

Negotiating and Drafting Pre-nuptial and Cohabitation Agreements

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Author Gerald Ashcroft has retired as of July 1, 2019. Please contact us for further assistance.

The preparation of a pre-nuptial or cohabitation agreement requires an approach that is different than that required when preparing a separation agreement or a commercial contract. Sensitivity is required. The parties are optimistic about their future together. A positive environment must be maintained in order not to have a negative impact on the parties' future relationship. The purpose of the agreement must be clearly understood, and it must be tailored to the particular circumstances. A four way meeting of the parties and their lawyers is often a good way to start the process. There are some dangers that must be avoided.



Don't Procrastinate

Don't leave the negotiation and drafting of the agreement until just before the wedding or, if in an unmarried union, just before three years of cohabitation. Time is required to negotiate a fair agreement, after receipt of full financial disclosure, in order to avoid the chance of it being challenged and set aside. If left until the last minute, extreme pressure may be put on one party and interfere with his or her ability to make an informed and rational decision. There is also the possibility that the lawyer will decline to act if consulted on short notice and there is no time to negotiate a fair agreement.

The Need for Independent Legal Advice

Each party needs independent legal advice. It is an important means of ensuring an informed decision is made to enter into the agreement, and minimizes the risk of duress, undue influence, mistake and lack of understanding. It is also important that a party and/or his or her lawyer not interfere with the other party's choice of lawyer, or undermine the relationship.

The Necessity of Full Financial Disclosure

Many parties are reluctant to provide full and complete financial disclosure, especially when it includes particulars of family trusts and businesses controlled by family members. There is a positive duty for the parties to disclose the nature and value of all assets and debts, along with information about their income. Appraisals may be necessary. The failure to provide comprehensive disclosure increases the chance that the agreement may later be successfully challenged in court.

The Requirement for Utmost Fidelity and Good Faith

Unlike separation agreements, pre-nuptial and cohabitation agreements require the utmost fidelity and good faith between the parties. It is because of the special relationship between the parties, as intended spouses or cohabitants, and because they are not entirely at arm's length, that they owe one another a duty of good faith and fair dealing.

The pre-nuptial and cohabitation agreement should be drafted in a clear and uncomplicated manner. An agreement that is one-sided or unconscionable will invite an attack by one party if the relationship comes to an unexpected end. There can be problems if the deal is "too good". In order to minimize the possibility of a successful challenge, the domestic agreement should be fairly negotiated, with discussions held over a period of time, with concessions made by both parties, and with independent legal advice. This type of domestic agreement is important for many people, and its preparation should not be left until the last minute.

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