

The information provided below is strictly for information purposes only and it is not intended to be interpreted as legal advice. If you are in need of legal advice, please feel free to contact the Balasunderam Law Office in order to schedule an appointment for a consultation.

DOMESTIC CONTRACTS

Written by: Sharnveer Grewal, B.A., LL.B.

Part IV of the *Family Law Act* governs the creation and validity of domestic contracts in Ontario. It establishes that people may enter into domestic contracts of various types, sets out special validity and enforcement rules, and confirms that as a general rule, a valid, enforceable contract will be upheld and enforced by the courts. Here are the important points to know:

Types of Domestic Contract. The domestic contracts authorized by the *Family Law Act* typically apply to intimate relationships, for example: Cohabitation agreements, marriage contracts, and separation agreements. These contracts can be used to set out certain terms of a relationship or to set out rights and responsibilities in the case that the relationship comes to an end.

In recent times it has become apparent that more and more couples today are cohabiting without getting married. Cohabitation agreements can be made either before a couple moves in together or after. These agreements can include: how the finances in a relationship will be organized, what will happen to the shared property in the case that the relationship ends, if any support will be paid to either of the parties after they separate, etc. Although many would find it ironic to create a contract outlining what will happen at the end of a relationship, it is a crucial step in the process of cohabitation. Relationships are not guaranteed, and rights may not be either if legal advice is not obtained. Family law with regards to property does not apply to common-law couples, when the couple separates the home they lived in belongs to the person whose name is on the title. Family Law does not give un-married couples the same consideration it gives to married couples. If a cohabiting couple decides to get married after living together, their cohabitation agreement becomes the marriage contract. Marriage contracts are similar to cohabitation agreements yet obviously concern married couples, while a contract for those who plan to marry is referred to as a pre-nuptial agreement.

Validity. Domestic contracts are legally valid and eligible for being upheld by a court only if the following requirements are met:

- The agreement is in writing, and is signed and witnessed;
- Each party has fully disclosed all assets, debts, and liabilities;

BALASUNDERAM LAW OFFICE

- Each spouse has obtained independent legal counsel, even if there appears to be no disputed issues;
- The parties have made their intent clear on the face of the agreement; and
- There has been no fraud, undue influence, duress, or unconscionability.

Note that there are legislated restrictions on the topic-areas that particular kinds of domestic contracts may cover. For example, cohabitation agreements and marriage contracts (including pre-nuptial agreements) cannot contain decisions about custody and access of children; these decisions can only be made after the couple has actually separated. Separation agreements, on the other hand, can be entered into by either married or common-law spouses in order to address not only property and finances, but custody and access as well.

Enforcement. As previously mentioned, a domestic contract can be enforced in courts through litigation. However, in order to avoid unnecessary turmoil the best way to ensure its enforceability is to file it with the court; the contract becomes equivalent to a court order and its terms (for example the clauses providing for support) can be enforced through the mechanisms applicable to court orders.

Independent legal advice. It is vital that all parties to a domestic contract fully understand the terms, rights, and ramifications of its provisions. In fact, no domestic contract should be signed without professional legal advice; a contract that is signed by each party without them having the benefit of input from an independent legal advisor can be set aside by a court. In such cases the contract can be attacked on more grounds, including its legal validity, ambiguity in interpretation, and unconscionable circumstances surrounding its execution, among other things. For example, a lawyer at our office may be able to successfully demonstrate that either your partner failed to provide adequate financial disclosure, that the agreement was signed under duress, or that the agreement is unfair and capricious.

Domestic contracts are important documents that – when drafted with care – can go a long way towards protecting your legal interests. However, a poorly-drafted contract, or one that is not comprehensive, can inadvertently take away your legal rights as well. Therefore, before signing any type of domestic contract, it is important to contact a lawyer at Balasunderam Law Office to obtain professional legal advice.¹

¹ Adapted from James G. McLeod & Alfred A. Mamo, *Annual Review of Family Law, 2009* (Toronto: Carswell, 2009).