

PRAGMATIC ROMANCE

by Marilyn Penner

© 2004 Wallace Meschishnick Clackson Zawada

You have worked hard to achieve financial success and have now met that special person to share everything with. But do you really want to share *everything* if the relationship doesn't last forever? Family and friends say "you better get a prenup." Romantics suggest that prenuptial agreements are not necessary, that relationships last forever. Pragmatists claim that nothing lasts forever. About 40% of all first marriages will end in divorce and the number is even higher for second or subsequent marriages.

Pre-nuptial agreements do not conjure up the images of romance and happiness that we often associate with weddings and new relationships. You may, however, one day fall within those unfortunate statistics and face divorce, or maybe you already have. A prenuptial agreement is not a statement that your relationship is going to end, but one that has you prepared in the event that it does. It can help lessen the financial stress of divorce or separation for you and your spouse by clearly defining what the financial consequences will be.

Prenuptial agreements are an "interspousal contract" under *The Family Property Act*. The Act presumes a 50-50 division of all family property, subject to certain considerations, but couples can opt out by entering into an interspousal contract. Interspousal contracts include agreements entered into after separation, during cohabitation and prior to cohabitation. Such contracts can deal with the "possession status, ownership, disposition or distribution" of property presently owned or owned in the future by one or both of the spouses. Prenuptial agreements include contracts entered into by those intending to marry or cohabit.

There are three key elements to any interspousal contract: (1) the contract must be in writing and signed by each of the parties in front of a witness; (2) each spouse must acknowledge that they are aware of the nature and effect of the contract and that they are giving up those claims to the extent necessary to give effect to the contract; and (3) the acknowledgment must be made in front of a lawyer other than the lawyer acting for the other party. The lawyer has an obligation to ensure you understand your rights under the law before you enter into the contract.

If the requirements of the legislation are met, the contract will be binding upon the parties. Courts can set aside interspousal contracts that are "unconscionable or grossly unfair," but if a party has received the required independent legal advice at the time of entering into the agreement, it will likely withstand most court challenges. A recent decision of the Supreme Court of Canada (*Hartshorne v. Hartshorne*) upheld a prenuptial agreement between spouses who had cohabited for 12 years, 9 as husband and wife, and had two children together. The contract stated that their property would be kept separate, except the wife would receive an interest in the family home for each year of marriage. Applying the agreement, the husband was entitled to \$1.2 million and the wife only \$280,000. Despite the apparent unfairness of the division, the Supreme Court found that the agreement was fair given the expectations that each of parties had at the time of entering the relationship. The Court held that the wife was fully aware of the shortcomings of the agreement as she had received thorough independent legal advice when she negotiated and signed the agreement.

Remember that negotiations take time. You and your future spouse will need to reach agreement on the all of the terms and provisions of the contract. Because of the delays which

may occur in negotiating and signing the prenuptial agreement, allow for sufficient time to complete this process. Waiting until the eve of your wedding or cohabitation to begin the process will only increase the pressure which you are under and create the possibility that the agreement cannot be completed in time. A document with such long term ramifications should never be rushed.

Prenups let you fashion your own financial arrangements, rather than being limited to the division or distribution schemes set by the Act. If it is a second marriage, one spouse might be most interested in protecting children from the previous relationship. Additionally, the feelings can run high when any relationship breaks down, as will the legal fees, if people are guided by emotion rather than logic. A settlement negotiated before difficulties arise between the parties can decrease the emotional and financial costs.

They are not romantic, but prenuptial agreements can offer peace of mind as well as an orderly splitting up of your financial assets. Look at the prenuptial agreement as a business arrangement or an insurance policy to help reduce the amount of emotional stress that naturally occurs when a relationship ends.

Marilyn is a lawyer with Wallace Meschishnick Clackson Zawada in Saskatoon. Questions or comments on this article can be directed to her at marilyn.penner@wmcz.com.

This article is for general information only and relates only to Saskatchewan law. Specific situations may require different or additional information. Do not act on any information contained in this article without consulting your advisors regarding your specific circumstances. As well, some of the articles are of historical interest only because legislation or case law may have changed.