The Compact: A (Proposed) New Way Forward For Marriage Contracts & Cohabitation Agreements[1]

Introduction

As you can probably tell from the title, this paper is not a survey of cases about a particular topic or a detailed examination of an area of family law. Rather, it is a proposal, an invitation if you will, which I submit we as a profession need to accept if we are to save ourselves from, well, ourselves.

Let me elaborate. If insufficient financial disclosure is the "cancer" of family law, the "heart disease" of our field at present is the frequency with which attacks on marriage contracts and cohabitation agreements are launched – and succeed.[2] Never before have we seen challenges to these kind of agreements with such regularity, ferocity and pervasiveness. In almost every single case where an agreement has been signed and one party now seeks to uphold it, significant time is spent analyzing how strong one side's argument is that the court will ignore the contract, trying to determine how the case will play out if in fact it's set aside and trying to come up with a settlement proposal that avoids the time and expense of finding out.

It's gotten so bad that recently a family court judge asked me, with utmost frankness, why, in light of the rather small remuneration involved for these kinds of contracts and the high level of risk of a negligence claim involved,[3] would any of us ever even want to *do* these kind of contracts?

I was stunned. Marriage contracts and cohabitation agreements provide a tremendous benefit to all couples who wish to opt out from, in the case of marrieds the harsh formula of equalization, to common law partnerships the pitted journey involved in unjust enrichment/ constructive trust claims, and to all those considered "spouses" under the *Family Law Act*, the increasingly tight-fitting contours of the Spousal Support Advisory Guidelines. In light of the very good chance that the relationship will ultimately fail[4], who wouldn't want the ability to tailor-make an agreement about what happens if it falls apart?

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[1] Brahm D. Siegel, C.S., Nathens, Siegel LLP, March 2015. This paper is dedicated to my friend and colleague Andrew Feldstein and all family lawyers like him, who, I hope, will reconsider doing cohabitation agreements and marriage contracts after reading it.

[2] By success, I refer not only to being set aside or ignored by the courts but cases where a financial settlement for more than what is set out in the contract is reached.

[3] Between 2009 and 2013, 23% of all family law claims related to domestic contracts. Even worse, domestic contract claims accounted for a whopping 47% of the cost of all family law claims for that period. Source: Yvonne Bernstein, Litigation Director & Counsel, Lawyers' Professional Indemnity Company (LAWPRO), email dated December 11, 2014.

[4] Although the number of divorces has shown recent declines (due primarily to the increase in common law relationships), in 2008 it was estimated that 41% of marriages will end in divorce before the 30th year of marriage,

Why All The Trouble?

The relevant provisions regarding marriage contracts and cohabitation agreements are simple enough. Found in sections 52 and 53 of the *Family Law Act*,[5] they are as follows:

> **Marriage contracts**
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> 52. (1) Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
>
> (d) any other matter in the settlement of their affairs. R.S.O. 1990, c. F.3, s. 52 (1); 2005, c. 5, s. 27 (25).
>
> **Rights re matrimonial home excepted**
>
> (2) A provision in a marriage contract purporting to limit a spouse's rights under Part II (Matrimonial Home) is unenforceable. R.S.O. 1990, c. F.3, s. 52 (2).
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> **Cohabitation agreements**
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> 53. (1) Two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
>
> (d) any other matter in the settlement of their affairs. R.S.O. 1990, c. F.3, s. 53 (1); 1999, c. 6, s. 25 (23); 2005, c. 5, s. 27 (26).

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an increase from 36% in 1998: Statistics Canada, Health Statistics Division, Canadian Vital Statistics, Divorce Database and Marriage Database.

[5] *Family Law Act*, R.S.O, 1990, c. F.3, as amended.

> **Effect of marriage on agreement**
>
> (2) If the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract. R.S.O. 1990, c. F.3, s. 53 (2).

Marriage contracts and cohabitation agreements are of course "domestic contracts" as that term is defined in the *Family Law Act*.[6] A court's ability to set aside a domestic contract is governed by s. 56(4) of the *Family Law Act*. That subsection provides as follows:

> 56(4) A court may, on application, set aside a domestic contract or a provision in it,
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> (a) If a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the contract was made;
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> (b) If a party did not understand the nature or consequences of the domestic contract; or
>
> (c) Otherwise in accordance with the law of contract.

In *LeVan v. LeVan*[7], the Ontario Court of Appeal confirmed that the:

> analysis undertaken under s. 56(4) is essentially comprised of a two-part process. First, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged. Once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.

In light of this rather straight-forward structure, why do we have so many cases where these contracts are challenged? In my view, there are five major reasons.

First, based on twenty years of experience handling these matters, clients consistently tell me that they did not put enough thought and time into their contract because they never thought they would be divorced. They tell me they were so in love with their partner and trusted him or her so much that they never thought they would ever break up and never for a moment thought that the contract would be invoked in a manner that would harm them financially. Giddy with love, they are much more focussed on all of the positive aspects of their future than dwelling on the possibility that things will not work out as planned.

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[6] "Domestic contract" means a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement: s. 51, *Family Law Act*.

[7] *Levan v. Levan,* 2008 ONCA 388 (CanLII), 90 O.R. (3d) 1, leave to appeal refused, [2008] S.C.C.A. No. 331, at para. 51.

Second, there is no recommended protocol for how to go about doing an agreement the right way. Although everyone knows each side should have independent legal advice and provide a modicum of financial disclosure, neither the Law Society, the courts nor any other body that I know of has, to my knowledge, taken a firm position on the steps counsel should be taking in order to comply with the intent of the legislation. In the absence of such protocol, clients and lawyers often take the easy way out, which, often involves less than rigorous financial disclosure, failing to really understand what each party seeks and needs, and paying careful attention to drafting and the future consequences of various clauses. Clients, not anticipating they will ever need to rely on the contract, are extremely reluctant to pay a lot for them, which feeds into the lack of effort.

Third, many lawyers accept files for "independent legal advice" too eagerly, without ensuring that all proper steps and a detailed examination of the proposed terms has taken place and without giving careful thought to the risk they are putting their clients and themselves to future attack and the corresponding ultimate negligence claims. Not surprisingly, lawyers willing to attack these agreements seize on these files as evidence that no real bargaining took place and that, by definition, there was duress visited upon the weaker party[8].

Fourth, lawyers have come to realize there is no real downside to attacking an agreement. Either the attack results in an out-of-court settlement for more money than provided for in the contract[9], or a court case ensues and at the least the case is bifurcated with a significant amount of disclosure is produced. Since only the most resolute wind up at trial to defend the agreement, many of these cases settle, with the defending party left scratching his/her head wondering why they spent so much money going to the time and trouble of getting a contract in the first place.

Finally, the courts. In an effort to give each side a fair opportunity to air their side, judges strive to be balanced, which often means ordering significant disclosure even when these contracts are negotiated specifically so that financial disclosure will not have to be produced in the future. It also means that when these issues are case-conferenced or settlement-conferenced, judges bend over backwards to try to see both sides. This results in each side taking what they want from what the judge said, which tends to hamper, not encourage, settlement.

The Compact

The combined effect of these factors often leads to a bizarro-world scenario where everything is set up in favour of the person seeking to set aside the agreement, when, in fact, it should be the opposite. Things should, I submit, be set up so that absent some very clear and unfair

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[8] These kinds of quickie "ILA" kinds of files unfortunately do nothing to detract from the weaker party's sense that this is just a "formality" with no real financial consequences should the relationship fail.

[9] Usually because one side assesses the cost associated with defending it (whether financial, emotional or a combination) as too high.

situations, these agreements should be *upheld* and the message from the bench should consistently echo this. Otherwise, the family court judge's comment to me makes ultimate sense: why bother even doing them?[10]

So how do we do this?

This is what gave rise to the "Compact", a simple set of standard procedures I propose be used in *all* cases involving marriage contracts and cohabitation agreements. They are nothing more than seven steps to be followed by lawyers retained on these sorts of files. They are:

1. *No work is to be started on a file unless the wedding is at least four months away.*

2. *Each party must have his/her own lawyer from the outset, before any negotiations begin.*

3. *Each party provides a financial disclosure brief before any negotiations begin.*

4. *At least one four-way without prejudice meeting shall be held.*

5. *The lawyers fully report to the clients in writing after the four-way meeting.*

6. *A term sheet is prepared and approved before the agreement is drafted.*

7. *The agreement is drafted and signed with certain "key clauses".*

Borrowing from collaborative law, the steps are agreed upon *before* any real work is done on the agreement. Counsel will thus know from the outset how the file will be run and be able to advise the client exactly what happens and when. This will be of great benefit to clients who, at present, have very different experiences depending on the particular practice of his/her lawyer.[11]

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[10] Let me be clear. I am not blaming individual lawyers or lawyers at large or any judge for the quilted way in which these agreements are handled. I understand it. We are all just responding to what we see in front of us at that time, based on the particular agreement in front of us, and after asking the "customer" how it came to be prepared that way and what preceded its signing. But we can do better.

[11] At the risk of over-emphasizing the point, some lawyers have a pre-set way of insisting on how things should be done, regardless of who the client is, how much they own or earn or who the other lawyer is. Some are more flexible and strive to find a tailor-made set of rules for how each file should go. Finally, some counsel simply give way to whichever way the other, more experienced lawyer says things should be done. The point is that it is this extremely varied approach that is getting us into trouble. It is because we do not have an agreed-upon protocol which gives rise to different levels of quality with these agreements, which in turn leads so many openings for them to be challenged.

The steps are simple in and of themselves; many of you will recognize them from your own files.[12] Put together however, they provide a powerful structure, a framework if you will, for a contract that will stand up to scrutiny by anyone who looks at it in the future. I submit that a contract put together under the Compact will be upheld in all but the most exceptional circumstances - which is exactly what our clients expect when they walk through our doors.

Although the procedures can be followed by non-lawyers they are truly designed for counsel, not self-represented parties. These are difficult and often very challenging contracts for even lawyers to negotiate and draft. Like a dangerous stunt in the hands of a capable expert, I caution all self-representeds to abstain from trying this "at home".

The steps in the Compact are not meant to be substantive, only procedural. The Compact is not about trying to determine what goes into these contracts, only to ensuring that the manner in which they are put together is consistent, fair and reflects full participation by each side before it is signed.

As I say, none of the steps are revolutionary. However, when they are followed in full and in order, the resulting agreement will be extremely hard to attack, ignore or set aside for it will have been thoroughly negotiated, sufficient disclosure will have been provided and it will be impossible for a person to successfully claim duress.

Commentary on the Compact

1. *The Four-Month Rule: No work shall be started on a file unless the wedding is at least four months away.*

We are all used to getting calls at the last minute, sometimes days before the wedding, asking for our help in either drafting an agreement or providing independent legal advice. While many lawyers are smart enough to refuse to take these clients, many still do. These are inevitably the cases which lend themselves to later claims of duress, one-sidedness and incomplete disclosure.

Simply put, the four-month rule ensures no such files ever occur again. In the event a prospective client contacts you and asks you to do a marriage contract and the wedding date is less than four months away, reject it, even if you know the client and have worked with him or her before. Reject it even if they tell you the contract will be "easy" and the other potential spouse "knows about all my assets", two of the most frequent push-backs you get. In terms of options, the best advice in this situation is either to postpone the wedding or call back and start the file after the honeymoon. While neither is particularly palatable, I find the latter has worked well in certain situations.

[12] Rarely, however, do I work on a file where all of the steps are followed in that file.

I propose four months because even the most simple of marriage contracts take at least three months to complete when the Compact is followed, and, ideally, there should be at least one month between the signing of the contract and the wedding date. From the time it takes to get both counsel onboard, to exchanging financials, to negotiating the deal and to drafting it up, I find only the most organized and determined couples can get a good agreement done in less time.

The reader will notice that I am not suggesting that the contract itself must be signed more than four months before the wedding date. Although I toyed with this idea, I ultimately rejected it as being too unreasonable. The reality of the world at this time is that folks often leave these contracts to the last minute. If and when the Compact is uniformly applied we will be, in a sense, training the public not to leave them to the literal last minute, but that is different from a rule requiring a contract to be actually signed at least four months before the big day.[13]

The final point I'd like to make about this rule is that even if the work on a contract is started more than four months prior, that does not, in and of itself, mean the contract should be signed prior to the wedding date. In the event, for example, that the other steps in the Compact are not completed in time, the lawyers should advise the clients to either postpone the date or complete the steps and sign the contract after the wedding.

2. *Each party must have his/her own lawyer from the outset, before any negotiations begin or anything is drafted.*

This rule is designed to address the problem, all too common in many contracts I have attacked and defended in court, where one party has significantly more wealth than the other, already has a solid relationship with a lawyer (usually from a previous separation) and simply drops a draft agreement in the hands of the other party days before the wedding. Despite how fair the content of the agreement may actually be, the entire process becomes stained from the outset. The parties in such a situation cannot be said to be in equal bargaining positions, they do not have equal power and knowledge and, consequently, the resulting agreement cannot be a product of their joint participation no matter what it says.

Consequently, before any negotiations begin, before any meetings occur, and way before any contract is drafted, each side needs to have his or her own lawyer. Note that while it is preferable that the lawyer's practice be restricted to family law, that is not essential. Provided all the steps in the Compact are followed, I believe a generalist practitioner can safely navigate the waters of cohabitation agreements and marriage contracts.

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[13] While I would be personally extremely nervous about a contract being signed the day of the wedding, the proximity of the actual signing to the wedding date does not, in and of itself, determine whether the contract is valid. The astute reader will recall that the marriage contract in *Hartshorne*, signed the day of the wedding, was upheld. Provided the terms of the Compact are fully followed, the fact that the contract is signed the day of the wedding should not, it is submitted, result in a declaration the contract is invalid or unenforceable.

In terms of suggested practice, a simple letter from one party's lawyer directly to the other party looks like this:

> "Dear Ms. Khan:
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> I have been retained by your partner Kevin Jones to explore the possibility of a marriage contract. I understand your wedding is some six months away and ask that you retain a family lawyer of your choosing and have him or her contact me within three weeks so that we can commence the process.
>
> Yours truly,
>
> Brahm D. Siegel"

The letter does not need to be complicated or threatening. Keep it simple and formal. As long as the message is firmly communicated, that is all you need at this point.

Before the letter is sent, I would email it to the client to have him approve the draft. This gives him a good opportunity to discuss what is happening with his would-be spouse, which is a good thing. There should be no surprises. Surprises give rise to future allegations of "I didn't know" and "I didn't feel I had a choice".

A thorny issue arises when your client contacts you a week after the letter is sent and tells you that the would-be spouse is not interested in retaining counsel. This does not happen often but when it does, you need to explain that the spouse having independent legal advice is for *his* benefit, not just for your spouse's. Once I explain this, and how the eventual agreement will be more likely to be upheld if his spouse has had good solid representation, he usually takes that knowledge back, further discussions are held between the spouses and I almost always hear from counsel a short while thereafter.

Another issue sometimes arises when the client asks you to provide a name or some names of good family lawyers to give to the would-be spouse. Resist all such temptation. Even if you have a good working relationship with various lawyers on these kinds of contracts, if the parties ever break up you will definitely hear a complaint in the form of "The lawyers had it all worked out beforehand" or "I never really chose my own lawyer" or something of that nature. I know because it happens all the time. Finally, when your client comes back to you (as happened to me recently) and says his would-be spouse tried to find a lawyer but none would take her case, tell him it is her job to do so, that you will not be offering up any names and that the agreement will be stronger and less prone to attack if she finds her own lawyer on her own. Full stop.

3. Each party provides full financial disclosure before any negotiations begin.

Other than allegations of duress, the most common argument as to why an agreement should be set aside is "I didn't know what he earned" or "I didn't know what he owned". The

assumption here is that had the spouse known what he earned or owned she would have negotiated for a more favourable deal, which is usually (but not always) false. While there is no way to know whether that (rather presumptuous) assumption is true or not in a particular case, many courts have found that a significant failure to disclose is sufficient to void a contract. Thus, in order to strengthen a contract, full financial disclosure should occur in every case, even when the client tells you (as they often do), "My spouse knows everything I have".

Accordingly, step 3 is the exchange of a disclosure brief, complete with Form 13 Financial Statement, complete income tax returns with notices of assessment for three years, three recent paystubs and statements proving the values of all major investments and debts. In the event one party is self-employed, corporate tax returns and business financial statements for the past three years should be attached as well.[14] This is not to say this is all the disclosure that should ever be produced but it should constitute the minimum.

This disclosure is not costly nor does it take a lot of time to produce. I usually have an associate work on the draft with the client, either by phone or in person, and then meet with me a week or so later to go over everything in detail, making sure all the appropriate back-up is attached, to have it revised, signed and commissioned.

Sometimes lawyers get fussed about valuations. Nothing in the caselaw requires spouses to spend thousands of dollars on costly valuations.[15] The disclosure should, however, be more than a few lines on one page appended as a schedule, which, unfortunately at present, seems to be the norm.

As long as the material is exchanged between counsel and there is a good record of it,[16] I see no need to attach anything to the actual contract. It's a waste of paper and the Financial Statement only represents a portion of the disclosure provided anyways. It is important, however, to ensure that in the "ILA/Financial Disclosure" section of the agreement the drafter highlights that not only sworn Financial Statements but supporting documentation was also provided. A good example from a recent agreement is as follows:

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[14] While it's tempting not to complete the "budget" section (after 20 years if I have to ask one more client how much they spend on toiletries I think I'm going to lose it), it should be completed as well as it provides a good yardstick against one's claimed income.

[15] Having said that, if during the negotiations one party disputes the value of the other's business the issue will need to be resolved one way or the other because by the end of the process the parties both need to be satisfied with the values put forth by the other. As a result, in some cases a valuation by a chartered business valuator may be the best way of proving such value.

[16] I typically keep all financial disclosure in two folders, one from my client and the other from the other party.

INDEPENDENT LEGAL ADVICE/FINANCIAL DISCLOSURE

Selma and Rick each acknowledge that:

(a) Selma has had independent legal advice from Jack Straitman, Barrister & Solicitor;

(b) Rick has had independent legal advice from Brahm D. Siegel, C.S., Barrister & Solicitor;

(c) each of them has read the agreement in its entirety and has full knowledge of its contents;

(d) each understands the nature and consequences of the agreement and his or her respective rights and obligations hereunder;

(e) each believes this agreement is fair and reasonable and that its provisions are entirely adequate to discharge the present and future responsibilities of the parties and will not result in circumstances unconscionable to either party;

(f) each has made full financial disclosure to the other of his and her respective financial assets and liabilities as evidenced by sworn Financial Statements sworn by Selma on August 21, 2014 and by Rick on August 20, 2014. Further, Rick has provided tax returns, proof of his investments and balance sheets, income statements and T3 slips for the Kawartha Family Trusts referred to above in paragraph 12;

(g) each has given all information and particulars about his or her income, assets and liabilities that have been requested by the other, is satisfied with the information and particulars received and acknowledges that there are no requests for further information that have not been met to his or her complete satisfaction; and

(h) is entering into this agreement without any undue influence, fraud or coercion whatsoever and is signing this agreement voluntarily.

4. At Least One Four-Way Without Prejudice Meeting Must Be Held

After the financial disclosure has been exchanged the parties and counsel should have a without prejudice four-way meeting. The meeting should take place even if counsel believe the parties are *ad idem* on the key points.[17] Even on files where I believe, going in, that the meeting will not lead to anything new being agreed upon I am always proven wrong, for there always seems to be a myriad of things that were either not fully understood by one party or topics that the

[17] e.g., full releases and waivers on spousal support and property. Almost every client marrying for the second (or third) time will want these and will tell you, way before the meeting, their spouse has already agreed to it.

lawyers bring up which neither party even thought about which require some fulsome discussion.[18]

Even in cases where both parties have been married before and agree to full releases and waivers, it is very helpful, not only for the parties but for the integrity of the agreement, for the lawyers to discuss, openly, what "full and final releases and waivers" means. Sometimes after discussing this, one party changes his mind and the terms are modified so that they apply only in the event the parties do not have children or only after their marriage lasts less a certain minimum period. Other times, the parties have fully understood what the terms mean in which case sitting around a table and confirming them, with the lawyers serving as devil's advocates ensuring that all scenarios have been contemplated, is a solid proving ground and reality-testing as to whether the parties are being reasonable and fair with each other.

5. The Reporting Letter

After the four-way meeting each lawyer reports in writing to his/her client on what transpired, making sure the letter reflects on what each party's position was, what the lawyer's advice is and what they feel the next steps should be. The importance of all of this documentation proves invaluable in cases of future attack where the court is often called upon to piece together what the terms of the agreement were – or were not.[19] It also is usually very helpful in cases where the negotiations were complicated, the client needs to process what happened and there are various scenarios to be considered. Laying it out carefully in writing for the client helps lead to more fuller discussions between lawyer and client and, hopefully, a more carefully considered contract.

6. Term Sheet

In most cases the four-way meeting is a success and all four participants leave with a good understanding of what has been agreed to. This should then be followed up by a short letter from one counsel to the other, outlining the terms understood to be agreed upon at the four-way. The letter should make it clear that *before* the contract will be prepared, a letter from the other lawyer is requested confirming that the proposed terms are in fact agreeable in all respects.

The benefit of this step cannot be overstated. First, because the letter is usually sent a few days after the meeting, it gives each side time to consider and reflect upon what was discussed. Although to counsel these issues are often rather straight-forward and customary, for clients they are sometimes overwhelming. Things happen in a blur and they need time to understand

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[18] e.g., life insurance, how long a spouse gets to stay in a home if the other dies, changing wills to reflect the terms of the agreement to name a few.

[19] See for example *D'Andrade v. Schrage,* 2011 ONSC 1174 (Ont. S.C.J.) at paras 35-40, where Justice Sachs relied upon a reporting letter from this writer to the client as a "reliable account" of what transpired at the four-way meeting, the terms of which were later incorporated into the marriage contract.

what was discussed, read the reporting letter, perhaps even discuss it with counsel and make sure they are still good with the terms discussed at the meeting.

The second benefit is that almost always the letter that comes back either modifies the proposed terms or significantly changes them. This is either because one party (or one lawyer) misunderstood something that was discussed at the meeting, or sometimes one party changes their mind. This is a good thing and should be welcomed, for it shows how an agreement comes together. It shows the back and forth involved in a genuine negotiation and prevents agreements from being drafted which are later labelled unconscionable.[20]

Counsel should bear in mind that in rare cases this step is where one party realizes they do not really want the contract at all. Often it is only at this stage where one client appreciates the larger consequences of what is on the table and after careful reflection and discussion with counsel come to realize that the terms are not in their interests. Whether the parties later revisit the issues at a subsequent four-way meeting and finally agree on terms or marry/live without a contract, it is submitted that both scenarios are far better than a contract being signed where one party either does not really like what is being proposed or does not understand its implications fully.

Finally, it should go without saying that as with any important letter, a draft should be sent to the client first and be clearly approved by them by email before it is signed and sent off to the other lawyer.

7. Drafting & Signing

Once the confirming letter comes back approving the terms, you are then – and only then – ready to proceed to draft. Draft the agreement, review it with the client in all respects before it is sent to the other lawyer (making sure to get the client's approval by email on it before it is sent out) and forward it to the other side for approval as to form and content. No matter what, do not have your client sign and send over four copies until the other lawyer has approved the draft.

If things go smoothly the other lawyer will approve the draft in short order with a simple email stating it is satisfactory and to please send over executed copies. If the other lawyer writes back seeking changes, these will obviously have to be dealt with, negotiated if necessary and resolved before the final version can be signed.[21]

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[20] In rare cases (I can only think of one in my career) another four-way meeting will be necessary.

[21] It should go without saying that all drafts should be retained in the file, making it clear the date when they were prepared and sent to the other side if applicable. I say "if applicable" because often I go through a few different drafts with the client before he and I are satisfied with it.

You can then get the client in, have him/her sign and initial four copies and courier them to the other side. He meets with his client, has her sign and initial, and return two to you. The file is now complete.

Key Clauses: Releases & Waivers, Summary Judgment and Bifurcation

As mentioned previously, the Compact does not seek to manage the contents of what couples agree to in their contracts; it is only a code designed to strengthen and increase the chances that what has been agreed to will be upheld.

In order to further bolster these agreements, a few extra clauses are recommended for inclusion in every contract. These clauses are consistent with leading precedents in three Supreme Court of Canada family law cases: *Hartshorne v. Hartshorne,*[22] *Miglin v. Miglin*[23] and *Hyrniak v. Mauldin.*[24]

(a) Hartshorne

In *Hartshorne*, the parties signed a marriage contract on their wedding day. It preserved the right to spousal support but precluded any division of property, save and except for allowing the wife a 3% interest per year in the family home (owned by the husband) for each year of their marriage, up to a maximum of 49%.

At trial[25], the judge found the agreement was "unfair" as per the provisions of the British Columbia *Family Relations Act*,[26] and awarded the wife $1,415,000, which was approximately

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[22] *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22 (Can LII).

[23] *Miglin v. Miglin*, (2003) SCC 24 (CanLII), [2003] 1 S.C.R. 103.

[24] *Hyrniak v. Mauldin*, [2014] 1 SCR 87; 366 DLR (4th) 641 (S.C.C.).

[25] *Hartshorne v. Hartshorne*, 1999 CanLII 5113 (B.C.S.C), var'd 2001 B.C.S.C. 1678 (CanLII).

[26] *Family Relations Act*, R.S.B.C., 1996, c. 128. Section 65, which is a different (and lower) standard from s. 5(6) of Ontario's *Family Law Act*, states:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

$1,135,000 than she was entitled to pursuant to the terms of the agreement. The husband's appeal failed,[27] following which he appealed to the Supreme Court of Canada.

In granting the appeal and upholding the contract the Court emphasized that provided parties clearly intend to opt out of court involvement great deference should be given to their wishes. As Bastarache J. said, speaking for the majority:

> To give effect to legislative intention, courts must encourage parties to enter into marriage agreements that are fair, and to respond to the changing circumstances of their marriage by reviewing and revising their own contracts for fairness when necessary. Conversely, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess the arrangement on which they reasonably expected to rely. Individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so: see generally *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83 (CanLII).[28]

The court noted that by signing the agreement the parties entered their marriage with certain expectations on which they were reasonably entitled to rely. Their intention, as expressed in the agreement, was to leave each with what he or she had before the marriage. The court

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> (e) the needs of each spouse to become or remain economically independent and self sufficient, or
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> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.
>
> (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
>
> (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[27] *Hartshorne v. Hartshorne*, 2002 B.C.C.A. 587 (CanLII).
[28] *Ibid* at 36.

noted, bluntly, that if the wife truly believed that the agreement was unacceptable at that time, she should not have signed it.[29]

The court further observed that parties are expected to fulfill the obligations they undertake in an agreement; it is not open for one to simply later state that he or she did not intend to live up to his or her end of the bargain. While it is true that in some cases agreements that appear to be fair at the time of execution may become unfair at the time of separation, depending on how the parties' lives have unfolded,[30] in a framework where parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained.[31]

Since the key question thus becomes whether the operation of the agreement will prove to be unfair (or "unconscionable" in Ontario) in the circumstances present *at the time of separation*, the following clause is recommended for all contracts:

> HARTSHORNE
>
> As required by the Supreme Court of Canada in the case of *Hartshorne v. Hartshorne*, in preparing this agreement Selma and Rick have discussed with each other and their solicitors their notions of fairness and the circumstances under which the terms of this agreement were negotiated. They agree and acknowledge that the terms of this agreement are presently fair and will always be seen by them to be fair in the future, regardless of what happens to either of them, and regardless of how their lives unfold after the execution of this agreement. Neither Selma nor Rick will attempt to have this agreement or any provision thereof set aside in the future on the grounds that their lives or financial arrangements unfolded differently than either had anticipated.

(b) Miglin

Not every marriage contract or cohabitation agreement contains full releases and waivers in respect of spousal support, but for those that do, counsel and the courts have to contend with the seminal case of *Miglin,* which directs that where an agreement contains a final release of spousal support a two-stage analysis is required.

The first stage considers the circumstances of the parties at the time the agreement was entered into, including issues such as financial disclosure, legal advice and balance in bargaining power. These will be adequately addressed by following the Compact.

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[29] *Ibid* at 65.

[30] Which the court called the "triggering event" instead of a "separation".

[31] *Ibid* at 67.

As discussed above however, a finding that an agreement is satisfactory at stage one does not end the inquiry. The court must assess whether circumstances have changed in ways that the parties may not have contemplated, whether the agreement is still in compliance with the objectives of the *Divorce Act* or whether enforcing the agreement in the circumstances as at marriage breakdown would lead to a situation that the court cannot condone. Yet it is *precisely* for this reason why couples often want a cohabitation agreement or marriage contract with full releases and waivers - to insulate themselves from the myriad of financial possibilities which could result had the parties not opted to decide for themselves how things will look upon separation.

For these reasons, and specifically because section 33(4) of the *Family Law Act* provides that a court may set aside a provision for support or a waiver of the right to support in a domestic contract and may determine and order support in an application although the contract contains an express provision excluding its application if the provision for support or the waiver to support results in "unconscionable" circumstances, every agreement containing full releases and waivers should contain the following language to ensure the court exercises its discretion in favour of not interfering with the contract:

MIGLIN

(a) Selma and Rick realize that their respective financial circumstances may change in the future, by reason of career reversals, loss of employment, retirement, lack of employment opportunities, contingencies of life including illness and disability, inheritances, adverse economic circumstances such as rising costs and inflation, the mismanagement of funds by themselves or others, financial reversals, poverty, or a general change in family conditions, *inter alia*. No such change in circumstances, whether catastrophic, drastic, radical, material, profound, unanticipated, foreseeable, foreseen, unforeseeable, unforeseen or beyond imagining, and no matter how extreme or consequential for either or both of them, whether or not the change is causally connected to the marriage, and whether or not such change arises from a pattern of economic dependency related to the marriage, will alter this Agreement, or entitle either party to support from the other or result in circumstances that one of them ever considers as "unconscionable" pursuant to section 33(4) of the *Family Law Act*.

(b) For greater certainty, Selma and Rick acknowledge that:

  (i) they are financially independent, do not require financial assistance from the other nor will they ever seek financial assistance from the other in the future;

  (ii) they have negotiated this Agreement in an unimpeachable fashion and that the terms of this Agreement fully represent their intentions and expectations;

(iii) they have had independent legal advice and all the disclosure they have requested and require to understand the nature and consequences of this Agreement and the implications of waiving support, and to come to the conclusion, as they do, that the terms of this Agreement, including the release of all spousal support rights, reflects an equitable arrangement for support in their cohabitation, marriage or upon a breakdown of the relationship;

(iv) the terms of this Agreement substantially comply with the overall objectives of the *Family Law Act* and the *Divorce Act* now and in the future, and Selma and Rick have specifically considered the provisions and factors set out in sections 30 and 33 of the *Family Law Act*, sections 15.2 and 17 of the *Divorce Act* and the *Spousal Support Advisory Guidelines*;

(v) they have been advised by their respective solicitors of rulings in the Ontario courts in which the court has awarded spousal support, notwithstanding that full releases of spousal support have been contained in an agreement. Selma and Rick require the courts to respect their autonomy to achieve certainty and finality in their lives and to enforce this Agreement and specifically this spousal support release;

(vi) this Agreement may be pleaded as a complete defence to any claim brought by either party for spousal support in contravention of this Agreement; and

(vii) the terms of this Agreement and, in particular, this release of spousal support, reflect their own particular objectives and concerns, and are intended to be a final and certain settling of all support issues between them. Among other considerations, Selma and Rick are also relying on this spousal release, in particular, upon which to base their future lives.

(c) If at any time, a party is unable to be self-supporting in whole or in part and the other party voluntarily assumes support directly or indirectly for the non self-supporting party, such voluntary payments will not constitute a waiver of the terms of the Agreement, particularly this spousal support release, nor will they create any future responsibility for support.

(d) Selma and Rick intend this paragraph of the Agreement to be forever final and non-variable. In short, they expect the courts to enforce fully this spousal support release no matter what occurs in the future. Neither of them will ever assert that the waiver of support in this Agreement constitutes "unconscionability" under section 33(4) of the *Family Law Act*.

(e) Selma and Rick agree that, as required by the Supreme Court of Canada in *Miglin v. Miglin,* this agreement has been negotiated in substantial compliance with the *Divorce Act* and under unimpeachable conditions. For clarity, this means that neither party was or is subject to any circumstances of oppression, pressure or other vulnerabilities.

(f) Selma and Rick hereby specifically sign this section in the presence of their respective counsel as witnesses (if applicable) and represent and acknowledge that they have been informed of the consequences thereof and are under no duress or misrepresentation. Both agree to be forever barred from making any claim against each other for spousal support, regardless of the circumstances that either may find themselves in after this agreement has been signed and that such circumstances will never be amount to circumstances that are "unconscionable" pursuant to section 33(4) of the *Family Law Act.*

_____ _____

Witness Selma Smith

_____ _____

Witness Rick Jones

Getting the parties to sign at the end of this section of the agreement in addition to the final page of the agreement is an added protection, designed to avoid later claims that "I only signed where my lawyer told me to and never read it."

(c) Hyrniak

In the event that notwithstanding the above-noted clauses, an attack is brought to set aside a contract or part of it, the following clause, consistent with the principles in the ground-breaking case of *Hyrniak v. Mauldin* released last year, should be included to give the defending party (and the court) the tools required to stop the claim from proceeding very far:

HYRNIAK

In the event either Selma or Rick ever challenges this contract or a part of it in court for any reason, the challenging party hereby consents to an order on motion by the defending party dismissing such claim with costs. The parties agree that such a motion shall be brought and granted by way of summary judgment and without the requirement of a case conference under the *Family Law Rules.*

Selma and Rick understand that a motion for summary judgment dismissing such a claim means that no genuine issue for trial exists. Selma and Rick, once again, understand that the terms of this agreement are final and non-variable and that they both fully expect to adhere to such terms

> regardless of the circumstances they find themselves in in the event of a separation, regardless of how such separation may come to pass.

Although not available at the time this paper is being submitted, it is my understanding that changes to Rule 16 (Summary Judgment) in the Family Law Rules are imminent, changes that would more closely align the rule to the general principles set out in *Hyrniak*.

(d) Bifurcation

Nothing riles a client who thought his contract was impervious to attack like receiving a letter from an expert seeking a laundry list of financial disclosure dating back from prior to marriage – except, perhaps, a judge who orders it.

Not one single client who ever signs a contract with full releases and waivers ever thinks that will occur – yet it does. Judges are routinely faced with requests for financial disclosure in the face of contracts which, on their face, appear to make such disclosure irrelevant. This enrages clients seeking to uphold the contract, furthers litigation and increases the chances of destructive and expensive trials.

In the face of such requests, lawyers often move for a "bifurcation" order under Rule 12(5) of the *Family Law Rules* which provides as follows:

> 12(5) If it would be more convenient to hear two or more cases, claims or issues together or to split a case into two or more separate cases, claims or issues, the court may, on motion, order accordingly.[32]

If the terms of the Compact are followed, allegations of unfairness, duress and lack of disclosure will hopefully become a thing of the past. Further, when the suggested key clauses noted above in respect of *Hartshorne*, *Miglin* and *Hyrniak* are added in, it is hard to fathom of a situation that will cry out for redress from the court. However, in the unlikely event a contract negotiated by way of the Compact is ever challenged in court and the motion for summary judgment fails, all such contracts should contain a "bifurcation" clause which guarantees that in the event of a challenge, the issue of the validity of the contract shall be split and tried first – bifurcated – from the other claims (spousal support and/or equalization).

The benefits of such a clause are significant. It increases the chances that the case will settle before the first trial, as overturning the agreement will now require two trials, not one, which is an expensive proposition and requires a truly steely heart ready for a lot of difficult litigation. Similarly, in the event the first trial proceeds and the agreement is upheld, it increases the chance that the second trial will not occur. Third, it reduces the amount of disclosure and

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[32] While by no means exhaustive, the following are noteworthy cases involving a judge having to wrestle with this issue: *Mantella v. Mantella*, 2006 CanLII 10526 (Ont. S.C.J.); *Simioni v. Simioni* (2009), 74 R.F.L. (6th) 202 (Ont. S.C.J.); *Baudanza v. Nicoletti* (2011), 11 R.F.L. (7th) 329 (Ont. S.C.J.); *C.M.G. v. R.G.*, 2013 ONSC 961 (Ont. S.C.J.); *Dillon v. Dillon*, 2013 ONSC 7679 (Ont. S.C.J.); and *Balsmeier v. Balsmeier*, 2014 ONSC 5305 (Ont. S.C.J.).

documentation required as the first trial will be limited only to whether the agreement should be upheld or not. If it is upheld, the losing party should pay significant costs and will be under significant pressure to accept the terms and move on with life. If it is set aside, only then will significant disclosure be required in order to assess what the spousal support and/or equalization should be.

Here is the precedent clause suggested for inclusion:

> BIFURCATION
>
> (1) Neither Selma nor Rick ever intend to set aside this agreement or a provision thereof. However, in the event either party ever attempts to do so and a claim for dismissal based on summary judgment fails, that party shall consent to an order that the trial of the matter shall be bifurcated such that the first issue to be tried is whether the circumstances at the time this agreement were negotiated justify a finding that this agreement should be found not to be valid. Only the parties' financial disclosure existing at the time this agreement was negotiated shall be producible for this part of the case.
>
> (2) Only in the event the court finds that the circumstances at the time this agreement were negotiated justify a finding that this agreement should be set aside shall each party be then at liberty to request from the other, and seek from court, financial disclosure in addition to the parties' income and net worth at the time this agreement was negotiated.

While of course no language in a contract can ever totally in and of itself preclude a court from assessing or analyzing whether the terms run afoul of the legislation, the combination of the Compact along with the above-noted clauses, in addition to the other customary clauses commonly included,[33] will hopefully lead to significantly fewer attacks on cohabitation agreements/marriage contracts in the future and even fewer successful ones.[34]

Final Thoughts: Pushing Back & Letting Go

Lawyers who intend to follow the Compact will benefit from knowing that their agreements are strong and will be upheld. Sometimes however, clients chafe and push back at the steps involved. Usually, this occurs mid-way through the process, because they have unrealistic

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[33] Definition clause, severability clause, non-representation clause, governing law clause, amendment clause, general release clause, assignment clause, etc.

[34] This is not to say that every contract presently in existence is vulnerable. All contracts, even ones prepared in accordance with the terms of this paper, are vulnerable. The question is to what extent. Following the terms of the Compact establishes a standard by which the courts can more clearly and adequately assess the risk of vulnerability.

expectations about timing or cost and do not know how easy it is to set aside contracts when the basic fundamentals are not followed.

In order for the Compact to work smoothly, it is incumbent on both lawyers to explain, *from the outset, especially at the inquiry or consultation stage*, that there is a process, that it will take at least a few months and that each step is crucial to protecting the integrity of the agreement.[35] When the lawyer does a good job adjusting the client's expectations right from the beginning this way, the level of pushback is usually very small, although at times the lawyer may need to remind him of the progress being made, where the finish line is, what the next steps, and why each is important.

In the unusual event a client who appeared to be initially on board with the steps of the Compact later gives you a hard time and refuses to follow them, what to do? What of the client who informs you, a month before the wedding, that he and his bride-to-be have decided they do not want to move the wedding date, do not want to complete the steps after the honeymoon and want the contract drafted and signed this week?

The answer is simple: you tell the client two things. First, while it is his life and his choice, an agreement signed in such a fashion will be vulnerable to attack and it will be no fun wondering whether, if the marriage ever breaks down, it will or will not be set aside. Second, you as the lawyer will not participate in such an agreement. You have agreed to follow the terms of the Compact and have done so for good reason.

In the event the client persists, you simply politely and respectfully inform him he can pick up his file tomorrow with the appropriate refund cheque for all unused trust funds. While some clients may then back down and agree to stay the course until all steps are completed, many will not. To those clients, you should close up the file quickly, making sure to properly document what happened, and wish them well.

Conclusion

The steps in the Compact are designed to be followed in every single case involving a marriage contract or cohabitation agreement, regardless of the amount of money involved, the level of experience of counsel or the sophistication of the client. It is this level of consistency which, over time, will cause the Compact to become the routine way of doing these agreements. As they do, judges will have an easier time calling out those that should be set aside and firmly encouraging all the rest to stop wasting their time and money and follow its terms.

That is not to say that the steps and suggested clauses outlined in this paper are forever fixed and non-variable. As I said at the outset, this is simply an invitation, a proposal. I look forward

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[35] I sometimes (crassly) tell clients that if the steps are not followed from beginning to end the client runs the risk that a judge will treat the agreement like toilet paper. While not the most professional of metaphors, it almost always brings home the point to clients that with a stroke of the pen, despite both parties' intentions at the time the contract is signed, the client's wealth can be slashed and lives upturned.

to consulting with colleagues, the bench, LAWPRO and the Law Society, and revisiting the terms every few years, with the expectation that new points will be added or revised.

By making this proposal and inviting all lawyers to follow the Compact, at the same time I wish to definitively state that I am not saying that all existing contracts which did not follow the Compact are invalid, unconscionable or even vulnerable to attack. That would be irresponsible. All I am saying is that the time has come for some clear uniformity in terms of how we as the Bar approach these contracts and the Compact is my attempt to help clear a path towards this goal.

I hope that you will seriously consider joining me in adopting the Compact as part of our daily practice. If this occurs, I am really looking forward to seeing an *increase* in the number of family lawyers prepared to take on these contracts, a corresponding *increase* in the number of these kinds of contracts being completed, and, most of all, a significant *decrease* in the amount of litigation over them.

Brahm D. Siegel, C.S.

March 30, 2015