

**DOMESTIC CONTRACTS AND THE ONTARIO MATRIMONIAL PROPERTY REGIME – IN TEN  
MINUTES OR LESS**

**Oren Weinberg**

**Boulby Weinberg LLP**

The Framework

1. In Ontario, matrimonial property is governed by the *Family Law Act*. Each of the provinces of Canada have family property legislation, some similar to Ontario and some provinces with different regimes. I will speak to the Ontario family property regime.
2. Separating spouses are required to share the growth in value of their assets accrued during the marriage.
3. A spouse must calculate the net value of his or her assets at the date of marriage and deduct that from the value of his or her net assets at the date of separation or, if the marriage ends by death, the day before death – the valuation date. It is a straightforward accounting exercise.
4. The legislation provides for certain exclusions from the calculation such as:
  - a. Property other than a matrimonial home acquired by gift or inheritance during the marriage;
  - b. Income from gifts or inheritances if the donor expressly stated that it was to be excluded;
  - c. Damages for personal injuries, nervous shock, mental distress or loss of care and companionship;
  - d. Proceeds of or the right to proceeds of a policy of life insurance; and
  - e. Property other than a matrimonial home into which property referred to above can be traced.

80 Richmond St. W., 18<sup>th</sup> Floor  
Toronto, ON Canada M5H 2A4  
T: 647.494.0113 ext. 100  
F: 647.347.2156  
E: oweinberg@boulbyweinberg.com

5. The matrimonial home held at the valuation date is given special treatment under the legislation. A spouse who might bring in the asset into the marriage must share the full value as at the date of separation – whether or not the matrimonial home was gifted or purchase with gifted funds. Furthermore, a spouse cannot dispose of or encumber a matrimonial home without the consent of the non-owner spouse or court order.
6. Spouses can have more than one matrimonial home. Any real property that is ordinarily occupied by the parties can be considered a matrimonial home.
7. The legislation defines property expansively and includes any present or future interest, vested or contingent that a person has starting at the date of marriage and ending at the date of separation.
8. Spouses can by agreement contract out of all or part of the legislated equalization regime and they can do so before marriage by co-habitation agreement, during the marriage by marriage contract and on separation, by separation agreement. Collectively these agreements are defined in the *Family Law Act* as domestic contracts.
9. Parties to a cohabitation agreement may contract about their respective rights to ownership and division of property, support obligations, the right to direct the education and moral training of their children (but not the right to custody and access). If they marry, the cohabitation agreement will be deemed a marriage contract governing the parties' rights on separation. Even if a couple is not cohabiting, they may enter a marriage contract in contemplation of their marriage.
10. If parties contract to have the law of another jurisdiction apply to the determination of their property rights on separation, the Ontario court will apply that law as long as the contract itself is valid and enforceable under Ontario law.

#### Essential Validity and Enforceability

11. The Family Law Act governs the formation and enforceability of domestic contracts. To be enforceable, agreements must be made in writing, signed by the parties, and witnessed.

12. The court retains jurisdiction to override provisions of a domestic contract that it considers not in a child's best interest. It may also override any provisions for the support of a child if it determines the provisions to be unreasonable or not in compliance with Canada or Ontario's child support guidelines.
13. The court will override waivers of support or specific provisions for support if it would result in unconscionable circumstances in light of the parties' circumstances at the time of separation.
14. Provisions that make a right of a party contingent on chastity are not enforceable
15. Provisions of a contract could be set aside if the court is satisfied that the consideration for the provision was the removal of barrier to remarriage within the spouse's faith.
16. A court may set aside a domestic contract or a provision of a domestic contract if:
  - a. A party failed to disclose their significant assets, debts and liabilities existing at the date the contract was made,
  - b. A party did not understand the nature or consequences of the contract, or
  - c. Otherwise in accordance with the common law of contract – ie fraud, duress, mistake, misrepresentation etc.

#### Contracts Made Outside of Ontario

17. Contracts made outside of Ontario are enforceable in Ontario if the contract is entered into in accordance with Ontario's internal law, that is the contract expressly waives rights to Ontario's family property equalization regime, complies with Ontario's high standard of financial disclosure and, in addition, meets common law contract standards.
18. The court will set aside provisions of contracts made outside of Ontario the same way it would a contract made in Ontario

19. A provision of a marriage contract respecting the right to custody of or access to children is not enforceable.
  
20. It is becoming increasingly common that parties to a marriage contract or separation agreement reside in more than one jurisdiction. Parties are entering international marriage and separation agreements with a view to enforceability on more than one jurisdiction. It is therefore very important to work with counsel in the requisite jurisdictions to make sure the agreements are, as best as possible, enforceable in each jurisdiction. Ontario's courts have recognized that a couple may have multiple jurisdictions of residence and have taken jurisdiction in cases in which the couple only resided in Ontario for recreational purposes, such as a summer cottage.