

## DO I NEED A PRE-NUPTIAL AGREEMENT?

By Ken Nathens<sup>1</sup>

There is much confusion regarding the rights and obligations of both married and unmarried couples in the event of the breakdown of the relationship. For instance, many spouses assume that common law couples are automatically entitled to the same property division rights on separation as married parties, which is not the case in Ontario. Others may assume that common law partners are not entitled to spousal support on the breakdown of the relationship, which is not accurate in 9 of the 10 provinces, and all of the territories, with Quebec being the only province or territory that does not provide for common law spousal support rights.

It is possible to avoid much of the confusion and uncertainty that occurs on a breakdown of a relationship. In Ontario, the *Family Law Act* permits both married and common law couples to enter into domestic contracts (called “marriage contracts” when the spouses are married and “cohabitation agreements” when they are not) that specify in advance his and her respective rights and obligations to the other spouse in the event of relationship breakdown. Domestic contracts may stipulate, for instance, how much support one spouse is required to pay the other and for how long or how certain property is to be divided, such as the family home, in the event of relationship breakdown.

Domestic contracts are generally held to be valid provided that the spouses have exchanged proper financial disclosure prior to signing the contract and neither party has put undue pressure or coerced the other to sign. The assistance of legal counsel in the preparation of domestic contracts helps to ensure that both spouses have knowledge of the consequences of signing the contract and that the drafting and the negotiation process was fair.

Not every couple needs a domestic contract. For instance, a young couple who start out with very little in the way of assets and are content to share income and assets that accumulate during the relationship will not require a domestic contract.

In other circumstances a domestic contract may be necessary. Examples where a domestic contract may be advisable are as follows:

1. The spouse who owns a home at the commencement of a relationship may wish to protect the value of the home that accumulated prior to the relationship by way of domestic contract. Absent a domestic contract the entire value of the home that has accumulated both prior and during the relationship may be subject to division in the event of separation.

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<sup>1</sup> Ken Nathens is a partner in the Toronto and Mississauga Family Law Firm of Nathens, Siegel Barristers LLP

2. Older couples or couples in a second or third domestic relationship may wish to preserve assets for their children or grandchildren from prior relationships. In order to do so, a domestic contract may be drafted to ensure that their estate receives their assets on death, and not the other spouse. The domestic contract may also stipulate that the survivor of the two spouses may continue to occupy the family home pending his or her own death and stipulate the terms of the occupation.
3. A domestic contract may be advisable in situations where there is considerable disparity in wealth between spouses at the time of entering into the relationship. The wealthier party may wish to preserve some or all of his or her assets and income from division in the event of a relationship breakdown. A typical example is a spouse who has already established a valuable business at the time of the commencement of the relationship. Another example is the scion of a wealthy family who faces familial pressure to protect financial gifts, inheritances, trust interests and all capital growth on assets that had been given or willed to him or her by the family matriarch or patriarch prior to or during the relationship.

Marriage contracts and cohabitation agreements are necessary tools to protect one's assets and income in the event of separation. However, they are complicated to draft and there are a number of competing interests that must be considered in the drafting of domestic contracts. The advice of competent family law counsel prior to the negotiation and signing of a domestic contract is essential.