

Marriage Contracts / Cohabitation Agreements

1. What is a Marriage Contract?

1.1. A Marriage Contract is an agreement between two people getting married or already married that sets out their rights and obligations during their marriage, if they should separate or if one party should die. The contract with some exceptions can change the law governing married couples found in the Divorce Act, Family Law Act and common law so to suit the needs and wishes of the parties.

2. What is a Cohabitation Agreement?

2.1 A Cohabitation Agreement is the same as a Marriage Contract except the parties are not presently married or intending to get married in the near future, though most Cohabitation Agreements state that the contract is still in effect if the parties do later marry.

3. Should everyone who is getting married have a Marriage Contract?

3.1 No, because actually everyone who is married in effect has a Marriage Contract as if they are married as set out in the Divorce Act, Family Law Act, Children's Law Reform Act and the Succession Law Reform Act. Common law and judge's interpretations of them set out one's rights and obligations and if not married, part of the Family Law Act, Children's law Reform Act, and Succession Law Reform Act. Common law set out their rights. It is when there is a need to change those rights and to give certainty that there should be a Marriage Contract.

4. Should everyone living together have a Cohabitation Agreement?

4.1 The rules are a little more uncertain in the cases of people living together. People cohabiting are generally in greater need of an agreement, but again, it is a matter of whether the rules should be changed and certainty is needed.

5. Who should have a Marriage Contract or Cohabitation Agreement?

5.1 Anyone who wants different rights than those rights set out in the law and wants their own rights and obligations should consider having a Marriage Contract or Cohabitation Agreement.

5.1.1 For instance anyone who does not wish to share their growth of assets or someone who does not want to pay spousal support if they should separate should consider having a Marriage Contract or Cohabitation Agreement.

5.1.2 Anyone who wants more certainty as to their rights and obligations should consider having a Marriage Contract or Cohabitation Agreement, as there can be many interpretations of how the law applies to a certain set of facts. An agreement reduces the argument about the interpretation and application of the law.

5.1.3 For instance common law spouses do not have the property rights a married person does, but can argue a common law trust claim that he or she should get an interest in a house. An agreement can specifically say there is no trust claim.

5.1.4 Marriage Contracts also give certainty as to assets each party had at the time of marriage or cohabitation by listing them in the agreement.

6 What common situations generally require a need to change one's rights by way of a Marriage Contract or Cohabitation Agreement?

6.1 As the Family Law Act does not give a party credit for bringing a house into the relationship, when dividing up the assets on separation, most people believe that this is not fair remedy, thus by having a Marriage Contract, it states they be given credit for this asset.

6.2 If during the marriage, one party's parents buy a gift, leave an inheritance or give money to pay down a mortgage; a single purpose Marriage Contract gives credit to the party who receives the money.

6.3 Second marriages of people who marry later in life are often made to ensure that if one party dies, their estate goes mostly to their children and not to the second spouse, though the second spouse often is allowed to stay in the home until their death or as long as they want to stay in the home. Those agreements can also confirm there will be no claim for support if the parties separate or one dies.

6.4 If one party has substantially more assets than the other party, when they get married and those assets appreciate, it is common to ensure that the increase in value is not shared equally, but goes to the spouse who owned those assets.

6.5 If one party is worried the marriage or cohabitation will not work, they request an agreement containing terms that would allow them to get out of the relationship easily, if it does not work out.

6.6 Though not common and perhaps not easily enforceable, some Marriage Contracts confirm what religion the children will be raised.

7 What rights are generally covered in a Marriage Contract or Cohabitation Agreement?

7.1 Generally the issues of spousal support, child support, division of property and occupation of the home are covered in the agreement. If the parties should separate, or if one dies or one becomes incompetent, as well as financial arrangements while living together, are set out in the agreement.

8 Can an Agreement just deal with one issue?

8.1 Yes. Often the only purpose of the agreement is to ensure a large gift to pay down the mortgage from one party's family is not shared if the parties separate.

9 Can Agreements just be for a specific period of time?

9.1 Yes. Often agreements state that support will not be payable if the marriage is less than 5 years but if it is longer, the normal support rules apply. Therefore if it is a relatively short marriage, there is no argument about support.

10 What can the Marriage Contract or Cohabitation Agreement not change?

10.1 Though not that big an issue or problem, a Marriage Contract and/or Cohabitation Agreement cannot give up one's right to exclusive possession (right to stay) in a matrimonial home.

10.2 A Marriage Contract or Cohabitation Agreement cannot state which parent will have custody of a child of the relationship, or what the child support would be if the parties separate. That includes possible support for the other party's children, if the law found that the non parent was obligated to support the children of the partner because he or she treated the child as his or her family. See 15.3 for a discussion on how to reduce the risks of being obligated to pay support for the other party's children.

10.3 A Marriage Contract or Cohabitation Agreement cannot be used as a defense to a support claim from the government if the government is giving money to the needy spouse.

11 What are the formalities of making a Marriage Contract or Cohabitation Agreement?

11.1 A Marriage Contract and Cohabitation Agreement must be in writing and be witnessed. There must be full financial disclosure of each party's income, assets or debts, or the agreement may be set aside. Each party must understand the nature and consequences of the agreement. The agreement can be set aside if it is found to be unconscionable or if made under duress.

12 Why is there the need for full financial disclosure?

12.1 If one party to the agreement does not disclose their significant assets or debts, the other party may argue that it be set aside, saying that if they had known the true financial situation, they may have bargained differently and perhaps asked for more.

13 Can one lawyer represent both parties?

13.1 No. To do so would be a conflict of interests. Often one party sees a lawyer who explains the law and drafts the agreement and the other party gets a lawyer for one session of advice and to be the independent witness, or the other party does not obtain a lawyer and has a friend witness the agreement, though it is advisable that both parties retain a lawyer.

14 What information is needed to draft a Marriage Contract or Cohabitation Agreement?

14.1 The following information is needed

14.1.1 Names of the parties

14.1.2 Date of marriage or cohabitation

14.1.3 Names and birth dates of children

14.1.4 Intentions for spousal support, division of assets, occupation of home during cohabitation, on separation, on death or on incapacity

14.1.5 Approximate Income, assets and debts of both parties.

15 What other documents or actions are done in conjunction with a Marriage Contract or Cohabitation Agreement?

15.1 Wills and Powers of Attorney need to compliment the Marriage Contract or Cohabitation Agreement. One can give more rights in a Will than in a Marriage Contract or Cohabitation Agreement, but does not give fewer rights.

15.2 It is very important to arrange one's financial affairs, keeping in mind what the agreement states. If the agreement has each party separate as to property, if they should separate, then their assets will not be shared. One party should be spending a disproportional amount of money on joint expenses while the other party saves. One party should be buying expensive gifts for the other party.

15.3 To reduce the risk of being obligated to pay support for the other party's children (which would happen if found to have treated the child as family), one should do little parenting but also have the natural parent pay for the expenses of the child.