

The Importance of a Prenuptial or Cohabitation Agreement for Business Owners (and everyone else)

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Why get a Prenuptial or Cohabitation Agreement?

So, you've found "the one"! You are now planning your future as a couple and the questions in your mind include, "Should we live together?", "Should we get a joint bank account?", and "Are we going to get married?". Amidst all of the excitement, you may forget to turn your mind to an issue we don't want to think about, "What happens if we separate?" The "what if" discussion can be difficult but is important. The benefit of a Prenuptial or Cohabitation Agreement is that it allows you to plan and answer the "what if" questions before they arise.



Who qualifies as "common-law"?

Many people are unaware of the definition of "common-law" and when a couple actually becomes "common-law partners" for the purposes of *The Family Property Act*, *The Family Maintenance Act* and *The Homesteads Act* – the legislation in Manitoba that governs property division, child support and spousal support. The definition of common-law is different depending on which legislation you are considering.

- *The Family Property Act* and *The Homesteads Act* each define "common-law partners" as parties that are either registered as common-law partners, or parties residing together in a conjugal relationship for a period of at least three years.
- *The Family Maintenance Act* defines "common-law partners" as parties that are either registered as common-law partners, or parties residing together in a conjugal relationship for a period of at least three years, or parties residing together in a conjugal relationship for a period of at least one year and they are together the parents of a child.

It should also be noted that for the purposes of *The Pension Benefits Act*, a couple must have registered their relationship as common-law, or they must have cohabited in a conjugal relationship for at least three years if either of them is married, or they must have cohabited in a conjugal relationship for at least one year, if neither of them is married.

Property Division

When a couple separates, the value of their assets and debts is calculated as of the date of separation. When dividing family property, the Manitoba legislation follows an equalization principle. Essentially, the value of the assets and debts are calculated (typically called a family property accounting) and each party's net position is determined. In order for each party to walk away with an equal amount of family property, an equalization payment may be due and owing from one person to the other.

For couples coming into a relationship with existing assets such as a corporation, RRSP, pension etc., it is important to know that under Manitoba legislation, a spouse or common-law partner may be entitled to an increase in value of any pre-acquired assets from the date of cohabitation to the date of separation.

Inheritance and gifts are exempt under *The Family Property Act*; however, if you comingling those funds, they become shareable. Even without comingling funds, those assets, too, *may* have their increases in value included in a family property accounting upon separation.

The benefit of a Prenuptial or Cohabitation Agreement is that a couple can set their own guidelines. The Agreement can outline how a couple's property will be divided at the time of separation on their own terms.

Spousal Support or Common-law Partner Support

A Prenuptial or Cohabitation Agreement can also address spousal or common-law partner support issues.

If spousal or common-law partner support is not referred to in a Prenuptial or Cohabitation Agreement, and your partner has an entitlement, it is important for owners of a corporation to know that their corporate tax returns, and financial statements are required to be provided to their spouse/common-law partner at the time of separation. While the tax write-offs many business owners benefit from are allowable under the *Income Tax Act*, family law legislation allows for some of those write-offs to be added back in for the purposes of income determination for support. This means that if you are a business owner, your line 150 income may not be used and instead your income may be imputed for the purposes of spousal or common-law partner support.

Succession and Estate Planning

Entering into a Prenuptial or Cohabitation Agreement is a great way to plan your estate and can work in conjunction with a will. While this is something typically looked at by those entering a second marriage or common-law relationship, it is worth considering and exploring to avoid any potential issues of entitlement.

Conclusion

If you are thinking about entering into a Prenuptial or Cohabitation Agreement, you should speak with a lawyer about the specific details. If you have already gotten married but have not yet entered into a Prenuptial Agreement, you can still enter into a *Postnuptial* Agreement in Manitoba; however, there is no obligation for someone to enter into an agreement and once married, a spouse's entitlement is in place.

If you own property or a business in a different jurisdiction, your Agreement needs to reflect the appropriate legislation. It may be wise to **consult with a lawyer who practises in that jurisdiction** and is familiar with their legislation. In that case, your Manitoba lawyer and a lawyer in the other jurisdiction may need to work together on finalizing your Prenuptial or Cohabitation Agreement.

Parenting issues and child support cannot be addressed in Prenuptial or Cohabitation Agreements. These issues will have to be negotiated and agreed upon separation.

It is important to note that *both* parties should always obtain independent legal advice when entering into a Prenuptial or Cohabitation Agreement to ensure that there are no issues of validity or enforceability of the Agreement at a later date.

Author Alexandra Aquila has left TDS to pursue a new opportunity, effective September 28, 2023.

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