

LEGEND— NA = Not applicable L = Lawyer LA = Legal assistant or secretary

NA L LA DATE DUE DATE DONE

ACTION TO BE CONSIDERED

INTRODUCTION

Purpose and currency of checklist. This checklist includes matters to be discussed and information to be collected prior to the commencement of proceedings in family or matrimonial actions. It focuses on the initial interview with the client, and also includes some follow-up from that interview. The lawyer should then refer, as appropriate, to the checklists for DIVORCE ACT PROCEDURE, FAMILY LAW AGREEMENT PROCEDURE, SEPARATION AGREEMENT DRAFTING, MARRIAGE AGREEMENT. This checklist is current to September, 2003.

New developments—pending Divorce Act changes. The federal government has introduced a bill (Bill C-22) proposing to remove the terms “custody” and “access” from the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), focusing instead on the more child-centred phrases “parenting orders” and “contact orders”. The concept of “parental responsibility” will replace “parental rights”. In addition, the proposed amendments include a non-exhaustive list of factors to be considered in determining what arrangement best suits a child's best interests. The changes are not yet finalized, nor are they expected to come into force until late 2003 at the earliest; practitioners can watch for updates at the Justice Canada website (www.canada.justice.gc.ca/en/index/html).

New developments—interjurisdictional support orders. The *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9 sets out a new process for obtaining, varying and recognizing spousal and child support orders in interjurisdictional cases.

New developments—common law relationships. Recently, the federal government passed legislation expanding the definition of “spouse” under certain federal statutes to include common law spouses, whether or not of the same sex (see the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, in force July 31, 2000 (SI/2000-76). For example, unmarried spouses, whether of the same or opposite sex, are now recognized under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (which generally requires cohabitation in a conjugal relationship for at least one year, for the purposes of qualifying as a “common-law partner”). Family law agreements made before, during or after a relationship (whether of the same or opposite sex) are subject to judicial review for fairness on the same basis as agreements made between married spouses.

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- 1. Preliminary Matters

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CHECKLIST

1. PRELIMINARY MATTERS

- 1.1 When arranging the interview:
 - .1 Find out whether proceedings have been commenced against your client and, if so, get the name of your client's partner's lawyer and get copies of all pleadings.
 - .2 Ask client to bring all relevant documentation.
 - .3 Consider asking the client to write out a history of the marriage and the parties' respective employment histories for use during the interview.
- 1.2 Ensure that there is no conflict of interest. Do not act for both parties, even in drafting a marriage agreement or issuing a co-petition for divorce. Refer one for independent legal advice.
- 1.3 Advise client regarding calculation of your account and method and timing of payment.
- 1.4 Determine client's general objectives. Discuss relief available and options. In cases of separation or divorce, discuss the possibility of reconciliation, the counselling services available to the client, the advisability of negotiating issues of support and custody, and the availability of mediation services (*Divorce Act*, s. 9). Consider the option of the collaborative separation and divorce model (e.g., see www.collaborativefamilylawyers.ca and www.collaborativefamilylaw.ca).
- 1.5 Determine if there is a need for urgent action (e.g., to preserve assets or evidence, for support, for physical safety of individuals).
- 1.6 Discuss the process and what you will be doing for client.
- 1.7 Satisfy yourself that client is competent to give instructions. Consider such things as age, mental competence. Assess client's emotional state and consider a referral to a professional counsellor or physician.
- 1.8 Determine if death or bankruptcy of either party is a possibility.

2. COLLECT INFORMATION

- 2.1 Collect relevant information, either at the interview or by use of a form for client to complete and return. (See, e.g., items 2.2 to 2.17.)
- 2.2 Client:

- .1 Name, address, telephone numbers, and social insurance number.
 - .2 Birthdate and place of birth.
 - .3 Employer/school, address, telephone, position, salary.
 - .4 (If applicable) marital status prior to marriage.
 - .5 Previous surnames.
 - .6 Addresses for last 12 months.
 - .7 Any mental or physical problems relevant to any of the issues in the proceedings.
- 2.3 Client's spouse, common law spouse or registered domestic partner:
- .1 Name, address, telephone numbers, and social insurance number.
 - .2 Birthdate and place of birth.
 - .3 Employer/school, address, telephone, position, salary.
 - .4 (If applicable) marital status prior to marriage.
 - .5 Previous surnames.
 - .6 Addresses for last 12 months.
 - .7 Any mental or physical problems relevant to any of the issues in the proceedings.
- 2.4 Where spousal support is an issue: projected expenses needed to provide for self and to provide supervision of children. Collect information regarding employment and education history of the individual requiring support. (See item 2.14.1(a)(ii) and (vi).)
- 2.5 Children:
- .1 Names, sexes, birthdates, birthplaces.
 - .2 School or employment details.
 - .3 Past, present, and proposed future arrangements for custody, access, support, etc.
 - .4 Physical, emotional, and educational needs, including special problems.
 - .5 Where custody is an issue:
 - (a) Schools: grades, location (near home?).
 - (b) Who has been involved in day-to-day care of children (e.g., feeding, childrearing, assistance with school work, discipline,

- etc.).
 - (c) Hours of work of each parent or partner.
 - (d) Regular time of each away from home and children (e.g., evening recreation).
 - (e) Involvement of each partner in extra-curricular activities of children (e.g., driving children to activities, attendance at games or recitals, participation in games).
 - (f) Any unusual behaviour of either partner toward children, and the negative impact it has (e.g., swearing, abuse of alcohol, sexual practices, derogatory remarks, physical abuse).
 - (g) Involvement with family (e.g., grandparents, aunts and uncles), friends, community activities, church, etc. in area of home.
 - (h) Relationship of each child to each other child and to each partner.
 - (i) Whether there are medical or educational records relevant to which partner should have custody.
 - (j) For an aboriginal child, particulars of the child's involvement with an aboriginal community.
- .6 Where support is an issue: expenses, including any special or extraordinary expenses (e.g., health, education, extracurricular activities).
- .7 Where client wants an order prohibiting the partner (or another person) from interfering with children:
- (a) Incidents causing mental or physical harm to children.
 - (b) Mental or physical problems the children are experiencing, including, if possible, any written corroborating reports from teachers or doctors.
 - (c) Effect of behaviour on children's school work, sleep, play with other children, relationship with client, etc.
 - (d) History of psychiatric problems, temper situations, or past physical or mental abuse.
 - (e) Criminal record.

- .8 Concerns that the children may be removed from the jurisdiction. Whether either partner wishes to move out of the jurisdiction with the children, and the reasons for such a move (e.g., to enable the partner to obtain better employment or be closer to family elsewhere).

2.6 Marriage or marriage-like relationship:

.1 Marriage:

- (a) Place and date.
- (b) Whether it was a valid marriage.
- (c) Whether parties lived together prior to marriage, and, if so, when did they commence cohabitation.

- .2 Marriage-like relationship: duration and other particulars of the relationship (e.g., to determine if the parties qualify as "spouses" under the *MCA*—which requires a marriage-like relationship for at least two years; also to determine whether parties are "common-law partners" under the *Income Tax Act*—which generally requires cohabitation in a conjugal relationship for at least one year).

.3 Registered Domestic Partnership

- (a) Date

2.7 Separation:

- .1 Place and date.
- .2 Particulars, including events leading up to it.
- .3 Whether there have been attempts to reconcile.
- .4 Whether client or partner has received counselling.
- .5 Whether partners have lived together since separation and, if so, the dates and details.
- .6 Client's residence:
 - (a) At time of separation.
 - (b) Since separation.
- .7 Client's partner's residence:
 - (a) At time of separation.
 - (b) Since separation.

- .8 Whether there is any kind of written or verbal separation agreement or marriage or cohabitation agreement.
- 2.8 New relationship:
 - .1 Details of cohabitation (date, whose residence, discussions of marriage).
 - .2 If not cohabiting, details of any plans to live together (timing, whose residence, discussions of permanence).
 - .3 Details of children's relationship with new partner.
- 2.9 Previous proceedings (and details of when, where, terms, result, etc.), such as:
 - .1 Divorce.
 - .2 Custody order.
 - .3 Support order.
 - .4 Marriage, cohabitation, or separation agreement.
 - .5 Other.
- 2.10 Previous separations and reconciliation attempts.
- 2.11 If *Divorce Act* applies, whether there has been a permanent breakdown of the marriage (*Divorce Act*, s. 8), and full particulars (including acts committed by client):
 - .1 Separation for not less than one year immediately preceding anticipated determination of divorce proceeding and separation at commencement of proceeding.
 - .2 Adultery: whether before or after separation; details that are known (identity of third person, places and times); whether spouse is willing to admit.
 - .3 Physical cruelty: details of behaviour and incidents, medical reports, police reports.
 - .4 Mental cruelty: specific acts of cruelty and any physical manifestations, medical reports.
- 2.12 If *Divorce Act* applies, explain the meaning of, and find out whether there has been:
 - .1 Collusion (any agreement, understanding, or arrangement by your client or anyone else to fabricate, falsify, or suppress evidence in order to get a divorce).
 - .2 Connivance (encouragement by spouse to commit adultery).

- .3 Condonation (whether innocent spouse has forgiven the other spouse for the adultery, in the sense that he or she would take the adulterer back to live together as husband and wife).
- 2.13 If registered domestic partnership, whether it has been terminated:
- .1 Statement of termination filed with Registrar of Vital Statistics
 - .2 Parties separated for one year or more and one or more has the intention that the relationship not continue
 - .3 One of the parties marries someone else
 - .4 Parties have registered an agreement with the Court pursuant to *MCA*, s. 52(1)
- 2.14 General lifestyle and spending habits of each person, such as: characteristics of family residence, number of cars, recreational activities, social activities, restaurants attended, clothing, holidays, and the functions performed by both partners during cohabitation.
- 2.15 Financial details, where maintenance or property division is an issue (consider having client fill out a Statement of Financial Information and Statement of Property). Note that under the *Divorce Act*, when making a spousal support order, the court will consider any economic advantages or disadvantages to both spouses arising from the marriage or its breakdown (s. 15.2(6)(a)):
- .1 Income:
 - (a) Client:
 - (i) Amount and sources of income.
 - (ii) Jobs held and income earned throughout relationship.
 - (iii) Periods of unemployment and reasons.
 - (iv) Any foreseeable change in job or income.
 - (v) Whether worked as a homemaker and, if so, whether this was by agreement with spouse.
 - (vi) Ability to earn income, including education, skills, qualifications, health.
 - (vii) Future intentions about

employment.

- (viii) If currently in school or training, what will this cost, what are employment goals and probable earnings.
 - (ix) Special needs of children (e.g., age, disability) that affect client's ability to work outside the home.
- (b) Client's spouse:
- (i) Amount and sources of income.
 - (ii) Jobs held and income earned throughout relationship.
 - (iii) Periods of unemployment and reasons.
 - (iv) Any foreseeable change in job or income.
 - (v) Whether worked as a homemaker and, if so, whether this was by agreement with spouse.
 - (vi) Ability to earn income, including education, skills, qualifications, health.
 - (vii) Future intentions regarding employment.
 - (viii) If currently in school or training, what will this cost, what are employment goals and probable earnings.
 - (ix) Special needs of children (e.g., age, disability) that affect client's spouse's ability to work outside the home.

.2 Real property owned by either partner at or since beginning of relationship (distinguish which property is matrimonial home):

Property division laws do not apply to unmarried couples, however, unmarried couples can opt into those provisions by registration of a domestic partnership declaration. Family law agreements made before, during or after a relationship between unmarried spouses (whether of the same or opposite sex) are subject to judicial review for fairness. In the absence of an agreement or registered domestic partnership, division of

property claims between unmarried spouses are typically decided on the principles of resulting trust or on the law of remedial constructive trust.

- (a) Address and legal description.
- (b) Registered owner.
- (c) Acquisition: date, purchase price, source of original funds, mortgage amount, mortgage lender.
- (d) If acquired before beginning of relationship: market value at date of relationship, whether an appraisal available, amount of mortgage at date of relationship.
- (e) If mortgage was paid off during relationship: when, what funds were used, whether both partners contributed, amount paid.
- (f) If sold during relationship: when, selling price, net sale proceeds, use of proceeds.
- (g) If re-mortgaged during relationship: when, with whom, who signed mortgage, terms of mortgage, what funds have been used to make payments, what was done with mortgage proceeds.
- (h) Current state of mortgage, if it was not paid off during relationship, or, if property was re-mortgaged: balance owing, defaults, late payments.
- (i) If still owned: present fair market value, whether appraisal or real estate evaluation available, current details of possession and use.
- (j) Contributions of each partner to maintenance and improvement of property during relationship.
- (k) If owned by other partner: what property was being used for at beginning of relationship, whether client contributed to property before relationship (e.g., cash, co-signing loan or mortgage, business acumen, physical labour, homemaker), whether client contributed to property after relationship, whether property was used during relationship for benefit of family, whether partners considered it to be for

benefit of family, what contribution partner expected of client regarding the property.

- .3 Mobile home(s) owned by either partner at or since beginning of relationship. Collect the same information as required for real property. (See item 2.15.2.)
- .4 Personal property owned by either partner at or since beginning of relationship. Collect information on all types, including: cash, bank accounts, term deposits, bonds, stocks, options, commodities, debentures, mortgages, agreements for sale, motor vehicles, recreational vehicles, farm or other machinery, equipment, boats, aircraft, art objects, furnishings and household goods, jewellery, club memberships, bullion/coins, RRSPs, RRIFs, pensions, life insurance, medical, dental, and disability insurance, promissory notes, judgments. Obtain the information that is relevant for each item, such as:
 - (a) Description.
 - (b) Owner.
 - (c) Acquisition: date, price/value, who acquired the property, source of funds, financing.
 - (d) History of ownership: in whose name, who has made payments, amount of payments, amount owing, use, details of any sale, use of sale proceeds.
 - (e) Value at date of separation and current value, any appraisals, maturity dates and values, whether RRSPs, insurance policies, etc. can be cashed in at present time.
 - (f) For bank accounts: all banks used by client or partner; account locations, types, numbers and balances. Determine whether account is joint or sole.
 - (g) For stocks, etc.: number of shares, class of stock, encumbrances, restrictions on transfer.
 - (h) For insurance policies: beneficiary, whether policy has been borrowed against and details of this, cash surrender value, if any.
 - (i) For promissory notes: from whom, amount owing, interest rate, payments, due date.

- (j) For outstanding judgments: against whom, date, amount, whether collectable.
 - (k) For pensions: beneficiary, plan name, contributions, owner, details of plan.
- .5 Businesses, partnerships, and joint ventures owned by either partner at or since beginning of marriage/marriage-like relationship:
- (a) Whether incorporated or unincorporated.
 - (b) Name and address of business and of principals or participants.
 - (c) If incorporated: registered and records offices, directors, shareholders.
 - (d) Type of business.
 - (e) Nature of interest: number and ownership of shares.
 - (f) Acquisition: date, price/value, who acquired the property, source of funds, financing, how much capital introduced into the business.
 - (g) Value: estimated market value and book value at date of acquisition, date of beginning of relationship, date of separation, and current date; whether anyone has tried to purchase business in past year and on what terms.
 - (h) If sold: when, selling price, net proceeds, use of proceeds.
 - (i) If still owned: liabilities each partner is responsible for, including co-signed loans and guarantees.
- .6 Livestock, pets, and related equipment.
- .7 Real or personal property sold or given away by client or partner in the past two years:
- (a) Name and address of trustee, if applicable.
 - (b) Date of disposal.
 - (c) Price: whether an appraisal was done first, fair market value, proceeds, whether transfer was for market value and, if not, why not.
 - (d) Whether partner approved of transfer.
 - (e) Use of proceeds.

.8 Debts and liabilities of client and partner at beginning of relationship, date of separation, and current date:

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- (a) Description (e.g., mortgages, agreements for sale, credit cards, bank loans, personal loans, business loans).
 - (b) When incurred.
 - (c) Why incurred.
 - (d) Whether partner co-signed or guaranteed.
 - (e) What security given.
 - (f) Amount: original amount, interest rate, payment history, present status (including amount outstanding and defaults).
- .9 Personal guarantees given by client or partner.
- .10 Reasons why assets should be considered family assets:
- (a) Property in question.
 - (b) Owner.
 - (c) Physical or monetary contribution made to acquisition, preservation, or maintenance.
 - (d) Housekeeping and child rearing roles.
 - (e) Opportunities for employment or advancement given up to assist in acquisition.
- .11 Any property owned by one partner to the exclusion of the other and used primarily for business purposes, where the non-owning partner did not make a direct or indirect contribution to the acquisition of the property or the operation of the business (*MPA*, s. 18).
- .12 Whether client or partner received or is about to receive:
- (a) An inheritance: who received it, when, how much, what was done with it.
 - (b) A windfall (e.g., lottery winnings, prizes, gift from family): who received it, when, how much, what was done with it.
 - (c) An award for personal injuries, including workers' compensation benefits: who received it, when, how much, what was done with it.
 - (d) Proceeds of an insurance policy (and if so, whether it was in respect of property or related to some other matter): who received

it, when, how much, what was done with it. | | | | |

- (e) A gift from his or her partner: who received it, when, market value, what was done with it.
- (f) A bonus relating to past services (e.g., severance pay).
- .13 Any previous distribution of property:
 - (a) Whether by gift, agreement or court order.
 - (b) When.
 - (c) Terms of agreement and details of distribution.
 - (d) Value of property involved.
- .14 Who is currently in possession of the various items.
- .15 Whether there is any reason to suspect that client's partner intends to dispose of any assets or remove them from Nova Scotia (see item 2.17).
- .16 Whether client or partner want specific items of property.
- 2.16 Where client wants exclusive occupancy of the family residence or an order restraining the partner (including common law partner) from entering the family residence:
 - .1 Description of dwelling.
 - .2 Location with respect to schools.
 - .3 Reasons for wanting the partner removed:
 - (a) Violence.
 - (b) Abuse of alcohol, drugs.
 - (c) Effect of behaviour on the mental or physical health of the client or the children, including, if possible, medical reports.
 - (d) Any criminal charges previously laid against the partner.
 - (e) Alternate accommodation available to the partner.
 - (f) Financial impact of moving/selling.
- 2.17 Where client wants exclusive use of chattels:
 - .1 Clear description of the chattels.
 - .2 Who used them prior to separation.
 - .3 Reason that client needs them now (e.g., need car for work or to drive the children to school or to

recreational activities).

.4 Similar chattels available to the partner.

2.18 Where client wants an order restraining disposition of assets:

- .1 Clear description of the assets.
- .2 Present location of the assets.
- .3 Ownership of the assets.
- .4 Previous use of the assets.
- .5 Actions or statements of the partner that indicate he or she might dispose of the assets.
- .6 Reasons why the assets are to be considered family assets. (See item 2.15.10.)

3. COLLECT DOCUMENTS

3.1 Request copies of all relevant documentation, such as:

- .1 Certified copy of marriage certificate (long form) or certificate of registration of marriage.
- .2 Photograph of partner (for service purposes) if a divorce is sought.
- .3 Income tax returns of client and partner for past three years (both personal returns and corporate returns if any incorporated businesses are involved).
- .4 Financial records, such as: bank statements, paystubs, credit card statements, financial statements of a business for past three years.
- .5 Records relating to matrimonial property, such as: land title searches, mortgage statements, loan agreements.
- .6 Records relating to the value of family property, such as appraisals and Nova Scotia property assessment.
- .7 Records relating to pension plans, insurance policies, RRSPs, RESPs.
- .8 Marriage, separation or property distribution agreements, between the partners and between each partner and any prior partners.
- .9 Previous related pleadings and court orders, between the partners and between each partner and any prior partners.
- .10 Certified copy of divorce order if one partner was

previously divorced.

.11 Medical and legal reports.

4. ADVISE CLIENT AND OBTAIN INSTRUCTIONS

- 4.1 Consider whether an action should be commenced or whether mediation or arbitration are appropriate. Review mediation option with client (*Divorce Act*, s. 9(2)). Review collaborative family law option.
- 4.2 Determine where action should be brought (consider jurisdiction and enforceability).
- 4.3 If client wants a divorce, give a preliminary opinion as to whether there are grounds.
- 4.4 Consider possibility of divorce proceedings against client based on existing grounds; advise regarding future conduct that will constitute grounds. Advise regarding the possibility of an award of costs against a co-defendant.
- 4.5 If client wants a divorce, ensure client understands the meaning and significance of collusion, connivance, and condonation. (See item 2.12.)
- 4.6 Obtain details regarding any witnesses.
- 4.7 Consider the need to employ an investigator and obtain instructions.
- 4.8 Discuss the need to retain an accountant or tax consultant (e.g., where there are complex financial circumstances, valuation issues, or tax consequences). Determine whether a professional valuation of the assets is necessary, particularly in the case of a separation agreement. If a pension plan is involved, it is almost always necessary to seek a professional valuation. Obtain instructions.
- 4.9 Advise on issues regarding acquisition and disposition of property during period between separation and settlement.
- 4.10 Advise client to gather relevant documents and put them in a safe place, but beware of counselling theft.
- 4.11 Advise client regarding effect of interim custody arrangements on ability to obtain final custody. Advise client regarding impact of custody/access arrangement on determination of support issues (e.g., shared custody).
- 4.12 Consider possibility of invoking the law of trusts (e.g., for division of property of unmarried partners, or to obtain some priority over creditors where partner is heavily indebted).
- 4.13 Note any special issues, such as:
 - .1 Where an insolvent partner is transferring property to the other partner, avoid contravening the

provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25; and *Criminal Code*, R.S.C. 1985, c. C-46.

- .2 If your client is dying and assets are in his or her name, seek instructions as to client's wishes on death.
- .3 If your client is from a same-sex relationship, has ties with an aboriginal community, or is a recent immigrant, consider whether advice should be sought from a lawyer who has appropriate experience and knowledge.
- 4.15 Discuss the effect of a divorce, order for judicial separation, or declaration of nullity on an existing will. Advise client to review will to ensure it reflects client's present testamentary wishes.
- 4.16 Advise client regarding making an application for Canada Pension Plan credit splitting.
- 4.17 Discuss and obtain instructions to:
 - .1 Draft a marriage or cohabitation agreement (see MARRIAGE AGREEMENT DRAFTING checklist).
 - .2 Draft a separation agreement (see SEPARATION AGREEMENT DRAFTING checklist).
 - .3 Commence divorce proceedings, with corollary relief such as custody and support pursuant to *Divorce Act* (SEE DIVORCE ACT PROCEDURE checklist) or corollary relief pursuant to *MCA*.
 - .4 Bring a corollary relief proceeding under the *Divorce Act* with an application for interim relief, if required (see DIVORCE ACT PROCEDURE checklist).
 - .5 Bring a variation proceeding under the *Divorce Act* with an application for interim relief, if required.
 - .6 Commence proceedings under the *MCA* and *MPA* for custody, access, support, distribution of property, or other relief, with an application for interim relief, if required.
 - .7 Bring an action based in trust law, particularly if parties never married.
 - .8 Apply for partition and sale of real property pursuant to the *Partition Act*, R.S.N.S. 1989, c. 333.
 - .11 Draft a new will.

- .12 Apply for appointment of a receiver.
- .13 Apply for a change of name which can be done by including it as part of relief sought in the divorce.
- .14 Consider determination of "possible father" under *MCA*, s. 26.
- 4.18 Advise client to prepare an annual expenses list, (using the financial statement as a guide), including:
 - .1 Accommodation (rent, mortgage payments, property taxes, house insurance, hydro, water, sewer, telephone, heat, cablevision, household repairs and replacements, capital repairs and replacements).
 - .2 Food (groceries, restaurant meals).
 - .3 Transportation (car payments, insurance, repairs, gas, parking; bus; taxi).
 - .4 Medical/dental (insurance, prescriptions, other expenses).
 - .5 Clothing (self, children, laundry, dry cleaning).
 - .6 Other expenses, such as: gifts, entertainment, newspapers and periodicals, hairdresser/barber, cigarettes, alcohol, payments into retirement fund, CPP, EI, life insurance, reserve for income tax, reserve for holidays, educational expenses (tuition, supplies), cleaning help, babysitting/daycare, loan payments, legal fees.
- 4.19 Advise client to keep a diary noting contacts with spouse and children, expenses related to the marriage breakdown, payments made by one spouse to the other, etc.
- 4.20 Consider getting full retainer in advance (if you do not, and a support order is made against your client, you may be unable ethically to require payment of your account until client pays the support). Include adequate amounts for disbursements, including investigator, accountant, valuator, etc.

5. FOLLOW-UP FROM INITIAL INTERVIEW

- 5.1 Open file: place checklist in file and make entries in diary and bring forward ("BF") systems, noting relevant limitation periods, such as:
 - .1 *MCA*, s. 2(e), definition of "guardian": includes a stepparent where the child has been a member of the guardian's household.
 - .2 *MCA*, s. 2, definition of "spouse":
 - (a) Where unmarried couple (including persons of the same gender) lived together in a marriage-like relationship for at least two years, person must make application under

MCA within one year of date they ceased doing so.

- .3 *Divorce Act*, s. 21(2) and (3) and *Civil Procedure Rules*, 62.02(1)(b) and (c)
- .4 *Canada Pension Plan*, R.S.C. 1985, c. C-8, ss. 55, 55.1, 55.2, 55.3 (which now applies as well to a "common-law partnership" between two persons who cohabit in a conjugal relationship for at least one year).
- .5 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 56.1(3): tax relief is available only for spousal support paid in the year in which an agreement is signed or a court order is made, and the preceding year (note that the *Act* now applies as well to a "common-law partnership" between two persons who cohabit in a conjugal relationship for at least one year).
- 5.2 Send letter to client confirming the retainer and instructions, setting out the manner in which you will determine your fee for services, stating the conditions upon which you have agreed to act, and summarizing the points discussed, including follow-up to be carried out by the client.
- 5.3 Communicate by letter with client's partner advising partner to seek legal advice and requesting the name of the partner's solicitor if partner already has one. You should also consider requesting disclosure of income, assets and liabilities, seeking income tax returns for at least the last three consecutive years if the partner has been earning any income during that period, and a Statement of Financial Information and Statement of Property Forms.
- 5.4 Determine the tax implications of any proposed support and property division and consider whether another arrangement might be more beneficial to client.
- 5.5 Conduct any relevant searches (e.g., at the Registry of Deeds, Joint Stock Companies Office or Personal Property Registry).
- 5.6 Gather any necessary information. (See item 2.)
- 5.7 Continue preparation of case by consulting relevant legislation and checklists such as: DIVORCE ACT PROCEDURE, FAMILY LAW AGREEMENT PROCEDURE, MARRIAGE AGREEMENT DRAFTING, SEPARATION AGREEMENT DRAFTING.

ACTION TO BE CONSIDERED

**FAMILY AGREEMENT CHECKLIST
INTRODUCTION**

Purpose and currency of checklist. This checklist is designed to be used in conjunction with the FAMILY PRACTICE INTERVIEW checklist and the SEPARATION AGREEMENT DRAFTING or the MARRIAGE AGREEMENT DRAFTING checklists. This checklist is not specifically designed to relate to cohabitation agreements, although many of the provisions will apply. This checklist is current to September 1, 2003.

New developments—unmarried spouses. Recently, the federal government passed legislation changing definitions under certain federal statutes to include unmarried spouses, whether or not of the same sex (see the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, in force July 31, 2000 (SI/2000-76). For example, unmarried spouses, whether of the same or opposite sex, are now recognized under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (which generally requires cohabitation in a conjugal relationship for at least one year). *MPA* provisions concerning division of property do not currently apply to unmarried opposite or same sex spouses. However, they can opt into those provisions by registering a domestic partnership. Family law agreements made before, during or after a relationship between unmarried spouses (whether of the same or opposite sex) are subject to judicial review for fairness.

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CHECKLIST

1. INITIAL INTERVIEW AND FOLLOW-UP

- 1.1 Complete FAMILY PRACTICE INTERVIEW checklist.
- 1.2 Consider whether the definition of “marriage agreement” in the *MPA* (s. 23) applies to all or part of the agreement, and discuss with client the effect of this (i.e., whether provisions of the *MPA* relating to marriage agreements will apply to it). Note: provisions in which a spouse waives his or her right to maintenance in the event of a separation may be void or nullify the agreement *per Bood v. McGunnigle* (July 28,

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	NA	L	LA	DATE DUE	DATE DONE
ACTION TO BE CONSIDERED					
<p>1998) 1996 Proth. No. 1201-51272; 132229. Property division terms of the agreement that are unfair, having regard to the criteria set out in s. 29 of the <i>MPA</i> may be open to variation by a court.</p>					
<p>1.3 If one of the parties is a minor and you are drafting a marriage agreement, note need for consent of court prior to or after the client enters into a valid agreement (<i>MPA</i>, s. 25; see also <i>Statute of Frauds</i>, R.S.N.S. 1989, c. 442, s. 9).</p>					
<p>1.4 In the case of a separation agreement, consider whether client might be better served by a separation agreement or by minutes of settlement embodied in a consent order.</p>					
<p>1.5 Determine client's wishes with regard to specific terms of agreement (see MARRIAGE AGREEMENT DRAFTING checklist or SEPARATION AGREEMENT DRAFTING checklist).</p>					
<p>1.6 Advise client of the provisions of s. 12 of the <i>MPA</i> and the fact that the interest created by that provision is subject to a "marriage agreement" or a "separation agreement".</p>					
<p>2. DRAFTING THE AGREEMENT (SUMMARY)</p>					
<p>2.1 Prepare an outline of the agreement indicating the clauses from your precedent file that will be included (see MARRIAGE AGREEMENT DRAFTING CHECKLIST or SEPARATION AGREEMENT DRAFTING checklist).</p>					
<p>2.2 Consider tax implications on disposition or transfer of assets. If uncertain, refer questions to a tax specialist. If any aboriginal parties, consider impact if the party is exempt from federal or provincial taxation.</p>					
<p>2.3 If you intend to include statements of assets and awareness of each other's assets:</p> <ul style="list-style-type: none"> .1 Ensure that the agreement contains a specific assurance of the completeness and accuracy of each spouse's asset disclosure, and indicates that each is relying on the other's truthfulness. .2 Provide a method for resolving disputes if the statements later prove to be inaccurate (e.g., provide that undisclosed assets are deemed to be owned by the parties as tenants-in-common). .3 Consider making a written disclaimer to client of any responsibility for checking the accuracy of his or her spouse's statement of assets. .4 Where your client is incapable of checking the accuracy of his or her spouse's statement of assets, 					

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ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p>consider and discuss retention of experts (e.g., valuator, appraiser, accountant).</p>					
<p>2.4 Prepare the first draft.</p>					
<p>2.5 Review the first draft, checking each clause to ensure that it achieves client's objectives, and checking the document as a whole to ensure that it is internally consistent. Make necessary corrections and prepare a second draft.</p>					
<p>2.6 Send the second draft to client with a request that client review it and note any changes or questions client may have.</p>					
<p>2.7 Discuss changes or questions with client.</p>					
<p>2.8 Make any changes required to the second draft. Send a copy of the revised draft to client's spouse or spouse's solicitor. Decide whether to send the draft "without prejudice". Review any alterations with client.</p>					
<p>2.9 Satisfy yourself that there are no problems with regard to:</p> <ul style="list-style-type: none"> .1 Lack of certainty of terms. .2 Fraud or misrepresentation (e.g., failure to disclose assets). .3 Undue influence. .4 Unconscionability. 					
<p>2.10 Draft all required forms, such as irrevocable designation of beneficiary, and authorities to pension plans, consulting experts as appropriate.</p>					
<p>3. CONCLUDING THE AGREEMENT</p>					
<p>3.1 Where the other spouse has not obtained independent legal advice, ensure that he or she acknowledges in writing that you have advised that legal advice be sought and that he or she has refused and you have not provided him or her with advice.</p>					
<p>3.2 Where client insists on signing an agreement against your advice, put your opinion in writing and confirm with client that, notwithstanding your advice, client has instructed you that he or she still wishes to sign the agreement.</p>					
<p>3.3 Ensure compliance with relevant formalities, such as:</p> <ul style="list-style-type: none"> .1 <i>MPA</i>, s. 24: in writing, signed by both spouses, and witnessed by one or more other persons. .2 <i>MCA</i>, s. 52(1) (if the agreement will be filed so that it can be enforced as a court order). If the agreement 					

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is to be filed in Family Court, do not put in a clause giving the Supreme Court exclusive jurisdiction over the agreement.					
.3					
Formalities required by any other jurisdiction where property is located (e.g., recording of agreement, witnesses, statement/certificate as to independent counsel).					
.4					
Description of real or personal property for filings under the <i>Registry Act</i> , R.S.N.S. 1989, c. 392 or <i>Personal Property Security Act</i> , S.N.S. 1995-96, c. 13.					
4.	CLOSING THE FILE				
4.1					
Send copy to other party.					
4.3					
File notice at the Registry of Deeds, if there is designation of a matrimonial home (<i>MPA</i> , s. 7).					
4.4					
Send notice of irrevocable designation of beneficiary to the insurance company, requesting acknowledgment to be sent to the policy holder.					
4.5					
Send notice of any agreement regarding pensions to the employer or pension trustee, requesting acknowledgment to be sent to your client.					
4.6					
Complete any transfers of property.					
4.7					
Complete Canada Customs and Revenue Agency Form T2220 for transfer of RRSPs.					
4.8					
As soon as possible after completing the agreement, bill client for your services rendered. Once again, outline in your covering letter how you have determined the fee.					
4.9					
Close file.					