

## SEPARATION AGREEMENT CHECKLIST INTRODUCTION

**Purpose and currency of checklist.** This checklist is designed for use with the FAMILY LAW AGREEMENT procedure checklist and the FAMILY PRACTICE INTERVIEW checklist. The provisions suggested in this checklist must be considered in relation to the particular facts in the matter at hand, and augmented and revised as appropriate. This checklist is current to September 1, 2005.

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### CONTENTS

1. Date of Agreement
2. Names and Addresses of Parties
3. Recitals
4. Introductory Clauses
5. Guardianship
6. Custody
7. Access
8. Child Support
9. Spousal Support
10. Responsibility for Debts
11. Division of Property
12. Provision for Death
13. General Clauses
14. Schedules
15. Appendices

### CHECKLIST

#### 1. DATE OF AGREEMENT

- 1.1 Depending on the use to which the document is put, it may be a fraud on either the court or the Canada Customs and Revenue Agency to indicate that an agreement was executed on an earlier date than the one on which it was

actually signed by the latter party.

**2. NAMES AND ADDRESSES OF PARTIES**

- 2.1 First party (e.g., wife).
- 2.2 Second party (e.g., husband).
- 2.3 Others (e.g., a company, trustee, or escrow holder).

**3. RECITALS**

- 3.1 Particulars of marriage (date and place of marriage) or marriage-like relationship (cohabitation date and place of relationship).
- 3.2 Children.
  - .1 Names, ages, and birth dates of dependent children.
  - .2 List independent children, if necessary.
  - .3 If no children, are any expected?
  - .4 Are any of the children stepchildren to one of the spouses? (Note that under the *MCA*, a person qualifies as a guardian if the child is under age 19 and is a member of the person's household (s. 8(2)); see also the definition of "guardian" in s. 2(e). The test under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) is more complex.)
- 3.3 Separation particulars.
  - .1 Date of separation.
  - .2 Reasons for separation.
  - .3 Expectation of continued separation.
- 3.4 Reasons for agreement.
  - .1 Separation agreement.
  - .2 Marriage agreement (*MPA*, s. 23) or cohabitation agreement.
  - .3 Avoidance of controversy.
  - .4 Final settlement of rights.
  - .5 Interim settlement or partial settlement.
  - .6 Statement that arrangements are in the best interests of the children, with supporting reasons.
- 3.5 Issues to be settled by the agreement.
  - .1 Management of, ownership in, or division of matrimonial assets or other property, after separation or triggering event (*MPA*, s. 12).

PROVISIONS TO BE CONSIDERED

NOTES

- .2 Responsibility for debts.
- .3 Spousal support.
- .4 Child support.
- .5 Guardianship, custody, and access.
- 3.6 Previous agreements.
  - .1 Identify any prior agreements, including marriage or cohabitation agreements, or designation of matrimonial home.
  - .2 Rescind or replace prior agreements.
  - .3 Vary prior agreements.
  - .4 Continue all or part of a prior agreement, if applicable.
- 3.7 Previous and current court orders, and whether these are being varied by agreement.
- 3.8 Previous and current legal proceedings.
- 3.9 Legal and municipal description of matrimonial home.
- 3.10 Schedule of property (assets and liabilities) or completed Statement of Property.
  - .1 First party.
  - .2 Second party.
- 3.11 Statement of awareness of assets of other party.
  - .1 Consider provision to ensure full disclosure.
  - .2 Attach sworn statements of property.
- 3.12 Statement of what the parties acknowledge to be matrimonial assets within the meaning of Section 4 of the *MPA* or assets that are to be exempt from this definition (see Schedules, items 14.1 and 14.2).
- 3.13 Statement of occupation and income of parties.
  - .1 First party.
  - .2 Second party.
  - .3 Dependent children.
- 3.14 Statement that parties have obtained or have had the opportunity to obtain independent legal advice.
- 3.15 Statement that any party without counsel has not been advised or represented by other party's counsel.
- 3.16 Preamble to operative clauses.

**4. INTRODUCTORY CLAUSES**

4.1 General. (Placement of general clauses is a matter of drafting style. They are variously placed at the beginning and the end of the agreement. See also item 13.)

- .1 Statement that recitals are warranted correct and form part of the agreement.
- .2 Statement of governing law.
- .3 Statement that each party has been advised of his or her rights.
- .4 Statements that each party signs the agreement voluntarily, without undue influence or coercion, and the agreement adequately provides for his or her present and future needs.
- .5 Statement that the agreement constitutes the full and final settlement of all issues.
- .6 Release by both spouses of all claims, including claims in trust, arising out of the marriage/marriage-like relationship or joint ownership of property except as set out in the agreement.
- .7 Statement that agreement survives divorce.
- .8 Provision for amendment of agreement (which must be written, signed and witnessed to be valid under s. 24 of the *MPA*).
- .9 Provision that agreement binds estate. Consider whether support payments should be specifically included or excluded.
- .10 Provision for resolution of disputes.
- .11 Definitions.

4.2 Personal relations.

- .1 Statement that there is no reasonable prospect of reconciliation.
- .2 Statement that each spouse has the right to live separate and apart from the other as though unmarried.
- .3 Statement that neither will molest nor annoy the other nor attempt to compel cohabitation by the other spouse.
- .4 Statement that the agreement does not constitute a bar to actions based on subsequent misconduct.
- .5 Statement of effect of reconciliation and what

constitutes reconciliation.

**5. GUARDIANSHIP**

- 5.1 Sole guardianship.
- 5.2 Joint guardianship and the terms of same, if any.
- 5.3 Authority of the non-custodial guardian of the child or children.
  - .1 Of the person of the child.
  - .2 Of the estate of the child.
- 5.4 Statement that corresponding provisions are to be included in wills.

**6. CUSTODY**

- 6.1 Designation of custodial parent(s).
  - .1 Sole custody.
  - .2 Joint custody (define, e.g., each parent has an equal voice in decisions even though children may reside for longer periods with one parent than with the other; determine primary residence if applicable). If joint custody, consider how parties will make important decisions if they are unable to agree.
  - .3 Shared custody (define, e.g., substantial division of time spent with each parent and each having full control while children are in his or her custody).
  - .4 Split custody (define, e.g., where there are several children and some are in the custody of each parent).
- 6.2 Acknowledgement of fitness of one or both parties and that one or both continue to have responsibilities as parents.
  - .1 Definition of role of custodial parent.
  - .2 Definition of role of non-custodial parent.
- 6.3 Statement of the agreement to cooperate and support each other in their respective parenting roles.
- 6.4 Provisions covering.
  - .1 Type of education.
  - .2 Type of religious instruction.
  - .3 Other aspects of children's upbringing.
- 6.5 Establishment of consistent pattern in identifying with and dealing with children.
  - .1 Needs (essential support provisions).

- .2 Wants (enrichment and extras).
- 6.6 Views of children. If appropriate, a statement that they have been consulted and that the agreement follows the wishes of the children.
- 6.7 Provision dealing with emergency care.
- 6.8 Provision for death of custodial parent.
- 6.9 Provision regarding move by custodial parent with children.

- .1 Provision that custodial parent must not move ordinary residence of the children outside a specified area without either the consent in writing of non-custodial parent or a court order.
- .2 Alternatively, provision that custodial parent must notify non-custodial parent, prior to any move, of the date of the move, and the new telephone number and address. Specific length of time for prior notice of move.
- .3 Statement of who is to bear costs of access if custodial parent moves outside a specified area.

6.10 Provision for taking the children out of the jurisdiction.

- .1 Signed consent of both parties required before passports are obtained for the children.
- .2 Provision that custodial parent will provide passport (if necessary) for non-custodial parent to travel with children, with non-custodial parent to provide itinerary.
- .3 Provision that a party who takes the children outside the jurisdiction will be responsible for obtaining travel insurance for the children during the time away. If the party fails to obtain travel insurance, he or she will be solely responsible for the costs that would have been covered under a standard travel insurance policy.

6.11 Administrative provisions.

- .1 Variation.
- .2 Counselling.
- .3 Mediation.
- .4 Arbitration.
- .5 Collaborative law

6.12 Provision acknowledging that parties recognize children's needs will change and agreement that the parties will review

custody arrangements from time to time as appropriate.

**7. ACCESS**

**7.1 Designation of who is to have access.**

- .1 First party.
- .2 Second party.
- .3 Grandparents.
- .4 Other relatives.
- .5 Others.

**7.2 Right of access for non-custodial parent (a sharing of parental responsibility).**

- .1 Liberal and generous access.
- .2 Reasonable access.
- .3 Specified access (set out in schedule).
- .4 Correspondence.
- .5 Telephone calls.
- .6 Annual vacations.

**7.3 Limitations on rights of access.**

- .1 Specified times.
- .2 Specified places (geographical limitations).
- .3 Specified conditions.
- .4 No access or supervised access (specify who will supervise).

**7.4 Access obligations.**

- .1 Reasonable.
- .2 Obligatory scheduled access.
  - (a) State whether all or only some children, and how determined.
  - (b) Specify beginning and ending of access periods by date and hour, and who is to pick up and deliver the children.
  - (c) Advance notice of circumstances requiring change in schedule.
  - (d) Provision for alternate custodial arrangements (baby-sitter) paid for by non-custodial parent when unable to comply with scheduled access.

(e) State when denial of access is warranted.

7.5 Additional discretionary access to be scheduled by advance notice and agreement of parties (and children, where appropriate). Consider such events as:

- .1 National holidays.
- .2 Religious holidays.
- .3 Birthdays.
- .4 Graduations.
- .5 Weddings.
- .6 Serious illness.
- .7 Death of family member.

**8. CHILD SUPPORT**

8.1 Specify amounts, beginning dates, and continuing dates of all payments. Specify Guideline income of payor spouse, Guideline income of receiving spouse (if relevant).

8.2 Type of payment.

- .1 Monthly section 3 Guideline amount.
- .2 Section 7 expenses.
- .3 If amount differs from Guideline amount, why it differs.

8.3 Manner of payment.

- .1 Monthly cheque from supporting spouse.
- .2 Deposit into supporting spouse's account.
- .3 Payments to Maintenance Enforcement Program.
- .4 Purchase of annuity for a term of years.

8.4 Variation in quantum of payment.

- .1 Sliding scale tied to the supporting spouse's income.
- .2 Sliding scale tied to the Consumer Price Index (for Canada or for a specified city or region).
- .3 Provision for variation tied to any change in the Child Support Guidelines.
- .4 Provision for child who reaches 19 years of age but is dependent.
- .5 Provision for annual exchange of income tax returns.
- .6 Provision for reduction of payment where supporting spouse is unemployed owing to sickness, accident,



strike, or lay-off.

8.5 Provision for interest on arrears of support.

8.6 Provision for security for payment.

.1 Clause giving the supported spouse a charge on the supporting spouse's assets in the amount of the arrears of support.

.2 Clause giving the supported spouse the right to deduct an amount equal to the arrears of support from the proceeds of sale of the matrimonial home.

.3 Posting of a cash sum to be held in escrow as long as payments are not in arrears.

.4 Post-dated cheques.

8.7 Events upon which obligation to pay support is to terminate.

.1 Child ceases to be a child of the marriage (*Divorce Act*, s. 2(2)), and for greater clarity or where the parties are not married, consider items .2 to .9 below.

.2 Child reaches age 19 or other specified age.

.3 Child completes high school.

.4 Child completes a first university degree, five years of university, or a college program leading to a certificate.

.5 Child ceases to attend an educational institution on a full-time basis. Define full-time.

.6 Child takes full-time employment (obligations to revive if child is subsequently unemployed and not in receipt of EI benefits). Define full-time.

.7 Child ceases to live with the supported spouse and is not living away from home in order to be able to attend an educational institution on a full-time basis.

.8 Child marries.

.9 Child dies (physically or mentally handicapped child).

8.8 Support for step-children.

8.9 Provision for special expenses and how they will be apportioned between the spouses. (Alternatively, statement that in determining the amount of the support payment, the parties have taken into account all current special and extraordinary expenses and included in the amount of support any expenses under s. 7 of the Child Support

Guidelines. Consider listing the s. 7 expenses that are included in the amount of support.)

- .1 Child care expenses.
- .2 Medical insurance premiums. Provision requiring spouses to keep child on any medical insurance plan available through his or her employment.
- .3 Dental insurance premiums. Provision requiring spouses to keep child on any dental insurance plan available through employment.
- .4 Health related expenses not included in basic insurance coverage, such as orthodontia, eyeglasses, and mental health care by medical and non-medical professionals. Prior approval required for expenditures for non-insured items.
- .5 Educational expenses.
- .6 Expenses for extracurricular activities.
- .7 Support for children over the age of 19. Consider what effect the following will have on parents' child support obligation:
  - (a) Child's income.
  - (b) Scholarships.
  - (c) Bursaries.
  - (d) Scholarship trust funds.
  - (e) RESPs.
- 8.10 Provision for the death of the supported spouse.
  - .1 Provision that spouses maintain life insurance to cover child rearing costs if spouse dies.
- 8.11 Provision for the death of either parent.
  - .1 Obligation on parents to maintain life insurance, including:
    - (a) Irrevocable designation of the children, or a trustee, as beneficiaries of the policy.
    - (b) Length of time for which insurance is to be provided.
    - (c) Provision that each parent is to provide evidence from time to time that insurance is in effect and that if this is not done, then the other parent has the right to pay the premiums and charge them to the supporting spouse pursuant to the agreement.

Alternatively, consider having each parent acquire insurance on the life of the other parent or have the life insured person sign an authorization permitting the other party to contact insurers directly.

(d) Other enforcement provisions.

.2 Obligation to make provisions for the children in wills. (Note: this is not be binding.)

.3 Provision that the obligation to pay support is binding on the supporting spouse's estate, if insurance funds inadequate.

.4 Alternatively, a provision that life insurance proceeds are payable to the supporting spouse's estate, and that the obligation to pay support is binding on the estate.

8.12 Tax considerations.

.1 Child support paid under orders or agreements made after April 30, 1997, are no longer taxed as income to the supported spouse, or deducted from income by the supporting spouse, absent a court order or agreement to the contrary.

.2 Where there is joint custody of a child, provision needs to be made for which spouse is entitled to claim Child Tax Benefits and tax deduction for a dependent child or married equivalent claim.

**9. SPOUSAL SUPPORT**

9.1 Specify amounts, beginning dates, and continuing dates of all payments. Specify purpose of payments, if applicable (e.g., to obtain education).

9.2 Type of payment.

.1 Monthly allowance.

.2 Yearly allowance.

.3 Lump-sum payment to supported spouse.

9.3 Amount of payment.

9.4 Manner of payment.

.1 Monthly cheque from supporting spouse.

.2 Purchase of life annuity.

.3 Purchase of annuity for a term of years.

.4 Payment to third party. (Consider provisions of the

*Income Tax Act* regarding payments to third parties.)

- .5 Delivery of post-dated cheques.
- 9.5 Variation in quantum of payment.
  - .1 Sliding scale tied to the supporting spouse's income.
  - .2 Sliding scale tied to the supported spouse's income.
  - .3 Combination of items .1 and .2.
  - .4 Sliding scale tied to the Consumer Price Index (for Canada or for a specified city or region).
  - .5 Provision for reduction of payment where supporting spouse is unemployed owing to sickness, accident, strike, or lay-off.
- 9.6 Provision for interest on arrears of support.
- 9.7 Provision for security for payment.
  - .1 Clause giving the supported spouse a charge on the supporting spouse's assets in the amount of the arrears of support.
  - .2 Clause giving the supported spouse the right to deduct an amount equal to the arrears of support from the proceeds of sale of the matrimonial home.
- 9.8 Events upon which obligation to pay support is to be reviewed or terminate .
  - .1 Remarriage of supported spouse (or commencement of new marriage-like relationship).
  - .2 Supported spouse takes up cohabitation with another person for a specified period of time.
  - .3 Supported spouse begins earning a specified amount of money from employment.
  - .4 Specified time period elapses.
  - .5 If support to be reviewed, decide time period and which party has the onus of proving that support should be varied/terminated at the review. Decide terms of review, e.g., what information is relevant, what information must be provided.
- 9.9 Provision for the death of the supporting spouse.
  - .1 Obligation on supporting spouse to maintain life insurance, including:
    - (a) Irrevocable designation of the supported spouse as a beneficiary of the policy.

PROVISIONS TO BE CONSIDERED

NOTES

- (b) Length of time for which insurance is to be provided.
  - (c) Provision that the supporting spouse is to provide evidence from time to time that insurance is in effect and that, if this is not done, the supported spouse has the right to pay the premiums and charge them to the supporting spouse pursuant to the agreement. Alternatively, consider having the supported spouse acquire insurance on the life of the supporting spouse, or have the supporting spouse sign an authorization allowing the supported spouse to contact the insurer directly.
  - (d) Other enforcement provisions.
- .2 Obligation to make provisions for the supported spouse in the supporting spouse's will.
- (a) If acting for the supported spouse, advise of the chance this provision may be breached, leaving the supported spouse to sue the estate for breach.
- .3 Provision that the executors shall pay a lump sum to the supported spouse in satisfaction of a present debt.
- .4 Provision that the obligation to pay support is binding on the supporting spouse's estate.
- 9.10 Provision for dental and medical insurance.
- .1 Retention of family coverage.
  - .2 Supporting spouse to pay premiums.
  - .3 Duration of obligation of supporting spouse.
  - .4 Provision for the responsibility to pay medical and dental expenses not covered by insurance (note: most insurance companies will not cover a person who is no longer a spouse).
- 9.11 Effect of divorce on support provisions.
- .1 Support provisions are incorporated into the order for divorce.
  - .2 Support provisions are incorporated into the order for divorce at the option of the supported spouse.
  - .3 Support provisions will merge upon order for divorce.

9.12 Tax considerations.

- .1 Periodic payments are taxable in the hands of the supported spouse; lump sum payments are not.
- .2 Supported spouse is required to pay income tax on spousal support payments, and supporting spouse can claim a tax deduction for the payments (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 56(1)(b) and 60(b)).
- .3 In order for payments to third parties to be deemed to be received by the supported spouse, the agreement must provide that ss. 56.1(2) and 60.1(2) of the *Income Tax Act* shall apply to such payments.
- .4 Agreement may provide that payments made before the it came into effect are taxable in the hands of the supported spouse (*Income Tax Act*, ss. 56.1(3) and 60.1(3)). Agreement must be executed no later than the end of the year following receipt of payments.

9.13 If no support is payable by either spouse, consider clause estopping either party from claiming interim or permanent support.

9.14 If acting for payor spouse, consider the effect of retirement on support.

**10. RESPONSIBILITY FOR DEBTS**

10.1 Between the parties.

- .1 Acknowledgement of existence.
- .2 Payment (outline who pays what in schedule).
- .3 Security for payment (e.g., proceeds of sale of matrimonial assets).
- .4 Non-existence or negation of non-scheduled debts.

10.2 Due to third parties (individually incurred).

- .1 Payable by first party.
- .2 Payable by second party.
- .3 Indemnity of each against third party claims resulting from failure to pay.
- .4 Undisclosed debts to be assumed by the party who incurred them.

10.3 Recovery of specific property loaned.

10.4 Property of spouse pledged to secure debts of the spouse.

10.5 Joint obligations to third parties.

PROVISIONS TO BE CONSIDERED

NOTES

- .1 Continued joint obligations.
- .2 Close joint accounts.
- .3 One party assumes responsibility.
- .4 Indemnity to non-assuming party.
- .5 Consider responsibility for amounts due by either spouse to the Canada Customs and Revenue Agency for income earned prior to separation or other outstanding taxes and the transfer of property. Note s. 160 of *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
- 10.6 Return of credit cards to spouse responsible for payment.
- 10.7 Indemnification from supported spouse to supporting spouse for debts contracted in supported spouse's name after the date of the agreement. The amount of any of those debts paid by the supporting spouse shall be deducted from support payments.
- 10.8 Provision that each spouse is solely responsible for debts and liabilities incurred after the date of the agreement.

**11. DIVISION OF PROPERTY**

11.1 Matrimonial Home.

- .1 Transfer of title to one spouse.
  - (a) Date of transfer.
  - (b) Division of transfer costs.
  - (c) Outstanding property taxes.
  - (c) Release of transferor from liability under existing mortgage.
  - (d) Indemnity for transferor.
- .2 Deferred sale.
  - (a) State of title pending sale.
    - (i) Obligation not to sell interest.
    - (ii) Obligation not to encumber title.
    - (iii) Consider whether or not to sever joint tenancy (i.e., if not severed, sole title goes to survivor).
  - (b) Events upon which right to exclusive occupation is to terminate.
    - (i) Supported spouse takes up cohabitation with another person for a

PROVISIONS TO BE CONSIDERED

NOTES

- specified period of time.
- (ii) Spouse ceases to live in the family residence.
- (iii) Youngest child reaches the age of 19.
- (iv) After a specified number of years.
- (c) During the occupancy period, which spouse is to pay the following costs.
  - (i) Mortgage installments.
  - (ii) Property taxes.
  - (iii) Insurance premiums.
  - (iv) Sewage and garbage charges.
  - (v) Water and electricity rates.
  - (vi) Maintenance and repairs.
  - (vii) Heating.
  - (viii) Capital improvements or renovations.
- (d) Statement requiring notification to spouse of failure to meet any obligations imposed with respect to the property.
  - (i) As set out in item 11.1.2(c).
  - (ii) Vacancy of property for more than 30 days.
  - (iii) Change of principal residence designation.
- (e) Procedure for valuation, listing, and sale.
  - (i) Earliest date for listing for sale.
  - (ii) Sale price or method for determining value.
  - (iii) Costs of sale (e.g., real estate commission, legal fees).
  - (iv) Failure to find buyer within stipulated time.
- (f) Application of proceeds of sale.
  - (i) Removal of registered encumbrances.
  - (ii) Real estate agent's commission.
  - (iii) Legal fees and disbursements.
  - (iv) Arrears of support and interest on



arrears.

- (g) Division of net proceeds of sale.
- (h) Provisions to cover prior death of either spouse.
- (i) Right of first refusal of either spouse.

11.2 Other real property.

- .1 State of title pending disposition.
- .2 Manner of disposition.
  - (a) Right to and term of occupancy.
  - (b) Sale of property and division of proceeds.
  - (c) Transfer of property pursuant to a division of assets.
- .3 Specify who is responsible for capital gains/losses (*Income Tax Act*, ss. 74 and 160).

11.3 Contents of matrimonial home.

- .1 Present division.
  - (a) All contents.
  - (b) Listed contents (prepare schedule listing property owned by each and where located).
- .2 Deferred division.
  - (a) All contents.
  - (b) Listed contents (prepare schedule listing property owned by each and where located).
  - (c) Date and manner of delivery.
  - (d) Obligation to insure.
  - (e) Obligation to maintain assets in present state of repair.
  - (f) Gifts to children.

11.4 Automobiles.

- .1 Right to possession.
- .2 Obligation to make payments.
- .3 Obligation to insure.
- .4 Transfer of title.
- .5 Obligations under leases.

11.5 Other chattels.

PROVISIONS TO BE CONSIDERED

NOTES

- .1 List any chattels that are to be jointly used and specify circumstances, terms, and conditions.
- .2 Ultimate disposition of the chattels.
  - (a) Division of assets.
  - (b) Sale of assets and division of proceeds.
- 11.6 Animals and pets.
  - .1 Right to possession.
  - .2 Right of access.
- 11.7 Insurance.
  - .1 Disposition of policies.
    - (a) Transfer of ownership of policy to supported spouse.
    - (b) Retention of policy by supporting spouse but with irrevocable designation of the supported spouse as beneficiary.
    - (c) Cashing in of policy with equal division of proceeds.
  - .2 Obligations of supporting spouse where supported spouse is named as beneficiary.
    - (a) To pay all premiums as they come due until full maturity of the policy.
    - (b) To provide the supported spouse with evidence of payment.
      - (i) Within 14 clear days of the date on which payment is due; or
      - (ii) On a reasonable request by the supported spouse.
    - (c) To deliver the policies to the supported spouse.
  - .3 Special rights of the supported spouse with respect to the policy.
    - (a) Where the supporting spouse defaults on the premiums, to make payment and then recover the costs from the spouse.
    - (b) In accordance with the authorization contained in the agreement, to obtain, on a written demand to the insurer, information on the status of the policy.

PROVISIONS TO BE CONSIDERED

NOTES

- .4 Termination events for supported spouse as named beneficiary.
  - (a) Remarriage or cohabitation of supported spouse.
  - (b) Supported spouse takes up cohabitation with another person for a specified period of time.
  - (c) Supported spouse predeceases supporting spouse.
  
- 11.8 RRSPs.
  - .1 Present division of fund.
  - .2 Gradual collapse of fund.
  - .3 Consider provisions in the *Income Tax Act* (s.146(16)) with regard to transfer of RRSPs to spouse without attracting a tax liability.
  - .4 Appropriate discount factor to apply if RRSP is being traded against assets without tax or disposition cost.
  
- 11.9 RESPs.
  - .1 Identify the plan.
  - .2 Who will contribute.
  - .3 How will fund be handled when disbursed, considering ss. 3(2) and 7 of Child Support Guidelines.
  
- 11.10 Pension plans. Consider *PBA* (and other statutes') provisions concerning division of pension entitlement.
  - .1 Include parties' social insurance numbers in agreement.
  - .2 Determine if plan is a provincial plan (that is, a "local plan") or an extra-provincial plan.
  - .3 Determine if plan is a money purchase plan or defined benefit plan.
  - .4 Present division based on governing legislation.
  - .5 Present division based on the actuarial value of the plan (who pays for the valuation?).
  - .6 Deferred division.
  - .7 Elections and nominations under the plan.
    - (a) Non-owner spouse named as beneficiary.
    - (b) Where applicable, use a joint life and last

PROVISIONS TO BE CONSIDERED

NOTES

- survivor option with the non-owner spouse named as the last survivor.
- (c) Refiling of the nominations and election in (a) and (b) on remarriage or cohabitation of the pension-holder.
- (d) Where the plan has provision for election by the plan beneficiary to divide payments at source, and the parties have agreed to divide pension benefits on receipt, provide that the plan beneficiary shall make such an election.
- .8 Compensation payable where pension-holder elects to continue in pensionable employment beyond the earliest possible date of pensionable retirement.
  - (a) In lieu of eventual payments under the plan, payment of a monthly amount equal to one-half of the indexed pension payments to which the pension-holder was entitled on early retirement.
  - (b) Other forms of compensation.
- .9 If pension not dealt with in the agreement, it is assumed that the pension-holder keeps the pension.
- .10 Have the administrator of the pension plan review the pension clauses to ensure that they apply to the plan in question.
- 11.11 Pensionable earnings credits under the Canada Pension Plan.
- 11.12 Securities, including stocks, bonds, and notes receivable.
  - .1 Present division—consider income tax ramifications.
  - .2 Deferred division with securities to be held in trust until a specified event takes place.
    - (a) Supported spouse to receive income.
    - (b) Equal division of income.
    - (c) Re-investment of income.
    - (d) Obligation to pay income tax.
  - .3 Disposition of shares in private company.
    - (a) Restrictions on transfer.
    - (b) Restrictions on voting rights of transferring spouse (needed in order to prevent spouse from stripping company of its assets or depleting its treasury).

- (c) Consider income tax ramifications on transfer of shares in private company (consult accountant).

11.13 Stock options.

- .1 Determine whether stock options are a matrimonial asset.
- .2 If yes, trust clause for non-owning spouse, and mechanism for exercising non-owning spouse's options, for paying for options, and for tax consequences.

11.14 Funds on deposit.

- .1 Present division.
  - (a) Consider earliest date on which transfer is possible.
  - (b) Consider whether there should be an interest penalty for an unavoidable delay in transfer.
- .2 Deferred division until a specified event takes place.
  - (a) Supported spouse to receive income.
  - (b) Equal division of income.
  - (c) Re-investment of income.
  - (d) Obligation to pay income tax.

11.15 Club memberships.

11.16 Air miles or frequent flyer awards.

11.17 Undisclosed assets of a spouse. Consider the following provisions:

- .1 Undisclosed assets having a value over \$500 deemed to be assets owned by the spouses as tenants-in-common.
- .2 If the spouses cannot otherwise agree on how to divide such undisclosed assets, the assets must be sold and the proceeds divided equally between the spouses.

11.18 Consider whether to specifically waive variation provisions.

## 12. PROVISION FOR DEATH

- 12.1 Provision for payment of support out of the estate of the supporting spouse.
  - .1 To supported spouse.
  - .2 To children.
- 12.2 Provision for supported spouse and children in will.
- 12.3 Mutual provisions in will.
- 12.4 Renunciation of rights under the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 and the *Intestate Succession Act*, R.S.N.S. 1989, c. 236.
- 12.5 Release of claims against the estate that are not included in the agreement.
  - .1 On an intestacy under the *Intestate Succession Act*.
  - .2 Under the *Matrimonial Property Act*.
- 12.6 Consider the effect of Canada Pension Plan death benefits for spouse and children.

## 13. GENERAL CLAUSES

(Placement of general clauses is a matter of drafting style. See also item 4.)

- 13.1 What constitutes reconciliation, and its effect.
- 13.2 Effect of divorce.
- 13.3 Severability of:
  - .1 Void or voidable clauses.
  - .2 Clauses incorporated or confirmed by court order.
- 13.4 Agreement is entire agreement between parties, and there are no outside warranties or representations.
- 13.5 Provision regarding applicable law for interpretation and enforcement, and that Nova Scotia be the *forum conveniens*. Decide whether the agreement will be filed in Family Court or Supreme Court. Note that s. 52(1) of the *MCA* provides that agreements can be both varied and enforced.
- 13.6 No waiver except by signed written agreement.
- 13.7 Binding on the parties and their heirs, executors, administrators, and assigns.
- 13.8 Provision regarding who will bear the legal costs of the agreement and subsequent divorce.
- 13.9 Consider clause stating that costs of a successful application for enforcement of the agreement shall be paid by the defendant on a solicitor and own client basis.

- 13.10 Provision for incorporation of custody or support provisions in a corollary relief judgment.
- 13.11 Provision for filing the agreement in the Supreme Court or Family Court for enforcement of custody, access, or support terms, or for enforcement or variation: s. 52(1) *MCA*.
- 13.12 Notice provisions, including address of the parties and means by which notice may be given.

**14. SCHEDULES**

- 14.1 Matrimonial assets in which husband has beneficial interest.
- 14.2 Matrimonial assets in which wife has beneficial interest.
- 14.3 First party's liabilities.
- 14.4 Second party's liabilities.
- 14.5 Or complete Statement of Property Form.

**15. APPENDICES**

- 15.1 Irrevocable designation of beneficiary.
  - 15.2 Authorities to pension plans for release of information to non-owner spouse.
  - 15.3 Authorities to insurance companies for release of information to non-owner spouse.
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