

PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;"><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist is designed for use with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist, the FAMILY PRACTICE INTERVIEW (D-1) checklist, and the FAMILY LAW AGREEMENT PROCEDURE (D-2) checklist. This checklist does not include provisions regarding separation, although they are common in marriage agreements. For the drafting of separation provisions, refer to the SEPARATION AGREEMENT DRAFTING (D-3) checklist. Also, this checklist is not specifically designed to relate to cohabitation agreements, although many of the provisions will apply. 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 June 1, 2015.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li>• <b>Family Law Act.</b> On March 18, 2013, the <i>Family Law Act</i>, S.B.C. 2011, c. 25 (the “<i>FLA</i>”) came into force, along with accompanying amendments to the Provincial Court (Family) Rules, B.C. Reg. 417/98 (see B.C. Reg. 132/2012 and B.C. Reg. 122/2014) and the Supreme Court Family Rules, B.C. Reg. 169/2009 (the “<i>SCFR</i>”; see B.C. Reg. 133/2012, B.C. Reg. 249/2014, and B.C. Reg. 104/2015, effective July 1, 2015). Amendments to the <i>FLA</i> were made in the <i>Justice Statutes Amendment Act, 2014</i>, S.B.C. 2014, c. 9, effective May 26, 2014. The <i>FLA</i> repealed the <i>Family Relations Act</i>, R.S.B.C. 1996, c. 128 (the “<i>FRA</i>”) and effected fundamental changes to family law in B.C., particularly regarding children and the division of property after the breakdown of a relationship. The <i>FRA</i> will continue to affect orders and agreements made under it, as well as cases commenced under the <i>FRA</i> but not concluded by the time the <i>FLA</i> came into force. Consider the transition provisions of the <i>FLA</i> when advising clients regarding family law proceedings that were under way when the <i>FLA</i> came into force. For educational material about the <i>FLA</i>, including a concordance between the <i>FRA</i> and the <i>FLA</i>, see <a href="http://www.justicebc.ca">www.justicebc.ca</a>. The <i>Family Law Act Transition Guide</i> is available from the Continuing Legal Education Society of British Columbia.</li> <li>• <b>Unmarried spouses.</b> Family law agreements made before, during, or after a relationship between unmarried spouses (whether of the same or the opposite sex) are subject to judicial review for fairness on the same basis as agreements made between married spouses. Review <i>FLA</i>, Part 5, which provides for division of property between spouses (married and unmarried alike). Review <i>FLA</i>, Parts 3 and 4 regarding the regime changes concerning children, and review <i>FLA</i>, Part 7 concerning support.</li> <li>• <b>Marriage agreements.</b> The <i>FLA</i> does not identify marriage agreements as such, but provides that the parties may execute agreements on a range of matters, such as property division and child support, whether they are presently matters in dispute or are matters that may be the subject of future dispute: see <i>FLA</i>, ss. 6, 92, and 148. Note that there are limits on enforceability of agreements as to parenting, guardianship, and property division (<i>FLA</i>, ss. 44, 50, and 93).</li> <li>• <b>Law Society Rules.</b> On July 1, 2015, revised and consolidated Law Society Rules will be in effect. For a redlined version of the draft renumbered rules, providing background information and a historical table showing the new and old numbers assigned to each rule, see: <a href="http://www.lawsociety.bc.ca/docs/newsroom/highlights/Draft-LawSocietyRules2015-redlined.pdf">http://www.lawsociety.bc.ca/docs/newsroom/highlights/Draft-LawSocietyRules2015-redlined.pdf</a>.</li> </ul>	

PROVISIONS TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> <li>• <b>Code of Professional Conduct for British Columbia (the “BC Code”).</b> The confidentiality restrictions in Appendix B, paragraph 4(c.1) were amended in April 2015 and allow parenting coordinators some discretion to disclose information. Rule 3.6-3, commentary [1] regarding the duty of candour owed to clients respecting fees and other charges for which a client is billed was amended in June 2015. Effective July 2015, rule 3.7-9 will require that a lawyer promptly notify the client, other counsel, and the court or tribunal of the lawyer’s withdrawal from a file.</li> <li>• <b>Articled students as commissioners.</b> Effective September 1, 2015, articled students and temporary articled students will be commissioners for taking affidavits in British Columbia for the purposes of s. 60(1) of the <i>Evidence Act</i>, R.S.B.C. 1996, c. 124 (Commissioners for Taking Affidavits for British Columbia Regulation, B.C. Reg. 142/2015). Principals, who remain responsible for students’ actions, must ensure students understand the effect of acting as commissioner.</li> <li>• <b>Incapacity and adult guardianship legislation.</b> Amendments to the <i>Power of Attorney Act</i>, R.S.B.C. 1996, c. 370, and <i>Representation Agreement Act</i>, R.S.B.C. 1996, c. 405, in effect March 25, 2015 (<i>Justice Statutes Amendment Act, 2015</i>, S.B.C. 2015, c. 6) provide for termination upon separation of spouses if a spouse is, respectively, an attorney or representative.</li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li>• <b>Aboriginal law.</b> If the client or the other party has ties to an Aboriginal community, special considerations may apply (e.g., see items 1.7 and 2.18.6 in the FAMILY PRACTICE INTERVIEW (D-1) checklist); Note the requirements of <i>FLA</i>, Part 10, Division 3, which provide for standing and notice in cases concerning Nisga’a and treaty first nations children and treaty lands. Review the new federal <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>, S.C. 2013, c. 20, which came into full effect on December 16, 2014 (see SI/2013-128). Under the new legislation, certain First Nations, not on the schedule to the <i>First Nations Land Management Act</i>, had one year (during a transition period from December 16, 2013 to December 15, 2014) to implement their own matrimonial property laws. Beginning December 16, 2014, the new federal law applies to First Nations who have not enacted their own matrimonial real property laws. First Nations are not limited to the transition period to take steps to ratify their own laws and may enact their community-specific laws at any time. The Act applies to married and common-law spouses living on reserve land where at least one spouse is a First Nations member or an Indian. It provides separate regimes for matrimonial property division for member and non-member spouses on reserve and is very different from the provincial legislation. Consider whether a lawyer with Aboriginal law experience should be consulted. Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Points” section of the CLEBC website (<a href="http://www.cle.bc.ca">www.cle.bc.ca</a>) and in other CLEBC publications.</li> <li>• <b>Additional resources.</b> For more information on drafting of family agreements, see <i>Family Law Agreements—Annotated Precedents</i>, 3rd ed., looseleaf and online (CLEBC, 1998).</li> </ul>	

PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Date of Agreement</li> <li>2. Names and Addresses of Parties</li> <li>3. Recitals</li> <li>4. Introductory/Interpretation Clauses</li> <li>5. Support of Spouses and Children</li> <li>6. Ownership of Property</li> <li>7. Responsibility for Debts</li> <li>8. Management of Affairs</li> <li>9. Personal Decisions</li> <li>10. Provision for Death</li> <li>11. General Clauses</li> <li>12. Substantive Terms with Third Parties</li> <li>13. Schedules</li> <li>14. Appendices</li> </ol> <p style="text-align: center;"><b>CHECKLIST</b></p> <ol style="list-style-type: none"> <li><b>1. DATE OF AGREEMENT</b> <ol style="list-style-type: none"> <li>1.1 Depending on the use to which the document is put, it may be a fraud on either the court or the Canada Revenue Agency to indicate that an agreement was executed on an earlier date than the one on which it was actually signed.</li> </ol> </li> <li><b>2. NAMES AND ADDRESSES OF PARTIES</b> <ol style="list-style-type: none"> <li>2.1 Confirm compliance with Law Society of British Columbia Rules on client identification and verification, and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Complete the FAMILY PRACTICE INTERVIEW (D-1) checklist.</li> <li>2.2 Set out full name and address of prospective spouse #1. Include a defined term to use when referring to the first prospective spouse throughout the agreement, such as their first name.</li> <li>2.3 Set out the full name and address of prospective spouse #2. Include a defined term to use when referring to the second prospective spouse throughout the agreement, such as their first name.</li> <li>2.4 Others. Typically, there are no signatories to marriage or cohabitation agreements other than the spouses.               <ol style="list-style-type: none"> <li>.1 If there are third parties with whom the spouses are contracting regarding their domestic arrangement (e.g., other co-habitants in a residence, other parents to children, or partners in property), third-party signatories to the agreement might be desirable or necessary. However, consideration should be given to whether any obligations between the spouses and third parties should be addressed in a separate agreement referred to and/or appended as a schedule to the marriage or cohabitation agreement.</li> </ol> </li> </ol> </li> </ol>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.2 If one of the contracting parties is bringing a child into the relationship, review <i>FLA</i>, s. 44 which places restrictions on what can be agreed upon <i>only</i> by a child’s guardians, and says that an agreement about parenting arrangements is only binding if made <i>after</i> separation or when the parties are <i>about to separate</i> and the terms are to be effective on separation. Avoid terms relating to parenting arrangements of future children.</p> <p>Note also <i>FLA</i>, s. 50: except under the <i>Adoption Act</i>, R.S.B.C. 1996, c. 5, or the <i>Child, Family and Community Service Act</i>, R.S.B.C. 1996, c. 46, <i>only</i> parents can become a child’s guardian by agreement, and non-parent guardians must be appointed by the court.</p> <p><b>3. RECITALS</b></p> <p>3.1 Particulars of marriage/marriage-like relationship.</p> <p>.1 Parties are about to marry or enter into a marriage-like relationship.</p> <p>.2 If applicable, date and place of marriage or date of commencement of cohabitation.</p> <p>.3 If applicable, intention to marry and expected date of marriage (if known).</p> <p>3.2 Parties.</p> <p>.1 Ages and birth dates.</p> <p>3.3 Children.</p> <p>.1 Names, ages, and birth dates.</p> <p>.2 Whether children are of a previous marriage/marriage-like relationship.</p> <p>.3 If no children, are any expected?</p> <p>3.4 Purpose of agreement.</p> <p>3.5 Issues to be settled by the agreement.</p> <p>.1 Management of, ownership in, or division of family property or other property acquired prior to and during the marriage/marriage-like relationship. Note <i>FLA</i>, ss. 84 and 85.</p> <p>.2 Management of, ownership in, or division of family property or other property after separation (refer to the SEPARATION AGREEMENT DRAFTING (D-3) checklist for specific provisions).</p> <p>.3 Management of affairs during the marriage/marriage-like relationship or upon death of one of the parties (consider the effect of wills made after the marriage agreement). Note the <i>Wills, Estates and Succession Act</i>, S.B.C. 2009, c. 13 (the “<i>WESA</i>”), which came into force on March 31, 2014 and altered substantively the law of wills and estates in British Columbia.</p> <p>.4 Maintenance of spouses during the marriage/marriage-like relationship or after separation.</p> <p>.5 Avoid any terms relating to maintenance, guardianship, parenting time, custody, and access of children during the marriage/marriage-like relationship.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>Note: <i>FLA</i>, s. 148(1), which provides that an agreement about child support is only binding if made <i>after</i> separation or when the parties are <i>about to separate</i> and the terms are to be effective on separation.</p> <p>Note: <i>FLA</i>, s. 44, which places restrictions on what can be agreed upon <i>only</i> by a child’s guardians and that an agreement about parenting arrangements is only binding if made <i>after</i> separation or when the parties are <i>about to separate</i> and the terms are to be effective on separation.</p> <p>3.6 Previous agreements, including marriage agreements.</p> <p>3.7 Previous and current court orders.</p> <p>3.8 Previous and current legal proceedings.</p> <p>3.9 Legal and municipal description of family residence.</p> <p>3.10 Schedule of property (assets and liabilities) of each party as of the outset of cohabitation. Caution: the property regime under the <i>FLA</i> entitles each spouse to one-half of all property (except defined excluded property) owned by at least one spouse at the time of separation. This includes property beneficially owned and any increase in the value of excluded property over the period of the relationship (s. 84). This means that an accurate assessment of the property and value each party brings into the relationship is critical to assessing what the consequences may be on a later separation. Ensure full disclosure of all assets, including bank and investment accounts, pensions, accounts receivable, intellectual property, interests in trusts, and cash surrender value of life insurance or other life insurance. Insist on values being either agreed upon or confirmed by appraisals or valuations.</p> <p>Note: The <i>FLA</i> deals with “family property”. The <i>FRA</i> term “family assets” is no longer applicable.</p> <p>.1 Spouse #1.</p> <p>.2 Spouse #2.</p> <p>3.11 Statement of awareness of assets or liabilities or both of other party; consider provision to ensure full disclosure and/or attach sworn statements of property. Consider comprehensive schedules to support the value of critical assets and debts at the commencement of the relationship.</p> <p>3.12 Statement of what the parties acknowledge to be excluded assets within the meaning of <i>FLA</i>, s. 85, if applicable; release of claim to, or statement of assets that are not to be treated as, family property.</p> <p>3.13 Statement of occupations and incomes of parties.</p> <p>.1 Spouse #1.</p> <p>.2 Spouse #2.</p> <p>.3 Dependent children.</p> <p>3.14 Statement relating the recitals to the rest of the agreement.</p> <p>.1 Consider recitals as minimum standards of material representations.</p> <p>.2 Consider warranty of accuracy of respective representations.</p> <p>.3 Consider a statement setting out factors taken into account in making the agreement or referring to a schedule of considerations reviewed by the parties.</p>	

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<p><b>4. INTRODUCTORY/INTERPRETATION CLAUSES</b></p> <p>(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 12.)</p> <p>4.1 Statement that recitals are correct and form part of the agreement.</p> <p>4.2 Statement that any schedules to the agreement form part of the agreement.</p> <p>4.3 Statement of governing law. Consider including a statement that the parties are aware of the <i>FLA</i>, the <i>Divorce Act</i>, and the <i>WESA</i>, and agree that, regardless of any subsequent amendments or legislative changes, the terms in their marriage/cohabitation agreement are intended to apply.</p> <p>4.4 Statement that each party has been advised of his or her rights and has obtained independent legal advice, or has been advised of his or her rights and has chosen not to obtain independent legal advice.</p> <p>4.5 Statement that each party signs the agreement voluntarily, without undue influence or coercion, and that the agreement adequately provides for his or her present and future needs.</p> <p>4.6 Definitions.</p> <p>4.7 Statement that the agreement constitutes the full and final settlement of all issues to which it relates, except that it may be amended by written agreement of the parties (witnessed independently in the same manner as this agreement).</p> <p>4.8 Statement that the parties intend to review the agreement in a certain period of time. Consider a term that if the parties do not review the agreement it will continue and be deemed to be fair. Consider terms to specifically address future children to the extent of their effect on the agreement, concerning both property and support (such as a different regime for spousal support in the event the parties have children). Review <i>FLA</i>, ss. 44(4), 58(4), 93, 148(3), and 164 as to the court’s jurisdiction to alter or set aside agreements about specific issues.</p> <p>4.9 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.</p> <p>4.10 Provisions that the parties have read and understood the contents of the agreement and are aware of the effect, purpose, and intent of the agreement.</p> <p><b>5. SUPPORT OF SPOUSES AND CHILDREN</b></p> <p>5.1 Support of spouses.</p> <p>.1 Responsibility for support of each spouse, or waiver thereof. Note <i>Divorce Act</i>, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2: a waiver of spousal support in an agreement is only one factor considered in an application for spousal support. Note also that the spousal support provisions of the <i>FLA</i> (Part 7, Division 4) track the requirements of the <i>Divorce Act</i>. Consider whether including a waiver of support makes the agreement too “one-sided” and more vulnerable to future challenge as a whole. Consider whether a waiver of support is made in exchange for other consideration in the agreement (e.g., property rights) and consider whether to state this. Consider the Spousal Support Advisory Guidelines (the “Guidelines”, available at <a href="http://www.justice.gc.ca">www.justice.gc.ca</a>) and whether to make</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>a statement of the parties' awareness of the Guidelines and differences between the parties' agreement and the Guidelines.</p> <p>.2 How responsibility is to be met (e.g., by providing home, making monthly payments, setting up trust with life income).</p> <p>.3 Effect of particular circumstances (e.g., young children at home, whether caregiver spouse is working, compensation for foregoing earned income).</p> <p>.4 Statement as to circumstances under which responsibility for support is varied, suspended, or terminated (e.g., on separation, upon completion of a university degree, when disposable incomes become equal, upon illness, disability, or retirement of payor). Consider terms to limit events that will constitute a material change of circumstances sufficient to found variation.</p> <p>.5 Consider whether a spouse may acquire an increasing level of support over time.</p> <p>.6 Consider whether to leave support to the ability of one or either party to apply to court (and address only property issues, e.g., to possibly increase the likelihood of the agreement being upheld if challenged).</p> <p>5.2 Support of children.</p> <p>.1 Provisions regarding children of one spouse from a previous marriage: residence, support, education, adoption, role to be played by stepparent, etc. Consider the enforceability of these clauses, especially if they are intended to set up a framework for child support or time with children in the event of a separation.</p> <p>.2 Provisions regarding support of entitled children may not be enforceable, although terms are often included to document the intentions of the parties and the court can enforce obligations undertaken by a payor in an agreement if they benefit a child. If a separation occurs, child support will be governed by the applicable law at the time, including the Child Support Guidelines. Parties may wish to confirm this in their agreement, although it is not necessary. (Note, the Federal Child Support Guidelines, SOR/97-175, proclaimed under the <i>Divorce Act</i>, apply in B.C. as described in Family Law Act Regulation, B.C. Reg. 347/2012, Part 4.)</p>	
<p><b>6. OWNERSHIP OF PROPERTY</b></p> <p>6.1 General provisions.</p> <p>.1 Whether all or some property owned by either spouse before marriage/marriage-like relationship is to remain as separate property. Consider whether the growth in value or income from separate property will remain separate property or be divided. Give consideration to issues of tracing separate property. Note <i>FLA</i>, s. 85 on excluded property, and <i>FLA</i>, s. 92 on agreements as to property division.</p> <p>.2 Whether all or some property owned by either spouse is to be held as joint property.</p> <p>.3 Whether all or some property acquired by either spouse after marriage/marriage-like relationship is to be held as joint property, and how that intention is to be shown (e.g., registration in joint names; held as tenants-in-common in proportion to contributions; recorded in writing).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>4 <i>FLA</i>, Part 5 regarding the property division rules applies to both married and non-married spouses.</p> <p>5 All property and liabilities of both parties are set out in schedules to the agreement.</p> <p>6 Whether joint property will be held equally or in proportion to contributions. If in proportion, how the proportion will be calculated.</p> <p>7 Give consideration to whether a completely separate property regime is being sought and whether that departs from the <i>FLA</i> to such an extent that it could be considered significantly unfair either at present or in the future.</p> <p>8 Net value of items owned separately by each spouse; difference in net values; whether difference is to be made up by cash payments or whether claim is to be waived and released.</p> <p>9 Give consideration whether one spouse can acquire an interest in the other spouse's separate property over time.</p> <p>6.2 Family residence.</p> <p>1 Whether there is currently a family residence; if so, who is the owner.</p> <p>2 Whether it is to be owned by one spouse or by both spouses as joint tenants or as tenants-in-common; if tenants-in-common, in what proportion. Consider tax implications (e.g., property transfer tax and the result following the death of a spouse).</p> <p>3 Whether it is to be transferred from one spouse to the other, or to a joint tenancy or tenancy in common; if tenancy in common, in what proportion. Consider the tax implications.</p> <p>4 Whether a non-owner spouse may acquire an increasing interest (e.g., 5% every two years).</p> <p>5 Responsibility for paying or discharging any associated encumbrances and obligations; Indemnification of the other spouse.</p> <p>6 Responsibility for paying for repairs and maintenance, insurance (and beneficiary(ies) of insurance), property taxes, utilities.</p> <p>7 Spouses will not sever the joint tenancy, encumber the title, or pledge their interests in it as security. Specify the consequences if this were to occur.</p> <p>8 Whether one or the other spouse (or both) wish to buy out the other's interest. If so, include a buy-out clause and set out what triggers a buy-out and how fair market value is determined. Consider who has right to occupy in the interim.</p> <p>6.3 Other real property.</p> <p>1 Whether to be owned by one spouse or by both spouses as joint tenants or tenants-in-common; if tenants-in-common, in what proportion. Consider tax implications and the result following the death of a spouse.</p> <p>2 Whether to be transferred from one spouse to the other or to a joint tenancy or tenancy in common; if tenancy in common, in what proportion. Consider tax implications.</p> <p>3 Responsibility for paying or discharging any associated encumbrances and obligations; indemnification of the other spouse.</p>	



PROVISIONS TO BE CONSIDERED	NOTES
<p>.4 Responsibility for paying for repairs and maintenance, insurance (and beneficiary(ies) of insurance), property taxes, and utilities.</p> <p>.5 Who has the right to use/occupy the property.</p> <p>6.4 Automobiles.</p> <p>.1 Whether each spouse is entitled to have his or her own automobile and to be entitled to use it as he or she wishes, dispose of it, or encumber it.</p> <p>.2 Whether an automobile is to be designated as a family automobile with each spouse being entitled to equal shares and equal use.</p> <p>.3 Registration of title and whether there will be a transfer of title. Consider any tax implications or the result following the death of a spouse.</p> <p>.4 Obligations to make payments, contribute to insurance and maintenance, and pay operating costs.</p> <p>.5 Whether there is an obligation not to dispose of or encumber the automobile without the consent of the other spouse.</p> <p>6.5 Other chattels.</p> <p>.1 Specific chattels or types of chattels that are to be owned by one spouse and, where appropriate, circumstances, terms, and conditions of use. May include release of any claims under the <i>FLA</i> or any other law.</p> <p>.2 Specific chattels or types of chattels that are to be owned jointly.</p> <p>(a) Payment obligations.</p> <p>(b) Entitlement to use.</p> <p>(c) Obligation not to dispose of or encumber without the consent of the other spouse.</p> <p>.3 Entitlement to use chattels that are owned by one spouse or owned jointly.</p> <p>.4 Designation of chattels acquired during marriage as family property. Note there have been significant changes under <i>FLA</i>, Part 5. Consider the terms necessary to address the client's wishes.</p> <p>.5 Obligation to maintain and contribute to insurance on joint property; beneficiaries of insurance.</p> <p>6.6 Gifts and windfalls.</p> <p>.1 Gifts from a spouse or third party are to be separate property of the donee.</p> <p>.2 Wedding gifts and property purchased from the proceeds of wedding gifts are to be owned jointly.</p> <p>.3 Inheritances are to be separate property of the donee. Specify whether the growth in value, income from, or assets purchased with inherited funds remain separate property.</p> <p>.4 Windfalls, damages from personal injury actions, etc., are to be separate property (or are to be divided equally between the spouses and thereafter to be the separate property of each).</p> <p>6.7 Animals and pets.</p> <p>.1 Right to have animals and pets.</p> <p>.2 Responsibility for animals and pets.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.3 Who gets pets upon separation.</p> <p>6.8 Life insurance.</p> <p>.1 Each spouse (or one spouse) is required to maintain policies as specified until a specified time (e.g., until there is no longer a child dependent on the spouses).</p> <p>.2 Each spouse is required to designate solely the other (or the spouse, or another, or both in trust for the children) as sole beneficiary(ies) under the policy until a specified time (e.g., until there are no longer dependent children).</p> <p>.3 If the spouse defaults in payment, the other may make payment and recover it from the defaulting party, together with expenses necessarily incurred.</p> <p>.4 Neither spouse may borrow money from the insurer on the security of the policy.</p> <p>.5 Each spouse is required to provide the other with evidence that the policy is being maintained as required, or to provide the insurer with authorization to provide the other spouse, upon written demand, with information on the status of the policy.</p> <p>.6 When the event occurs that terminates the obligation to maintain the policies, each party may deal with his or her policies as he or she wishes, free from any claim of the other.</p> <p>.7 Consider any cash surrender value of life insurance policies, who will retain, and whether the policies will be cashed and divided.</p> <p>6.9 RRSPs.</p> <p>.1 To be the separate property of the spouse in whose name each is registered, unless they are registered in the names of both spouses.</p> <p>.2 Consider requirements for equal or spousal contributions, or both.</p> <p>.3 Consider beneficiary.</p> <p>6.10 Pension plans. Review <i>FLA</i>, Part 6 (Pension Division).</p> <p>.1 Whether pension plans are to be the separate property of the spouse in whose name each is registered. Consider provisions concerning division of pension entitlement (<i>FLA</i>, ss. 114 to 123). Consider any supplemental plans. Consider pre- and post-survivor benefits. Have pension plan administrator approve wording of agreement and consider any further documentation required by the plan. Consider seeking expert advice.</p> <p>.2 Whether each spouse releases any interest he or she may have or acquire in the other's Canada Pension Plan benefits and agrees not to apply for a division of the pensionable earnings credits in the event of a divorce (see <i>Canada Pension Plan</i>, R.S.C. 1985, c. C-8, s. 55.2, and the special wording required to waive interests). Refer specifically to <i>FLA</i>, s. 127(2) and ss. 55, 55.1, and 55.2 of the <i>Canada Pension Plan</i> (Canada). Consider a division of Old Age Security, the sharing of which would be administered by the parties.</p> <p>6.11 Bank accounts.</p> <p>.1 Each spouse is entitled to have his or her personal accounts.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.2 Whether contributions are to be made to a joint account, to be used for joint expenses (e.g., food, car, household expenses).</p> <p>6.12 Other provisions regarding specific items or types of property (e.g., consider whether other types of property listed in item 11 of the SEPARATION AGREEMENT DRAFTING (D-3) checklist are relevant).</p> <p>6.13 Specifically address any property that is “excluded” within the meaning of <i>FLA</i>, s. 85.</p> <p>6.14 General provisions regarding property not specifically provided for (e.g., to be the separate property of the party in whose name it is registered or who acquired it, or, if the parties are to have a joint interest, property to be registered in joint names). If the property is not subject to registration, consider a clause to include a list of such property on an appendix or schedule to the agreement.</p> <p>6.15 Release of any claims against the other spouse’s separate property other than those arising under this agreement.</p> <p>6.16 Each spouse has full power over and separate control of his or her separate property and is entitled to income from its lease or disposition.</p> <p>6.17 Neither spouse has a right to compensation for any contribution in respect of any property in which the other has an interest, unless otherwise agreed in writing.</p>	
<p><b>7. RESPONSIBILITY FOR DEBTS</b></p> <p>7.1 Between the parties. Review <i>FLA</i>, s. 86 regarding “family debt”. Consider its effect on the parties’ agreement.</p> <p>.1 Acknowledgement of existence of debts.</p> <p>.2 Provision for payment (set out details in a schedule).</p> <p>.3 Non-existence or negation of non-scheduled debts.</p> <p>7.2 Due to third parties (individually incurred).</p> <p>.1 Existing debts and responsibility for payment.</p> <p>.2 Indemnity of each against third-party claims resulting from failure to pay.</p> <p>.3 Undisclosed debts are to be assumed by the party who incurred them.</p> <p>.4 Neither spouse may contract in the name of the other or bind the other for any debts or obligations without consent; otherwise, will indemnify other spouse from any claims arising from those debts or obligations.</p> <p>7.3 Recovery of specific property loaned.</p> <p>7.4 Property pledged by one spouse to secure debts of the other.</p> <p>7.5 Joint obligations to third parties.</p> <p>.1 Existing joint obligations and responsibility for payment. (Note: where one party assumes responsibility, this will not be sufficient to release the other from liability for the debt unless it is renegotiated with the third party. Can include indemnification from one spouse to another.)</p> <p>.2 To be incurred in future only by agreement.</p> <p>.3 Consider joint debt instruments and liability for same (e.g., joint line of credit).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>7.6 Credit cards.</p> <p>.1 Whether to be used by both spouses, or whether the spouses are to have separate cards.</p> <p>.2 Responsibility for payments.</p> <p><b>8. MANAGEMENT OF AFFAIRS</b></p> <p>8.1 Whether property derived from earnings and income from all sources are to be the separate property of the spouse earning the income or are to be divided equally or in a specific proportion.</p> <p>8.2 Whether each spouse is to deposit a certain sum each month into a joint account (e.g., entire income, half of estimated monthly expenses, share of monthly expenses proportionate to spouse's income), with any surplus at the end of the month to be divided and to become separate property. Consider how specific or general to be, considering the parties' expenses now and in the future and whether they are predictable or not.</p> <p>8.3 Payment of usual household and family expenses (e.g., out of the joint account).</p> <p>8.4 Payment for household acquisitions (e.g., out of the joint account); ownership (e.g., to be held as joint tenants).</p> <p>8.5 Responsibility for household duties (may not be enforceable).</p> <p><b>9. PERSONAL DECISIONS</b></p> <p>9.1 Whether each spouse wishes to sign a document such as an enduring power of attorney or representation agreement authorizing each to act or make health care decisions on behalf of the other in the event of incapacity. Note that changes to enduring powers of attorney were brought into force under the <i>Adult Guardianship and Planning Statutes Amendment Act</i>, S.B.C. 2007, c. 34, in 2011. See <i>Representation Agreement Act</i>, R.S.B.C. 1996, c. 405; <i>Health Care (Consent) and Care Facility (Admission) Act</i>, R.S.B.C. 1996, c. 181; and CLEBC's <i>Family Law Agreements—Annotated Precedents</i>, 3rd ed., chapter 17. Note the <i>WESA</i> and its effect on succession planning. Consider the effects of death or separation on such documents following death or separation (e.g., <i>Power of Attorney Act</i>, ss. 29 and 30; <i>Representation Agreement Act</i>, s. 29). Consider referring the client to a wills and estates lawyer, if instructed.</p> <p><b>10. PROVISION FOR DEATH</b></p> <p>10.1 Whether each spouse will maintain a will making the other spouse (or the children) sole beneficiary(ies). If there are several beneficiaries, what proportion of the estate will each inherit. Consider a clause regarding the executors, executrixes, administrators, etc., being trustees on behalf of the surviving spouse in the event of the deceased spouse not maintaining his or her will as agreed. Consider the <i>WESA</i> and possible referral to a lawyer who has expertise in wills and estates.</p> <p>10.2 Whether each spouse renounces acquisition by virtue of marriage of any right to the other's estate upon death; estate to descend in the manner prescribed by will and in default thereof as though no marriage had taken place.</p> <p>10.3 Whether there is renunciation of rights under the <i>Land (Spouse Protection) Act</i>, R.S.B.C. 1996, c. 246, and the <i>Partition of Property Act</i>, R.S.B.C. 1996, c. 347.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>10.4 Release of claims against the estate that are not included in the agreement :</p> <ul style="list-style-type: none"> <li>.1 <i>WESA</i>, Part 3, re intestacy.</li> <li>.2 <i>WESA</i>, Part 4, Division 6, re variation of wills.</li> <li>.3 Under any law of like nature of any jurisdiction that may apply at the date of death.</li> <li>.4 Survivor’s benefits under any pension or annuity.</li> </ul> <p>10.5 Consider the effect of Canada Pension Plan death benefits for spouse and children.</p> <p>10.6 Consider whether occupation of property clauses ought to be different on death (e.g., life tenancy or more notice to vacate).</p>	
<p><b>11. GENERAL CLAUSES</b></p>	
<p>11.1 Effective date of agreement and effect of failure of prospective spouses to marry.</p>	
<p>11.2 Effect of separation (see the SEPARATION AGREEMENT DRAFTING (D-3) checklist for specific provisions regarding separation). Include a definition of separation.</p>	
<p>11.3 Releases with respect to separate property.</p>	
<p>11.4 Waivers (general and specific) disclaiming rights to the other’s property based on trust law or unjust enrichment.</p>	
<p>11.5 Severability.</p> <ul style="list-style-type: none"> <li>.1 Void or voidable clauses. Consider whether these clauses should be severed or if there are specific clauses that, if severed, may make the entire agreement unfair. Note <i>FLA</i>, s. 93(3).</li> <li>.2 Clauses incorporated or confirmed by court order if proceedings are taken other than to enforce the terms of the agreement.</li> </ul>	
<p>11.6 Provision as to resolution of disagreements between spouses as to the interpretation or application of this agreement; for example:</p> <ul style="list-style-type: none"> <li>.1 The dispute will be submitted to an arbitrator, to be appointed as provided in the agreement.</li> <li>.2 The dispute will be submitted to a family law mediator, to be appointed as provided in the agreement. Consider specifying how the mediator will be selected, the number of sessions prior to a court application, and how the mediator is to be paid.</li> <li>.3 In determining any matter in dispute, an arbitrator, court, or other tribunal may have regard to the course of conduct of a party in relation to the standards and expectations of the parties set out in a schedule to this agreement, to which the parties commit themselves.</li> <li>.4 Consider the parties having liberty to apply to court to bring into effect or ask for directions on clauses, such as pension division, sale or buy-out of family residence, etc.</li> </ul>	
<p>11.7 Continuing disclosure of income and financial position, to be kept confidential by the other spouse. Consider definition of confidential (e.g., exception for professional advisors).</p>	
<p>11.8 Further assurances.</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>11.9 No variations or amendment except by signed writing and witnessed in the same manner as the agreement.</p> <p>11.10 Provision that words of the agreement are those of both parties (<i>contra proferentem</i> does not apply).</p> <p>11.11 Cost and expense of marriage agreement (or cohabitation agreement), and who will pay.</p> <p>11.12 Binding on estates.</p> <p>11.13 Provision for filing with the Supreme Court or with the Provincial Court under <i>FLA</i>, ss. 44(3), 58(3), 148(2), and 163(3), but note <i>FLA</i>, s. 6(4)(c), whereby filing with the court is not necessary to ensure that an agreement as to matters that could become the subject of a future dispute is binding.</p> <p>11.14 Provision for filing notice of the agreement in the land title office (<i>FLA</i>, s. 99) or the personal property registry (<i>FLA</i>, s. 100), if permitted. See item 6.2.7.</p>	
<p><b>12. SUBSTANTIVE TERMS WITH THIRD PARTIES</b></p>	
<p>12.1 Consider what terms need to be included between the marrying or cohabiting spouses and any third party signatories to the agreement.</p> <p>12.2 Consider whether any positive obligations regarding third parties can be contracted by the spouses rather than having a third party signatory to the agreement (e.g., a property agreement between all parties occupying a shared residence).</p> <p>12.3 Consider whether any obligations between the contracting parties and third parties (e.g., corporations) should be addressed in a separate agreement referred to and/or appended as a schedule to the agreement.</p> <p>12.4 Ensure that any unrepresented third parties are referred for independent legal representation and that the representation (or waiver of representation) is documented. See <i>BC Code</i> rule 7.2-9.</p>	
<p><b>13. SCHEDULES</b></p>	
<p>13.1 Statement of property of wife/prospective wife/spouse.</p> <p>13.2 Statement of property of husband/prospective husband/spouse.</p> <p>13.3 Statement of wife/prospective wife/spouse's liabilities.</p> <p>13.4 Statement of husband/prospective husband/spouse's liabilities.</p> <p>13.5 Any other property schedules (e.g., life insurance policies of each spouse, agreement with relevant third parties, valuation evidence).</p> <p>13.6 Schedules relating to personal decisions such as wills, enduring powers of attorney, representation agreements.</p> <p>13.7 Terms regarding payment of debts between spouses.</p> <p>13.8 Standards and expectations setting out basic philosophy of marriage/marriage-like relationship (e.g., employment, household duties, decisions regarding children).</p>	
<p><b>14. APPENDICES</b> (e.g., certificates of independent legal advice, third party agreements, valuation documents re excluded property).</p>	