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WEALTH PRESERVATION GROUP

MARRIAGE AND COHABITATION AGREEMENTS

There can be many good reasons to enter into a Marriage or Cohabitation Agreement. Perhaps there are children from a previous relationship who must be protected. Maybe there is a significant difference in the net worth of the parties. Perhaps one of the spouses expects to receive an inheritance that is meant to stay within their family, or has an interest in a business that could be disrupted by a family law claim.

Whatever the reason, parties should understand from the outset the process involved in putting such an Agreement in place, the issues that are typically dealt with, and the cost that may be incurred.

THE PROCESS

1. Each party will need to be represented by his or her own lawyer. If a party doesn't have independent legal advice, that can be a ground for having the Agreement set aside or varied in the future.

2. At the start of the process, a determination should be made as to the law that is likely to govern the property and support rights of the parties should the relationship end. The place where the parties marry, the place where they intend to reside and the place where their assets are located should all be considered. If the law of a foreign jurisdiction might apply, a lawyer qualified to practice in that jurisdiction should be retained to review the Agreement and ensure that it would be enforceable there.

3. Prior to signing the Agreement, the parties will need to disclose to one another in writing their assets and liabilities, including values. In British Columbia, a list of the assets and liabilities of each of the parties is generally attached as a schedule to the Agreement. Failure to properly disclose assets can be another ground for varying or setting aside an Agreement. If a party is a beneficiary of a trust, his or her beneficial interest in the trust will be considered an asset for purposes of disclosure, and some indication of the value of the trust property will be required. That will be the case even if the spouse is a contingent beneficiary who will receive something from the trust only if a trustee decides to exercise his or her discretion and make a distribution to him or her.

4. Often, one of the parties will meet with a lawyer to discuss what might be included in the Agreement. That lawyer will then prepare a first draft of the Agreement and give it to that party for his or her review. If the content of the Agreement is acceptable, that party will then give the draft Agreement to the other party to take to his or her own lawyer for review.

5. It would be wise to allow at least 6 months for the negotiation and drafting of a Marriage or Cohabitation Agreement. It is often a stressful process that can require a period of negotiation in order to complete. It isn't something a couple should be dealing with in the days leading up to a marriage.

THE CONTENT OF AGREEMENTS

1. Marriage and Cohabitation Agreements can cover a multitude of issues, including property rights, support obligations, the division of household responsibilities and child care. They can deal with obligations while the marriage is ongoing, the rights of the parties if it breaks down and, subject to the comments in paragraph 4 below, what happens if one of the parties dies. Usually, it's best to keep the content of an Agreement focused on significant financial issues and allow other concerns to be addressed more informally between the parties.

2. Where one party has received or expects to receive a significant gift or inheritance from a family source, the goal may simply be to protect that gift or inheritance, any increase in its value and any income earned from it.

3. The matrimonial home is often given special treatment. In some cases, parties agree to share its value on a breakdown of the relationship regardless of where the money to purchase it came from. In other cases, a spouse who did not contribute to the value of the home may acquire an interest in it that

grows with the length of the marriage. Other options also exist.

4. An Agreement should be drafted so as to appear fair at the time when it is signed to a Court who might be asked to consider that issue later. The concern is that an overly one sided Agreement providing, for example, that the spouse with fewer assets will receive little or nothing in the event of a marriage breakdown regardless of the length of the marriage and regardless of whether children were born of the relationship, is more likely to be varied or set aside in the future.

5. The *Wills, Estates and Succession Act* ("WESA") of British Columbia provides that if a Will does not make adequate provision for the proper maintenance and support of the testator's spouse and children, the Court may, in an action commenced by or on behalf of the spouse or a child, order that the provision it thinks is adequate, just and equitable be made out of the testator's estate.

Under current law, it is not possible for spouses to give up their wills variation rights under WESA prior to the death of one of them. Notwithstanding this prohibition, a Marriage or Cohabitation Agreement will often set out what is to happen if the marriage ends because of the death of one of the parties. It may also express a wish that, if an application is made pursuant to the wills variation provisions of WESA, the Court give effect to the provisions of the Agreement. While such a wish would not be binding on the Court, it would be taken into account along with all other facts and circumstances.

COSTS

The legal costs associated with the preparation of a Marriage or Cohabitation Agreement can vary significantly depending upon how complicated the terms of the Agreement and circumstances are and how time-consuming the negotiation process is. If the Agreement is being entered into at the request of one party or a party's parents, that party or those parents will often agree to pay the legal fees incurred by both parties.

CONCLUSION

There are many issues that should be considered in the context of Marriage and Cohabitation Agreements, and the lawyers in our Wealth Preservation Group would be pleased to discuss them with you.

WEALTH PRESERVATION GROUP

Bull, Housser & Tupper's Wealth Preservation Group has been providing advice to Canadian and international clients for more than a century. Our lawyers represent individuals, trust companies, charities and other domestic and offshore entities in a wide variety of matters ranging from complex estate planning and administration to disputes involving estate and trust-related issues.

The content of this Newsletter is intended to provide information on Bull, Housser & Tupper LLP, our lawyers and certain aspects of the law. The information provided is summary in nature and does not constitute legal advice. For additional details or advice concerning specific situations please contact any member of our Wealth Preservation Group.

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If you have any questions, please contact any member of our Wealth Preservation Group.

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