Pension plans.
- .1 Whether pension plans are to be the separate property of the spouse in whose name each is registered. Consider provisions concerning division of pension entitlement in *PBA* and elsewhere.
 - .2 Whether each spouse releases any interest he or she may have or acquire in the other's Canada Pension Plan benefits and agrees not to apply for a division of the pensionable earnings credits in the event of a divorce (see *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 55.2). This provision is only available in provinces with appropriate enabling legislation. Currently, Nova Scotia does not have such legislation. Would parties wish this, if they moved to a province which has the appropriate enabling legislation?
- 7.11 Bank accounts.
- .1 Each spouse is entitled to have his or her personal accounts.

PROVISIONS TO BE CONSIDERED

NOTES

- .2 Whether contributions are to be made to a joint account, to be used for joint expenses (e.g., food, car, household expenses).
- 7.12 Other provisions regarding specific items or types of property (e.g., consider whether other types of property listed in item 11 of the SEPARATION AGREEMENT DRAFTING checklist are relevant).
- 7.13 General provisions regarding property not specifically provided for (e.g., to be the separate property of the party in whose name it is registered or who acquired it, or if the parties are to have a joint interest, property to be registered in joint names).
- 7.14 Release of any claims against the other spouse's separate property other than those arising under this agreement.
- 7.15 Each spouse has full power over and separate control of his or her separate property and is entitled to income from its lease or disposition.
- 7.16 Neither spouse has a right to compensation for any contribution in respect of any property in which the other has an interest, unless otherwise agreed in writing.

8. RESPONSIBILITY FOR DEBTS

- 8.1 Between the parties.
 - .1 Acknowledgement of existence.
 - .2 Provision for payment (set out details in a schedule).
 - .3 Non-existence or negation of non-scheduled debts.
- 8.2 Due to third parties (individually incurred).
 - .1 Existing debts and responsibility for payment.
 - .2 Indemnity of each against third party claims resulting from failure to pay.
 - .3 Undisclosed debts to be assumed by the party who incurred them.
 - .4 Neither spouse to contract in the name of the other or bind the other for any debts or obligations without consent; otherwise will indemnify other spouse from any claims arising from those debts or obligations.
- 8.3 Recovery of specific property loaned.
- 8.4 Property pledged by one spouse to secure debts of other.
- 8.5 Joint obligations to third parties.

PROVISIONS TO BE CONSIDERED

NOTES

.1 Existing joint obligations and responsibility for payment.

.2 To be incurred in future only by agreement.

8.6 Credit cards.

.1 Whether to be used by both spouses, or whether the spouses are to have separate cards.

.2 Responsibility for payments.

9. MANAGEMENT OF AFFAIRS

9.1 Whether all earnings and income from all sources are to be the separate property of the spouse so earning the income or are to be divided equally or in a specific proportion.

9.2 Whether each spouse is to deposit a certain sum each month into a joint account (e.g., entire income, half of estimated monthly expenses, share of monthly expenses proportionate to spouse's income), with any surplus at the end of the month to be divided and to become separate property.

9.3 Payment of usual household and family expenses (e.g., out of the joint account).

9.4 Payment for household acquisitions (e.g., out of the joint account); ownership (e.g., to be held as joint tenants).

9.5 Responsibility for household duties.

9.6 Responsibility for child care; use of day care.

10. PROVISION FOR DEATH

10.1 Whether each spouse to maintain a will making the other spouse (or the children) sole beneficiary(ies). If several beneficiaries, what proportion of estate to each.

10.2 Whether each spouse renounces acquisition by virtue of marriage of any right to the other's estate upon death; estate to descend in the manner prescribed by will and in default thereof as though no marriage had taken place.

10.3 Whether there is renunciation of rights under the *MPA*.

10.4 Release of claims against the estate that are not included in the agreement:

.1 On an intestacy under *Intestate Succession Act*, R.S.N.S. 1989, c. 236.

.2 Under the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 494.

.3 Under any law of like nature of any jurisdiction that may apply at date of death.

PROVISIONS TO BE CONSIDERED

NOTES

- .4 Survivor's benefits under any pension or annuity.
- 10.5 Consider the effect of Canada Pension Plan death benefits for spouse and children.

11. GENERAL CLAUSES

- 11.1 Effect of failure of prospective spouses to marry.
- 11.2 Effect of separation (see SEPARATION AGREEMENT DRAFTING checklist for specific provisions regarding separation).
- 11.3 Severability.
 - .1 Void or voidable clauses.
 - .2 Clauses incorporated or confirmed by court order.
- 11.4 Provision as to resolution of disagreements between spouses as to the interpretation or application of this agreement, for example:
 - .1 The dispute shall be submitted to an arbitrator, to be appointed as provided in the agreement.
 - .2 The dispute shall be submitted to a family law mediator, to be appointed as provided in the agreement. Consider specifying the mediator's name, the number of sessions prior to a court application, and how the mediator is to be paid.
 - .3 In determining any matter in dispute an arbitrator, court or other tribunal may have regard to the course of conduct of a party in relation to the standards and expectations of the parties set out in a schedule to this agreement, to which the parties commit themselves.
- 11.5 Continuing disclosure of income and financial position, to be kept confidential by the other spouse.
- 11.6 Further assurances.
- 11.7 No waiver or amendment except by signed writing.
- 11.8 Cost and expense of marriage agreement (or cohabitation agreement), and who will pay.
- 11.9 Binding on estates.
- 11.10 Provision for incorporation into relief in any proceeding under *MPA*.

12. SCHEDULES

- 12.1 Statement of property of wife/prospective wife/partner.
- 12.2 Statement of property of husband/prospective husband/partner.
- 12.3 Statement of wife/prospective wife/partner's liabilities.

PROVISIONS TO BE CONSIDERED	NOTES
12.4 Statement of husband/prospective husband/partner's liabilities. 12.5 Any other property schedules (e.g., life insurance policies of each spouse or partner). 12.6 Terms regarding payment of debts between spouses partners. 12.7 Standards and expectations setting out basic philosophy of marriage/marriage-like relationship (e.g., employment, household duties, decisions regarding children).	
13. APPENDICES	