

FROM YOUR ADVISOR EASING THE PAIN OF DIVORCE

Marriage and cohabitation agreements can protect each partner's financial situation should the relationship break down

A romantic proposal or an invitation to move in with a partner may seem like an awkward time to start planning for a smooth divorce. But with almost half of Canadian marriages ending before the death of one of the partners, a pre-nuptial agreement can help both partners emerge from a breakup financially unscathed.

"Why wouldn't we do some advance planning?" asks Michael Cochrane, a partner at Brauti Thorning Zibarras LLP in Toronto and author of *Surviving Your Divorce: A Guide to Canadian Family Law*.

Such agreements are called pre-nuptials if signed before the legal marriage ceremony. Cohabitation agreements are for common-law couples that have lived together for at least a year. Both can protect each partner's financial situation should the relationship end.

People with at least one asset to protect, such as a house or a stake in a business, should consider such agreements, says Nathalie Boutet, principal at Boutet Family Law in Toronto.

Older individuals entering a second marriage may feel compelled to protect anything salvaged from Marriage No. 1 and also not risk their children's future inheritance, Cochrane says.

Parents, meanwhile, often encourage — if not demand — their child secure a pre-nuptial agreement if he or she was given money for the down payment for a house, he adds.

Couples also may want to consider how such a document could protect their future financial stability. "Young people in particular enter marriage kind of blithely unaware," says Cochrane.

Some people don't necessarily consider how much their future income will be affected by time spent as a stay-at-home parent, he says, and they can find themselves in the midst of a divorce with their best earning years behind them.

An agreement can leave certain real estate, other property and investment assets — even pets — out of future divorce negotiations. A pre-nup or cohabitation agreement also can stipulate whether or not spousal support will be paid and, if so, how much.

Without such an agreement, determining who keeps what assets and what spousal support should be paid will be left to mathematical formulas in the legal system, for the most part, says Cochrane. If a couple owns a primary home, he says, its value

would be split evenly between the ex-partners if using the formula — regardless of whether the home was purchased by one partner prior to the marriage or whether one partner contributed more to paying down the mortgage over time.

Common-law couples don't have the same matrimonial home protection in the law, he adds, and property division for them is "a free-for-all."

Cohabitation or pre-nup agreements do have limits. They can't determine child custody or support payments in advance because these issues are decided following separation, although certain aspects of child-rearing, such as religious upbringing, can be outlined within an agreement.

As well, clauses that, for example, that attempt to enforce behaviour — such as being monogamous — in order to be entitled to assets are not allowed in such agreements. "How much you receive on separation is not connected with behaviour," says Boutet.

Other than those exceptions, everything contained in a pre-nup or cohabitation agreement is legally binding, as long as it meets certain criteria, which vary by province, she says.

In Ontario, where Boutet practises, the contract must be fair to both parties. For example, it cannot deny a person spousal support if that would force him or her to seek social assistance.

In addition, each person must disclose all of his or her assets and liabilities, and negotiations must be fair, which, Boutet says, can be achieved in part by securing separate lawyers. Couples can revisit their agreement as their circumstances change over time.

The cost of developing such agreements varies depending on the complexity of each partner's financial situation. However, Cochrane says, for simple cases, a couple can create a marriage contract themselves — as long as it's in writing and signed by the couple and witnesses.

Boutet says couples using a lawyer should budget for \$3,000-\$4,000 for separate legal representation and the fees associated with financial disclosure, such as property assessments. Very complex situations can cost up to \$30,000, she says, adding that the upfront cost is worth the potential future savings. "If you look at how much [a divorce] costs when there's a big mess and a big fight, [a marriage agreement] is a very good investment," says Boutet.

By Aleksandra Sagan (CP)