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Good Morning!

Welcome to
Devry Smith Frank *LLP*'s
FAMILY LAW SEMINAR



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Equalization of “What”??!!

A primer on how property is shared in
Ontario on a breakdown of marriage.

By: F. Timothy Deeth
B.A. (Hons.), B. S.c. J.D.



- Step 1
 - Determine the Valuation Date
 - “Valuation Date” is defined in the *Family Law Act*, Section 4(1) as the earliest of the following dates
 - 1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
 - 2. The date a divorce is granted.
 - 3. The date the marriage is declared a nullity.
 - 4. The date one of the spouses commences an application based on Section 5(3) (improvident depletion) that is subsequently granted.
 - 5. The date before the date on which one of the spouses dies leaving the other spouse surviving.



- Step 2
 - Calculate your net worth as at the Valuation date
 - Based on ownership
 - Jointly owned assets/debts typically shared 50/50
 - Consider depreciation and tax implications in valuation



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- Step 3
 - Repeat Step 2 as at date of marriage
 - Onus is on you to prove
 - Can't include matrimonial home



- Step 4
 - Calculate value of “excluded property” if any
 - Excluded property is defined in Section 4(2) of the *Family Law Act* as
 - 1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage;
 - 2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it should be excluded from the spouse’s net family property.
 - 3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.
 - 4. Proceeds or a right to proceeds of policy of life insurance, as defined under the *Insurance Act*, that are payable on the death of the life insured.
 - 5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.
 - 6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse’s net family property.
 - 7. Unadjusted pensionable earnings under the *Canada Pension Plan*.



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- Step 5 – Calculate Your Net Family Property
 - Take Value obtained from Step 2, and deduct values obtained from Steps 3 and 4
 - This should be your Net Family Property



- Step 6 - Equalize
 - Whichever spouse has the greater Net Family Property gives one-half the difference to the spouse with the lower Net Family Property

This is called an Equalization of Net Family Properties



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- Potential Issues/Pitfalls to Consider
 - Valuation issues
 - Contingent interests
 - Contingent tax rates
 - Trust claims
 - Marriage Contracts



- A Court may vary the equalization payment if it is of the opinion that an equalization would be “unconscionable” having regard to:
 - 1. A spouse’s failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
 - 2. The fact that the debts or other liabilities claimed in reduction of a spouse’s net family property were incurred recklessly or in bad faith;
 - 3. The part of a spouse’s net family property that consists of gifts made by the other spouse;
 - 4. A spouse’s intentional or reckless depletion of his or her net family property;
 - 5. The fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
 - 6. The fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
 - 7. A written agreement between the spouses that is not a domestic contract; or
 - 8. Any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.



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QUICK QUIZ

Wife and husband are separating. They own a house jointly (in which they are living) which has an equity of \$110,000.00. At the time of the marriage, the Wife owned a different house (solely in her name) having an equity of \$90,000.00. During the marriage that house was sold and the wife put all of the equity from the sale (\$90,000.00) towards the purchase of their home. Assuming there are no other assets and no other debts at the date of marriage or the date of separation and no other claims, is there an equalization payment owing from one of the spouse to the other, and if so, how much?



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Equalization of Net Family Properties for Common Law Couples

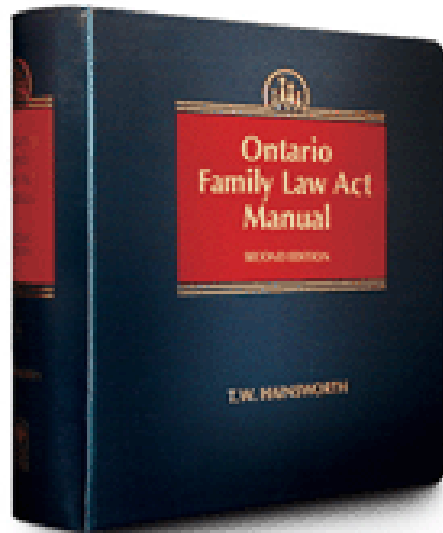
By: Michelle Farb
B.H.SC. (Hons.), J.D.
Articling Student



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Family Law Act in Ontario



Definition of Spouse:

“spouse” means either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.



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Common law couples do ***not*** equalize their property when they separate under Ontario Law!

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Weird and Archaic Solutions to Bad Financial Separations

The Principles of Equity Fixing Problems in Law

By: John P. Schuman
B.A.(Hons.), LL.B., LL.M.



Long before “family law”

- There was a recognition that sometimes the law was not fair
- Courts of Law could not always “do justice”
- Courts of Equity “did fairness”

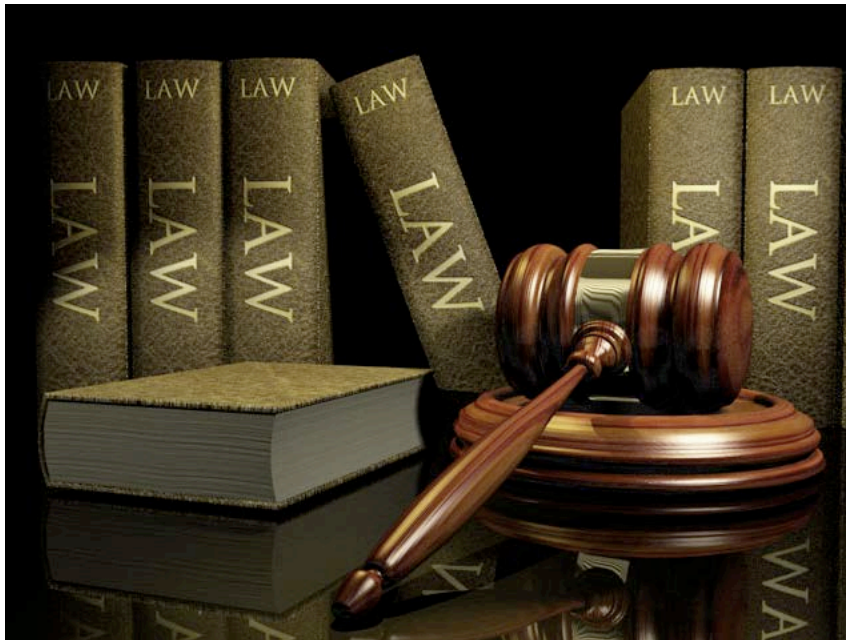




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Is “Equity” the Law?



- Equity came about because the law was unfair
- Originally just based on fairness
- But the Courts of Equity developed Rules



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Then in 1881...

- The *Ontario Judicature Act* merged the Court of Chancery and the Ontario Supreme Court (now Ontario Superior Court of Justice)
- One court could apply the Law, and the Rules of Equity
- When the law was unfair, the same court could fix it using the Rules of Equity"
- This applies to everyone – not just family law litigants





Legal Title Can be Unfair

- Sometimes "legal title" is in on person's names
- But the idea that both people would contribute to the asset and both would share in it
- Sometimes one party gives up other opportunities are helps the owner believing he or she will be rewarded



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Correcting Unfairness From Contribution



- Special property
- One side taking advantage of the other to hold legal title or to be otherwise “enriched”
- The other side being deprived
- There being no juridical reason for one side to be “enriched”



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There are rules in Equity

- It is not the Wild West
- There are rules
 - Equity does what ought to be done
 - Equity will not allow a wrong without a remedy
 - Equity follows the law
 - The Claimant must come to court with clean hands
 - Equity will not help the lazy
 - Etc. etc. etc. etc.





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Kerr v. Baranow, 2011 SCC 10



- Do not just have to contribute directly to an asset:
 - Mutual effort (did the couple intend to grow the business and divided the family money accordingly)
 - Economic integration
 - Parties intended to share
 - Did one party sacrifice to allow the other, or the family, to succeed?



Other equitable remedies (trust)

- Express trust
- Resulting trust
 - Presumed where one spouse buys property for the other
 - Can give something away to defeat creditors
- Quantum Meruit





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Other Remedies That Might Be Better



- Spousal Support
 - Recognizes economic impact of relationship and its breakdown
- Equalization for Married Couples
 - Makes trust claims more difficult – but not impossible



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Immigration Consequences of Relationship Breakdown

By: Asher Frankel

B.A., M.S., J.D.

Head of the Immigration Law Group



Immigration Scenario

- Typical - Canadian citizen or permanent resident returns to the home country and enters into an arranged marriage, foreign national is sponsored, moves to Canada and relationship breaks down thereafter.





- Other marital relationships recognized by Canadian immigration law include:
 - same-sex marriage;
 - common-law partnership – requires cohabitation for at least one year in a conjugal relationship;
 - conjugal relationship – partners are interdependent and have a significant degree of attachment – financially, socially, emotionally and physically;
 - not covered in this presentation are sponsorship of children, parents or grandparents.



Undertaking of Assistance

- As part of sponsorship application, the sponsor executes an Undertaking:

The image shows a form titled "APPLICATION TO SPONSOR AND UNDERTAKING" from Immigration Canada. At the top, it says "BEFORE YOU START, READ THE INSTRUCTION GUIDE" and "TYPE or PRINT in black ink". The form is divided into two main sections: "A SPONSOR" and "FOR OFFICE USE ONLY". Under "A SPONSOR", there is a field for "ID number" with a right-pointing arrow. Below this, there is a question: "1. If you are found ineligible to sponsor, indicate whether you want". There are two options: "To withdraw your sponsorship. All processing fees less \$75 will be repaid" (with an unchecked checkbox) and "To proceed with the application for permanent residence" (with a checked checkbox). At the bottom, there is a field for "Your language" with two options: "English" (checked) and "French" (unchecked).

- is an unconditional promise to financially support and provide the basic requirements for the sponsored relative, including: clothing, food, shelter, utilities, fuel, household supplies, dental care, eye care, etc.;



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- obligates the sponsor to repay all social assistance paid to the sponsored person.
- The obligations begin as soon as the sponsored relative becomes a permanent resident of Canada and continue for a duration of 3 years.



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Consequences of Relationship Breakdown on the Undertaking

- The obligations of the Undertaking remain in effect regardless of any changes such as divorce, separation or any other relationship breakdown, or any other change in the sponsor's circumstances such as unemployment, returning to school, moving to another province, etc.
- Enforcement action may be taken by the sponsored relative, as well as the federal and provincial governments.
- A sponsor in default will not be permitted to sponsor another person as long as debts remain outstanding.





Conditional Permanent Residence

- If at the time of filing the sponsorship application:
 - the couple is in a relationship for two years or less, OR have no children in common,
 - the grant of permanent residence is conditional on the couple cohabiting in a conjugal relationship for a continuous period of two years from when the sponsored relative becomes a permanent resident.
- Primary intent of the condition is to create a disincentive for a sponsored person to use a relationship of convenience as a means of circumventing Canadian immigration laws and abandoning the sponsor soon after becoming a permanent resident.



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Consequences of Relationship Breakdown within Period of Conditional Permanent Residence

- Non-compliance with the condition may result in removal proceedings against the sponsored relative.
- If a removal order is issued, the sponsored person may appeal on humanitarian and compassionate grounds, which may include Best Interest of the Child considerations.



- Exception to requirement of compliance with the two-year cohabitation requirement:
 - death of the sponsor during the two-year conditional period;
 - where there is evidence of abuse or neglect by the sponsor;
 - for both exceptions the sponsored relative must have cohabited with the sponsor in a conjugal relationship up until the cohabitation ceased due to death, or abuse/neglect by the sponsor.



Conclusion

- Relationship breakdown during the period of conditional permanent residence
 - although the sponsored relative may qualify for an exemption from the condition depending on the cause of the relationship breakdown (abuse or neglect by the sponsor),
 - the sponsor continues to remain obligated on the Undertaking for the duration of the three-year period irrespective of the cause of breakdown.





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Thank you.



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Enjoy your coffee break!



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BAD IDEAS in CUSTODY & ACCESS CASES

Thinking and strategies TO AVOID

By: Rachel G.C. Healey
B.A., J.D., LL.B.



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Remember: Children Will Listen

"...Careful the things you say Children will listen Careful
the things you do Children will see and learn..."

- Stephen Sondheim Into The Woods



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Some Basics

In 99.9% of Every Custody and Access Case:

1. The Children love both Parents;
2. The Children Need Guidance from Both Parents;
3. The Children should not know about the Parents stress as a result of the Separation.



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Children's Best Interests

- s. 24 *Children's Law Reform Act*



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The Following are Six examples of what NOT to do...



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Do Not...

1. Talk badly about the other parent to your children or anyone else.



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Do Not...

2. Stop the children from spending
quality time with the other parent

...and further to this....



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Do Not...

3. Bring an urgent motion to prevent the other parent from seeing the children.

(Unless your case is one of the few which truly meets the test of "urgency")



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Do Not...

4. Stop paying child support because the other parent will not allow you as much time with the children as you want.



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Do Not...

5. Falsely accuse the other parent of a crime to gain a tactical advantage.



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Do Not...

6. Flee the Jurisdiction



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Careful the Things you Say

Children Will Listen.

THE END



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Difficult Spousal Support Issues Post Spousal Support Advisory Guidelines “SSAGs”

By: Kerri A. Parslow
B.A.(Hons.), LL.B.



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The Spousal Support Advisory Guidelines (SSAGs) – Friend or Foe?

- Released in 2005 (finalized in 2008) – developed to bring more certainty and predictability to the determination of Spousal Support.
- The SSAGs are VERY different from the Federal Child Support Guidelines – not legislated by Federal Government. Purely advisory.
- Practical tool to assist spouses, lawyers, mediators and judges in determining the amount and duration of Spousal Support.
- Litmus test for the scope of “appropriate” spousal support orders.



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The SSAGs Have Not Resolved All Spousal Support Issues

- Difficult Issue #1 – **Entitlement**: the SSAG's do not deal with entitlement (just amount and duration once entitlement is established).
- The Court must balance conflicting objectives: recognizing the economic advantages/disadvantages arising from marriage or its breakdown; adjusting for the financial impact on the custodial spouse(s) of raising the children; relieving economic hardship, and promoting self-sufficiency.
- What are the trends in the case law?



How Long Does the Recipient Receive Support?

- Difficult Issue # 2 – **Duration:**
- Provided entitlement is established, duration typically depends on: (1) the length of the relationship; (2) whether or not there are dependent children; and (3) the recipient's age at the time of the relationship breakdown.
- Long-term marriage (20+ years); mid-length marriage (6-19 years); and short-term marriage (less than 5 years).
- Rule of thumb: duration ranges from .5 to 1 year for each year of marriage
- What are the trends in the case law?



What Do the SSAGs Suggest for Wealthy Payors?

- Difficult Issue #3 – **High Income Earners**: the SSAGs typically apply to a payor who earns gross annual income over \$20,000.00 (“floor”), and up to \$350,000.00, (“ceiling”).
- After payor’s gross income reaches the ceiling, the formulas should no longer be **automatically** applied.
- BUT, the \$350,000.00 is NOT a “cap”, as spousal support can and often will increase for income above that ceiling. Case-by-case analysis.
- What is the trend in the case law: the further away the income is from \$350,000.00, the less relevant are the SSAGs.



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FRIEND OR FOE?

- Definitely friend.
- Spousal support remains a complicated issue. There is still a great deal of discretion, and varying outcomes.
- Bottom line: it is well worth the investment of hiring a family law lawyer!



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Restraining orders: Keeping your scary spouse away

By: Sarah Falzon
B.Sc. (Hons.), J.D.



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What is a restraining order?

“A restraining order is a court order that requires a party to do, or refrain from doing, certain acts... A party that refuses to comply with an order faces criminal or civil penalties and may have to pay damages or accept sanctions.” – Wikipedia



Why should you get a restraining order?

- To protect yourself and/or your children
- To create a safe space for negotiations during a separation

A separation agreement, whether interim or final, can in theory provide for the same protections as a restraining order, but only a restraining order can be enforced by the police.





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How can you get a restraining order?

Family Law Act, RSO 1990 c F3

Section 13.1: Order regarding conduct

In making an order regarding family property the court may also make an order prohibiting contact without making a full restraining order.

Section 46: on application, the court may make an interim or final restraining order against a spouse, former spouse, or a person other than a spouse if the person is or has ever cohabited with the applicant for any period of time if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody.

NOTE: this does not cover situations where the parties were not married and did not cohabit.



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Children's Law Reform Act

Section 35: On application, the court may make an interim or final restraining order against any person if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody.





I hate my ex. Can I get a restraining order?

Situations where a restraining order was granted:

- H made emotional outbursts and verbal threats towards W – *Colley v Colley*, [1991] OJ No 60
- H abused W physically & emotionally throughout marriage; H had alcohol problem; H threatened to kill W if she left – *McDonald v McDonald*, [1994] OJ No 1644
- H convicted of assaulting W and breach of probation in previous year – *Huisman v Huisman*, [1994] OJ No 2345
- H writing letters to W, following her & telephoning her at work repeatedly – *Wilkins v Wilkins*, [1987] OJ No 1816
- Under the *CLRA*, in *McCash v McCash*, [2012] OJ No 3647, there was no direct evidence of any serious harm, but M's fear for her & the children's safety was reasonable given F's relentless allegations against M, his actions in causing her to be committed for a mental examination, his untreated mental health issues, his unpredictable behaviour, and his refusal to abide by the terms of court orders



What can a restraining order look like?

- Direct or indirect contact or communication with applicant or any child in applicant's lawful custody
- Restraining applicant from coming within a specified distance of one or more locations
- Any other provision that the court considers appropriate





My ex breached the restraining order. Now what?

Not everything is a breach. But annoyance has been defined by the court as Conduct of a sort that a reasonably minded person would regard as disturbing or as a substantial source of anxiety or irritation.

If I call a girl 37 times while she's sleeping will it say 37 missed calls on her phone or just 1 missed call? [Edit](#)

[Add Question Details](#)

[2 Comments](#) · [Post \(2\)](#) · [Wiki](#) · [Options](#) · [Redirect Question](#)

[30 Answers](#) · [Create Answer Wiki](#)

Michael Wolfe, CEO, Pipewise, Inc. www.pipewise.com

670 votes by Hao Nguyen, Shiela Appavoo, Joshua Liebster, (more)

It will say "restraining order."

[18 Comments](#) · [Post \(9\)](#) · [Thank](#) · Jan 23, 2012

Enjoy using www.lightweightfunny.com

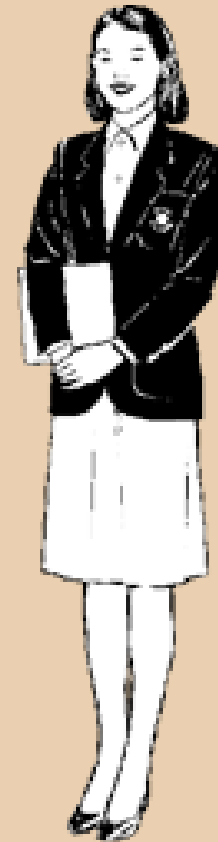
- The spouse may be required to enter into a recognizance or a bond.
- A spouse who is convicted of violating a restraining order under the *FLA* can be liable for a \$5,000 fine and/or 3 months imprisonment on a first offence, & to a fine of \$10,000 and up to 2 years imprisonment for each subsequent conviction.



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Sorry the restraining order
put a damper on your
feeling that you won.



som^{ee}cards
user card



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Why Going to Family Mediation Without Consulting a Lawyer is Like Playing Dodge Ball Blindfolded



By: Todd Slonim
B.A., LL.B., Acc. FM.



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Legal Knowledge and Clarity of Process

- Lawyers provide critical information about family law concepts and how the law applies to a party's specific circumstances.
- Assess legal issues and provide advice
- Clarify why mediation is being considered
- Explain the purpose of mediation, what it is, what is to be accomplished and what cannot be done at mediation





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Legal Knowledge and Clarity of Process (continued)

- Provide insight about mediators' approaches to the mediation process
- Explore issues of vulnerability prior to the process
- Review and explain the mediation Agreement



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Is your position reasonable?

- Understand acceptable ranges of settlement - help advance positions that are within a reasonable range
- Understand emotional dynamics – avoid positions that are clouded by emotion
- Avoid unreasonable positions that can affect a party's credibility





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Family law lawyers provide perspective on potential outcomes, what client's are getting and giving up

- A party needs to understand possible outcomes, advantages and disadvantages of settlement positions
- Manage a party's (unrealistic) expectations
- Is the deal a benefit or a burden – will it last?



Paperwork is crucial and must be completed correctly

- Productive, informed and meaningful mediation is impaired by lack of preparation and disclosure
- Mediation briefs that clearly explain the issues and positions are effective tools to advance a framework for settlement
- Financial mediations require the proper financial disclosure. For instance:
 - Sworn family law Financial Statements with supporting disclosure
 - Net Family Property (NFP) Statements



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Paperwork is crucial and must be completed correctly (continued)

- Support calculations (child and spousal support)
- Personal and, if applicable, corporate tax returns
- Business or Corporate financial statement
- Valuations and appraisals, where necessary





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Family law lawyers provide options that you may not have considered

- Lawyer have experience and understand the variability of the application of the law in cases
- Provide different approaches to resolution of matters
- Help design unusual resolutions that will be respected and enforced [by the courts]





Family law lawyers help settle cases

- Expertise in negotiations – necessary skill when advancing settlement options
- Advance strategies to assist the resolution of issues
- Understand the realities of the cost of the process





Lawyers can be used throughout the mediation process

- Provide independent legal advice (ILA) – Each party must retain a lawyer
– parties benefit from solicitor-client privilege
- Prepare enforceable Agreement – avoid ongoing conflict and fighting over same issues – Help expand the Memorandum of Understanding into a comprehensive and reliable agreement
- Explain Agreement – ensure that the party understands terms - little weight given to Agreements without ILA



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Family law lawyers can be used throughout the mediation process (continued)

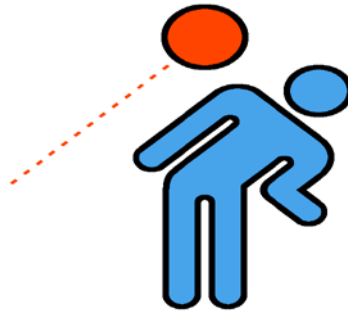
- Provide guidance and assistance prior and during the mediation to promote negotiations that are free from coercion, undue influence and other problems



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THE BLINDFOLD IS NOW OFF



THE END



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How to keep yourself from getting played – the benefits of a marriage contract or cohabitation agreement

By: Julie Tyas

B.A. (Hons.), LL.B.



What is a Marriage Contract?

What is a Cohabitation Agreement?

- Marriage Contracts are agreements made between two people who intend to marry or who are already married to each other.
- Cohabitation Agreements are agreements made between two people who are cohabiting, or intend to cohabit and who are not married to each other.



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What is the Effect of Marriage on Cohabitation Agreements?

- Cohabitation Agreements automatically become Marriage Contracts if the parties marry.
- We therefore ensure that if marriage is a possibility for one of our clients entering into a Cohabitation Agreement, that all clauses relevant to married couples are also included.



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Purpose of Marriage Contracts and Cohabitation Agreements

- Both types of domestic contracts govern the parties' rights and obligations under the marriage or cohabitation, upon separation, annulment or dissolution of the marriage (or cessation of cohabitation), or upon death.
- Opt out (of some, but not all) of the laws that would normally apply with respect to division of property, spousal support and many others that may arise on separation.



What types of rights and obligations can be dealt with in these agreements?

1. Ownership in or division of property;
2. Support obligations (spousal and child);
3. The right to direct the education and moral training of their children; and,
4. Any other matter in the settlement of their affairs (almost!).



1. Ownership in or Division of Property

- Exclude certain assets or liabilities from equalization or opt out of the equalization process altogether (common in cases where one or both parties have entered into the relationship with assets they want to protect).
- Who will own what – during the relationship and on separation.
- Process for how and when property will be transferred or sold following a separation.



2. Support Obligations

Spousal Support

- Who will pay and how much – during the relationship or on separation.
- Spousal Support release – *Miglin v. Miglin*
- Be fair! Release may be inappropriate if the parties intend to or already have children.

Child Support

- Only if the agreement is reasonable having regard to the *Child Support Guidelines*.



3. The Right to Direct the Education or Moral Training of the Children

- Must not deal with any rights to custody of or access to children.
- “Best interests of the child” test prevails, if challenged.



4. Any Other Matter

- Provided they are not terms which the parties are not permitted to contract out of!
 - Address custody or access arrangements.
 - Restrict either party's right to remain in the matrimonial home on separation.
 - Authorize one spouse to sell, mortgage or encumber a matrimonial home before the spouses are divorced.



4. Any Other Matter... continued

- Contain provisions for child support that benefit the child less than the *Child Support Guidelines*.
- Require the parties to resolve issues arising from the breakdown of the relationship by way of arbitration.
- Result in spousal support payments that are tax deductible for the payor and taxable to the recipient while the parties are still living at the same residence



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Setting Aside Domestic Contracts

- A party failed to disclose to the other significant assets or debts at the time the contract was made.
- A party did not understand the nature or consequences of the contract (i.e. each party did not have independent legal advice).



Setting Aside Domestic Contracts... continued

- In accordance with the law of contract:
 - Duress, undue influence, fraud, unconscionability (where the terms are so one-sided in one party's favour), fundamental breach, other equitable grounds (i.e. unequal bargaining power, material misrepresentation, etc.).



Timing of Negotiations

- Not ideal to begin negotiating terms of a Marriage Contract within two months of the wedding date – the focus is on the wedding, not on the legal contract!
 - Duress, undue influence, pressure to sign the contract to avoid cancelling the wedding.
- Can sign Marriage Contracts after the wedding.
- Stand-Still Agreement (preserves “unmarried” status upon marriage until the Marriage Contract is finalized; usually expires a few months after marriage to allow the parties time to properly negotiate the contract).



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We Changed our Minds!

- Intention to abandon the contract must be clearly set out in writing, signed by both parties, dated, and witnessed.
- If the parties ignore the terms of the agreement, or do things contrary to it, during the course of their relationship, this should not invalidate the agreement.



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“A HAPPY WIFE IS A HAPPY LIFE”



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QUESTIONS?



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