SEPARATION AGREEMENT

David R. Greig, BA, LLB

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NOTICE TO READERS

This kit provides general advice and information only. Since the issues set forth in your separation agreement will be important and may be incapable of later amendment, proceed with caution.

The draft agreements contained in this booklet are best suited to simple cases: if both spouses understand the agreement completely, and accept the settlement fully, the draft contract herein can be properly used to reflect that settlement. If, however, your case involves significant assets, difficult issues respecting children, or other complex legal considerations, you should get expert advice.

Note: This kit may be used in all Canadian provinces and territories except Quebec, where different legal principles apply.

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CONTENTS

Introduction 1

Preparing Your Separation Agreement 4

Five Key Issues to Address in Your Separation Agreement 6

Enforcing Your Separation Agreement 14

Miscellaneous 15

Samples

- Separation Agreement 17
- Schedule A 24

Appendix: Federal Child Support Tables

- Ontario 25
- Nova Scotia 32
- New Brunswick 39
- Manitoba 46
- British Columbia 53
- Prince Edward Island 60
- Saskatchewan 67
- Alberta 74
- Newfoundland and Labrador 81
- Yukon 88
- Northwest Territories 95
- Nunavut 102

Blank Forms

- Separation Agreement 109
- Schedule A 131

INTRODUCTION

Separation can be a time of great upset. Memories of broken promises and hurt feelings create confusion. Separating couples, who have managed to work together for decades, often cannot agree on anything. Arguments about children, money, and property can quickly escalate into costly court battles which further aggravate the acrimony and upset.

Ironically, the decisions that need to be made at the time of separation require calm consideration and objective assessment. These decisions will create significant and lasting financial consequences for the parties and their children.

Getting past the emotional turmoil of separation is not what this book is about. There are other books, counselors, and psychologists for that. The focus here, instead, is on assisting couples who choose to move on with their lives in a productive way after separation. It's about how to reduce your reasoned resolve to a written contract that will be reliable.

When you and your spouse separate, you have an opportunity to settle all the outstanding issues by agreement and to document that agreement in writing. A separation agreement is simply a contract that records the specific details of that agreement so that the terms are known to you and others now, and in the future.

An agreement that sensibly resolves all relevant issues can restore calm. It may also —

(a) offer significant tax advantages;

(b) simplify divorce proceedings;

(c) add certainty to financial planning; and

(d) assist in estate planning.

The law is constantly changing. Readers should keep this in mind as they work through their separation agreement.

In British Columbia, for instance, a major change occurred in March of 2013, when the long-standing *Family Relations Act* was completely replaced by new legislation, known as the *Family Law Act*. This new law achieves many objectives, including an emphasis on encouraging settlement and out-of-court resolution. In addition, the FLA focuses on a "child centered" approach to parenting issues, and adds many new definitions and terms. Now, instead of describing the residency of a child in terms of "custody and access," the law explains that persons responsible for making decisions about children are called "guardians" with "parental responsibilities." These guardians have defined "parenting responsibilities" and share "parenting time." They bear a duty to act in the best interests of the children, which is now the only consideration in determining what's "right" for a child.

Details about this new legislation can be gathered from a variety of sources, including online resources offered by family law firms, the Legal Services society, and the BC Superior Court website. Just search "BC *Family Law Act*" and you will have several excellent sources to review. Be wary, however, of unofficial "stuff" found on the Internet. One good site is www.resources.lss.bc.ca. If in doubt, see a lawyer.

The new BC legislation is designed to facilitate resolution, by parties, in the absence of acrimonious litigation. Section 4 specifically provides that one of the purposes is to "encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to court (and) to encourage parents and guardians to resolve conflict other than through court intervention."

This new provincial law in BC, of course, does not affect the law in any other province. Similarly, it cannot and does not replace or change the federal *Divorce Act*. Our national

Divorce Act continues to utilize the older language known to all: phrases such as "custody," "access," and "guardianship" prevail across the nation. For that reason, in this publication, we have continued to use the language of the *Divorce Act* in the draft agreement that accompanies this book. Readers in British Columbia who wish to avail themselves of the new legislation (the *Family Law Act*) will need to use some caution when drafting their agreement. It is important to note, however, that agreements made under the "old" law will not suddenly become invalid with the implementation of new law. Similarly, separating married parents who choose to use language that is consistent with the federal *Divorce Act* can anticipate enforceability in accordance with that law.

In the event of any conflict between any provincial law and the federal *Divorce Act*, the latter will prevail. For that and other reasons, it is likely that the effect of the new BC law will be of somewhat limited effect (at least initially) for married folks who reside in British Columbia. In the coming years, parties who separate and litigate will ask judges to interpret, apply, and define these new provisions. It may be some time before the full impact and ambit of the new legislation is known.

Elsewhere in Canada, provincial family laws and the federal *Divorce Act* will continue to operate together in a sometimes awkward (but often harmonious) relationship. Together, these various principles provide a combination of rules and concepts that can, at times, be confusing.

If you and your spouse are married and residing in BC, your parenting arrangements can still be determined under and in accordance with the federal *Divorce Act*. You may make an election to have the new *Family Law Act* prevail, but it's not necessary. However, when it comes to dividing family assets, the applicable rules and regulations governing that division will be found in provincial legislation. For British Columbians, that's the new *Family Law Act*. The genesis of this confusing mix of overlapping laws is our Constitution.

Under our Canadian Constitution, the federal and provincial lawmakers each have certain and defined topics over which they have "control." So, for instance, Criminal law is a federal topic, and is governed by our national Criminal Code. No province can make rules about Criminal law. That would be unconstitutional. Motor vehicle law, however, is a provincial topic, and each province makes vehicular legislation.

When it comes to family law, the overlap is more confusing. Our Constitution provides that "property and civil rights" are a provincial topic — and so every province has the exclusive right to decide matters pertaining to the division of property on marriage breakdown. Divorce, however, is a federally governed matter, and so the federal *Divorce Act* governs that topic. Unfortunately, the law is less certain when it comes to corollary relief (the issues which are ancillary to the divorce). There, the picture becomes hazy. The federal *Divorce Act* contains provisions respecting custody, access, guardianship, and spousal and child support. It does not purport to govern property division, (because that's one of the provincial topics under "property and civil rights").

All provinces and territories are powerless on the divorce topic, but they do have the capacity to make legislation governing other aspects of family law. Oddly, this means that the provinces can <u>also</u> make law regarding custody, access, guardianship, and spousal and child support, as long as they do not deal with "divorce" itself. And, of course, every province has exclusive jurisdiction to make all the laws about property division on marriage breakdown.

To make matters more confusing, however, the Supreme Courts in each province work in concert with the provincial courts, but the scope of the provincial court authority is limited by Constitutional law principles. Provincial courts cannot grant divorces, but they can make orders about the care of children and support. Provincial courts have very limited power, however, when it comes to dividing

property (even though that would seem inconsistent with the other Constitutional law concepts about "property and civil rights" described above). The Supreme Court in each province has the capacity to determine all matters relating to marriage breakdown (and the breakdown of a "common law" relationship), and will decide the matters based on provincial laws, federal laws, and the common law.

This means that both the federal and the provincial governments can enact laws on the common topics (children and support), and only the provinces can make law on property division.

For British Columbians who separate after March 2013, the BC *Family Law Act* will determine the division of property. The old *Family Relations Act* is "gone," and so the division of property for married folks and "common law" couples in BC will be determined exclusively under the new provincial law.

Questions about "which government prevails and what law applies" engage a legal topic called jurisdiction. It's a confusing area of law, and well beyond the scope of this publication. A general summary of the big jurisdictional principles that separation topics in this book might include the following:

(a) Divorce is exclusively a federal topic. A divorce can only be granted under the federal *Divorce Act*, and can only be granted by a Supreme Court.

(b) Children's issues, including custody, access, guardianship, and support, are topics common to both the federal *Divorce Act*, and the laws of each province and territory. As a result, children's issues can be settled or determined under provincial family law rules, or under the federal *Divorce Act* if the parties are married.

(c) If the parties are unmarried, the children's issues cannot be determined under the federal *Divorce Act* (because the spouses were never married), and so provincial law rules.

(d) Married and unmarried spouses can elect to have their children's issues addressed in either Supreme Court or provincial court.

(e) Property matters will be governed by provincial law (and in some cases, by the "common law"). The federal *Divorce Act* has no role in the division of property.

(f) Virtually all property matters must be determined by a Supreme Court.

(g) Spousal and child support are topics that are common to federal and provincial law, and can be determined in Supreme or provincial court.

If you are confused about these concepts, you're not alone. Questions about jurisdiction are not uncommon, and can be worrisome. Unfortunately, these issues should be addressed early in the separation process because determining which laws apply will affect the range of options available, and establish which language is most suitable. An experienced family law lawyer can address any jurisdictional concerns.

Do the courts recognize separation agreements?

Canadian courts and legislatures have tried to encourage parties to settle their disputes through negotiated contracts. Separation agreements are one such type of contract. Judges have shown a willingness to promote the validity of such contracts by judicial reluctance to interfere. If your agreement is fair, properly executed, and sensible, it will probably stand the test of time and withstand judicial review. There are, however, several exceptions to this general rule:

(a) If you and your spouse agree on issues relating to children (i.e., support and parenting) that are not in the best interests of the child, the court can make changes.

(b) If there is a lack of disclosure or deliberate deception respecting assets, liabilities, income, or expenses, the property division and support agreement may be reviewed.

(c) If the agreement is plainly unfair (i.e., one spouse releases all claims to support without compensation), the court can upset it.

Who is a spouse under current law?

This book is intended to apply to married couples who are separated or are considering separation. While many of the principles described herein apply equally to "common law" (unmarried) couples, that is not true everywhere in Canada. Across the nation, the rules that apply to common-law couples are changing, so for those persons, up-to-date legal advice is essential.

Recent amendments to Canadian law now permit the formalization of marriage between same-sex partners. In the event of a breakdown of such relations (where the parties are married under the new law and have recently separated), the use of the terms "husband" and "wife" may be inappropriate. Those terms can be supplanted by the given names of each spouse, or by simple reference to "Spouse 1" and "Spouse 2." A more difficult issue arises as to the retroactive application of the law respecting support and property division. If your same-sex marriage has come to an end, consultation with counsel may be advisable.

A separation agreement form specific to same-sex partners is included on the CD-ROM that accompanies this book.

PREPARING YOUR SEPARATION AGREEMENT

What is in a separation agreement?

Most separation agreements consist of the same essential points: They start with the date and the full names of the parties to the agreement. *Recitals*, which describe the background or particulars of the agreement, follow. Next, the terms of the arrangement (the *covenants*) form the main body of the agreement. Finally, the document ends with the *execution* (signing of the agreement by both parties), properly witnessed.

Examine the sample at the end of this guide and identify each of these components. Schedule A describes the assets and liabilities of the parties and should be added to the back of the agreement.

Completing the agreement

This book contains a blank copy of the basic separation agreement. There is also a CD-ROM that contains the blank forms in electronic format for you to use. Once you have familiarized yourself with the agreement, use one copy of the form to prepare a draft or rough copy by filling in all the variables that apply to your particular circumstance.

When you are satisfied with the agreement and your spouse has agreed to the terms, use a second copy of the agreement to prepare your final draft, keeping the following in mind:

(a) Add any terms that you want included in the agreement, but ensure that such additions make good sense and clearly describe what is intended.

(b) Names, addresses, and dates must be provided in full and must be accurate.

(c) Delete any clauses that do not apply by drawing a line through the words or sentences that you intend to omit. After copies of the document are made, both you and your spouse should initial each one of these deletions.

(d) When two alternative words are presented (such as he/she) be sure to cross out the one that does not apply.

(e) All disclosure particulars must be fully and fairly described. Failure to disclose an asset (such as savings in your name alone) may invalidate the agreement.

(f) The agreement must "make sense" and be understandable to someone other than you and your spouse. Even if the parties think that they understand the agreement perfectly, what is intended may not be obvious years later if a dispute subsequently arises. Because a judge may be called upon to interpret the agreement, the terms and conditions must be clear and capable of only one meaning. Sometimes, having a friend review the agreement *before* it's executed to ensure that it's understandable can be helpful. If you still have concerns, have the document reviewed by a lawyer.

If you do not understand a particular clause of the agreement or are confused about an issue, investigate further. Do not agree to anything you do not understand. If you remain uncertain or confused, talk to a lawyer.

While you can add terms to your separation agreement at any point in the agreement, the wording should be clear, legible, and sensible. In order for the amendments to be valid, they must be initialed by both parties. For example, should you wish to add an item to the property clauses, you should type or handwrite the additional wording and then initial the amendment in the margin as shown below:

JS Both parties will continue
to jointly own and use (to
their mutual benefit) the
SS Puerto Vallarta time-share.

Signing and witnessing the agreement

Once you have completed the main body of the agreement, check it for accuracy but do not sign or date the agreement. Before you sign, make as many copies of the agreement as you will need. Good quality photocopies are sufficient for this purpose, or you can print the copies you have completed on your computer. You will need at least two copies of the agreement, one for your spouse and one for you. If you sign the agreement before you make the copies, the signatures will not be original signatures and may not be valid.

For the signing of the agreement, you will *each* need a witness who is an adult (i.e., 18 or older) and is competent (i.e., understands what is being done). In front of your witness, date the agreement, initial all deletions, and sign it. Have your witness sign where indicated. Your spouse then repeats the procedure with his or her witness. Do not use one common witness!

If you and your spouse are using lawyers, you should each take the separation agreement to your respective lawyers and have them look at the agreement before signing. Then, each lawyer can act as a witness and keep a copy of the agreement in your file.

After your separation agreement is signed and witnessed, both parties should keep an original.

FIVE KEY ISSUES TO ADDRESS IN YOUR SEPARATION AGREEMENT

When parties separate, they generally need to address five key issues. These are: parenting of children (often called "custody"), access (sometimes called "visitation" or "parenting time"), guardianship (see below), support, and property division.

Custody

"Custody" is a word found in the federal *Divorce Act*, and in some provincial legislation. This term explains and describes where a child will normally reside after the parents have separated.

The federal *Divorce Act* uses the word "custody" to explain the residency of children. The language that is used to describe where a child will reside varies from one province to the next, but the basic substance of the law is pretty well uniform across the country. Generally speaking, the law tends to support the proposition that unless it is contrary to the best interests of the child, the child is entitled to the benefit of maximal contact with both parents. Quite often, that means shared parenting and something similar to joint custody. While many well intentioned parents will disagree on what specifics should prevail in their case, our legal system focuses the attention on what's best for the child. Joint custody and a "50/50" sharing are not presumed, but that is a common solution which many judges and parents implement because it often is in the best interests of the child.

Unfortunately, many divorcing parents have difficulty separating their own needs and wants from the "best interests" of the child. Often, there is a power struggle or control issue in play. As well, parents sometimes believe that they "need" custody in order to receive child support.

Our Canadian laws require a parenting arrangement that is in the best interest of the child — it's not "about" what's best for the parents, or most convenient for one or the other. It's also not "about" money — or who has the better house, job, or education.

Separating parents need to focus on the best interests of the child and must try to work cooperatively. That's easier said than done, however, but many parents find that a counsellor or mediator can help. When discussing and negotiating this issue, keep in mind the following principles:

(a) Regardless of what terms you and your spouse may settle upon, the court maintains the power to review the agreement at any time, and can adjust parenting arrangements as circumstances changes. Parenting topics (unlike property settlements) are always reviewable.

(b) As a consequence, it's unlikely that the parenting "deal" you settle on now will last forever. Your children will grow up, and as they do, their desires, interests, and your own circumstances will change. Keep that in mind as you discuss the arrangements with your former spouse.

(c) The wishes of your child are a relevant consideration, but rarely determinative. The views of a young child are significantly less important than the desires of a mature 13 year old.

(d) There are no "presumptions" which universally apply to all children, but often, courts will try to keep siblings together, and may seek to avoid schemes which require a great deal of "back and forth." While short and regular exchanges may be proper and preferred for infants, teens are unlikely to be well served by a daily change of residence.

(e) Courts are typically unimpressed by mud-slinging allegations of bad character or new lovers, but will be cautious

about any case where there is family violence, or demonstrable evidence of drug or alcohol abuse.

(f) A parent who has custody of a child more than 40 percent of the time may not be required to pay base child support (as described later), but will still be required to contribute to special and extraordinary expenses. So, while it is true that custody arrangements and "parenting time" can make a big difference in determining base child support, the proper decision about what's in the best interest of the child should not be determined by that fact. The parenting time topic should be decided first. The support issue can be assessed thereafter. Having said all that, the law on this point can be confusing, and so if you and your spouse need assistance addressing the concerns, get help. An experienced family law lawyer can explain the law and the options, often in a brief consultation.

(g) If the residency of the parents (and children) is likely to change, and if the move is contentious, you should consult counsel. Mobility (or "relocation." as it is sometimes called) is a tricky legal topic which is often determined according to the interplay between the case law and the common law. The new British Columbia *Family Law Act*, for instance, in section 65, contains an expansive description of the *notice* that a parent must give of an intended move, and describes how court "permission" is obtained. The Supreme Court of Canada case of *Gordon v. Goertz* remains important, so care must be taken when mobility or relocation is an issue.

(h) While the arrangements that you have settled on regarding property division cannot later be changed, the terms regarding custody and access can be reviewed from time to time. For instance, during the "turbulent" adolescent and teen years, it's not uncommon for children to "decide" that they want to change residences. In such circumstances, if it's determined that such a change is in the best interests of the child, an amendment to the agreement can be made, and the child can move. Typically, such modifications also involve an adjustment to the child support arrangements.

Some separated parents choose to utilize improvisational and neutral language in the description of their custodial arrangements. Phrases such as "shared parenting" are sometimes incorporated to set out the agreed-upon terms. This kind of creativity may make good practical sense to parties, but deviating from the conventional language (such as "custody and access") may be troublesome if issues arise concerning child support and mobility. If you and your spouse want to use special language to describe your parenting arrangement, it's best to obtain legal advice.

"Split custody" is a term used to describe the arrangement where each parent has custody of (at least) one child. That situation triggers specific support obligations which are defined in paragraph 8 of the Federal Child Support Guidelines. Parents who are sharing custody of several children should take advice on the operation of these provisions, to insure compliance with the law.

Access

Access terms set out the arrangement you and your spouse have settled on for visitation. Some couples agree on a general description; for example, "the Husband shall have reasonable and generous access." If you and your spouse have an amicable relationship and are able to communicate and cooperate,

that's fine. If, however, bickering and misunderstanding punctuate your post-separation spousal relationship, you should write out the specifics in your agreement. Describe the arrangement for weekends, holidays, birthdays, and religious holidays. Set out the specifics of the summer holidays, and who will perform the pick-up and drop-off. Be fair, be sensible, and, most important, be clear. Many couples spend thousands of dollars on legal fees arguing over these topics.

Readers in British Columbia who have children out of wedlock, or who wish to avail themselves of the provisions of the new *Family Law Act*, will need to be careful here. The terms "custody," "access," and "guardianship" (found in the *Divorce Act*) have been replaced with terminology that is quite different from the federal law. If you employ the "old" language of the *Divorce Act* in a new BC agreement, you will not likely have created an invalid bargain, but you could have problems. Care should be taken to get it right. If you are planning to have your situation governed by the FLA, you should use the proper terminology. Review the applicable provisions, and check out one of several informative websites for additional aid, and the complete text of the Act. If you still have questions, see a lawyer.

When you take those steps, you'll see that section 37 of the FLA provides that the only thing to be considered in making an order or agreement for the care of a child is the best interests of the child. All of the child's needs and circumstances are to be taken into consideration. Parents (who are guardians of children) may exercise all parental responsibilities with respect to a child and must do so with these considerations in mind. Sections 40 and 41 describe this. Access is now called "parenting time," and parenting arrangements describe how the time is to be shared. Despite the change in nomenclature, the same principles will continue to apply, and parents will be encouraged to find sensible parenting arrangements that are sensitive to the specific needs and interests of children.

Under the new BC Law, all parents are automatically guardians, unless the parent has never resided with the child. All guardians—and so, by definition, almost all parents—will enjoy parenting responsibilities and parenting time. Whether any of this new language will reduce conflict or encourage cooperation and hasten the resumption of peace in families in crisis remains a lofty objective and a perplexing question. For the purposes of this book, we have elected to continue with the language of the federal *Divorce Act*, in the sample agreement in part because those provisions are tested, known, and predictably reliable. British Columbian who wish to import the new language of the *Family Law Act* in their agreement should do so with caution.

Guardianship

In most jurisdictions, the arrangement on guardianship resolves two legal questions:

(a) Who will have custody of the child if one parent dies?

(b) Who will be involved in the decision-making process on topics affecting the health, welfare, and education of the child?

For most couples, an agreement that provides for joint guardianship is sensible.

Again, British Columbians wishing to utilize the new *Family Law Act* will need to be circumspect here, since the legal meaning of guardianship has now changed (radically). If you wish to utilize the FLA terms in your separation agreement, you will likely require independent legal advice with respect to the applicable nomenclature.

Support

Your separation agreement should address both spousal and child support.

Spousal support

Commonly called alimony in the United States, spousal support is compensation paid by one spouse to the other to relieve economic

inequality that may exist at the end of a relationship. Support can be a lump sum or periodic (i.e., paid monthly or at some other regular interval) and may be tax deductible if properly structured. Periodic spousal support is typically tax deductible by the payor, and counts as taxable income in the hands of the recipient. In some cases, spousal support continues indefinitely, while other spouses agree to support for a limited time or agree to review the arrangement some time in the future. Depending on your circumstances, the obligation to pay or the right to receive support can be significant, and so some advice on the topic may be necessary.

If a husband pays $200 per month to his spouse for her support, $2,400 per annum is deducted from the husband's taxable income, and an equal amount is added to the wife's income. Some qualifications to this general rule exist:

(a) The parties must be separated;

(b) The payments must be periodic (not a lump sum);

(c) The payments must be pursuant to a court order or written agreement. A separation agreement qualifies;

(d) If the payments are made to a third party and not the spouse directly (e.g., a mortgage company), certain restrictions apply.

Under the current federal *Divorce Act*, an identified object of spousal support is the promotion of economic self-sufficiency. Until recently, that factor was given considerable weight by the courts, and often resulted in the making of time-limited spousal support orders that terminated at some future time.

The law respecting spousal support continues to change. Several years ago, the Federal Department of Justice commissioned and then published a report concerning spousal support. This report, entitled "Spousal Support Advisory Guidelines" attempts to add certainty to the *quantum* of spousal support properly payable on separation, and to offer a formula for that determination.

The report is 182 pages long, and complex. It is, however, extremely helpful, and contains useful information about the suggested formula, and also the case law and principles on which it is based. Courts across the country have used and applied the formula contained within the report. Persons who have the opportunity to read the material should do so. The report can be found online at www.justice.gc.ca.

Some provinces have treated the Spousal Support Advisory Guidelines as very persuasive, while other provinces have been less enthusiastic. Either way, they are an important guidepost.

When considering the report, it's important to remember the following:

(a) Unlike the Child Support Guidelines (which *are* law), these spousal guidelines are not binding.

(b) The spousal guidelines do not necessarily apply to "common law" (unmarried) spouses, and offer no formula for determining entitlement.

(c) There are two formulas described: one for separating spouses without children, and one for families with children. The former is relatively easy to apply, the latter more complex.

(d) These guidelines offer a "range" for support within which various factors and considerations can be taken into account.

Remember that this report is not binding, and not firm law. Debate continues to rage about whether the report itself, or the principles behind it, will ever become law. While that debate carries on, we know that the old rule that spousal support was never to become a "pension for life" is now gone. At the end of a long-term traditional marriage, spousal support may continue indefinitely. This is particularly so when it can be demonstrated that one spouse has suffered a continuing economic disadvantage because of a career compromise made in order to take on family obligations, such as raising children.

Time limited support (that is, support that continues for a finite number of years) may be appropriate in marriages of shorter duration, and if the parties each have some means. When the marriage endures for seven or eight years or longer, however, the fairness of term support is suspect. In mid-term and long-term marriages, support that is automatically extinguished at some pre-determined time is a rarity, and few judges support such arrangements. That does not mean that parties cannot agree to term support at the end of a long marriage, but it does mean that a court might not approve of such a provision. A more common clause is one which provides for a review (of quantum, or entitlement) in a certain number of years. This sensible alternative has the unfortunate consequence of requiring the parties to re-engage in the process again, in a few years time, but at least it's flexibile.

There may be great value in the certainty of a final "deal" which is imperfect, but ends the war. Your particular circumstances, aspirations, and worries will be relevant. As always, use Internet resources with caution. The Federal Department of Justice website and www.mysupportcalculator.ca are both quite good.

Child support

Support paid by a spouse for the benefit of children is not deductible by the person making the payments, nor is the payment taxable income in the hands of the recipient. Legislative changes now provide tables (Child Support Guidelines) that set out the mandatory quantum of support. For your convenience, these tables are reproduced at the back of this book. The Department of Justice has released a step-by-step booklet explaining the Federal Child Support Guidelines. The CD-ROM provides a link whereby you can download this 79-page booklet, or you can visit the Justice Canada website at www.justice.gc.ca.

The child support legislation was designed to simplify and make uniform all child support payments. In many cases, it has achieved that objective. If, however, you and your spouse have a shared or split custody regime, the tables are not easy to understand and the law can be confusing.

In most circumstances, child support consists of two amounts: the *base* and the allowance for *specials*. To calculate the *base*, turn to the Child Support Guidelines at the end of this book, and refer to the table for the province in which the payor resides. Ascertain the payor's income by looking at line 150 of his or her last tax return, determine the number of children who qualify for support, and then find the corresponding amount of child support. That is the base amount that must be paid. Remember: the guideline amount is a floor, not a ceiling. A spouse can always pay more, but except in extremely unusual circumstances (such as in cases of undue hardship), rarely less.

To calculate the *specials*, ascertain the costs of daycare, ongoing medical and dental expenses for the child, and extracurricular expenses. These costs are then shared between the parents in proportion to their incomes. For instance, if the custodial mother earns $20,000 per annum, and the father earns $30,000, the father must add to his base support amount three-fifths (or 60 percent) of the cost of these special expenses.

In the above example, assume that there are two children, and the parties live in British Columbia. According to the guidelines, the base payable by the father (based on his income of $30,000) is $463 per month. If the specials are $50 per month, the amount the father pays to the mother is $463 plus three-fifths (or 60 percent) of $50, for a total of $493.

The courts have little discretion to avoid the application of the guidelines. In this regard, we must explain: the child support "guidelines" are not guidelines at all, they are law. The spousal support guidelines are, unfortunately, exactly that — guidelines. Try not to confuse the concepts, even though the language is nonsensical.

A child support agreement that is inconsistent with the guidelines will attract the critical attention of the court, and can constitute an absolute bar to the granting of a divorce.

Under the new BC *Family Law Act*, however, parents have the right to agree on a scheme that is not necessarily in compliance with the Guidelines, provided that reasonable arrangements for the support and maintenance of the child have been made. Those alternate "reasonable arrangements" may involve some special clause to divide property in a beneficial way, or provide "lump sum" support, or some other scheme. What will constitute reasonable arrangements will depend on circumstances.

Property division

When you and your spouse separate, your family assets (and any debts you may have accumulated) need to be divided. Of this there can be no doubt — owning real property with a friend is a very bad idea — continuing to own property with a former lover is worse.

The laws respecting the division of family assets (at the end of a marriage) vary from province to province. Generally speaking, however, there is a presumption in favour of an equal division of assets if those assets were acquired or used by the family during the currency of the relationship. In addition, most jurisdictions employ a legislative scheme that requires the parties to fairly allocate their obligations (debts). These principles are best described as a presumption in favour of equivalency. In some circumstances, however, a simple "equal division" may be unfair. For instance, where one party came into the relationship with significant assets and the other party was penniless, an equal division of assets at the end of a short marriage may be unfair.

In British Columbia, the new *Family Law Act* provides that the assets that one party brings to a relationship (before it begins) will survive the relationship and at the end, that party can claim an exclusion of them. Family property, under this new legislation, is all property except for "excluded property" which a party owned prior to cohabitation and would also include gifts, inheritance, personal injury awards and property held in trust. A close examination of Parts 5 and 6 of the *Family Law Act* will be important for British Columbians who are attempting to divide their family property.

Keep in mind that regardless of the specifics of the prevailing legislation, consenting and informed adults can always make a compromise or "contract" as long as it's generally fair and properly done. One of the best ways to ensure that this is accomplished in a supportable way, is to attach a description of the assets and liabilities owned and owed by the parties (at the end of the relationship) as an Appendix to the back of a Separation Agreement. In the sample that is provided, we describe this as "Schedule A." This Schedule can be fairly simple, but should be accurate.

Make sure that each and every asset and liability described in the Schedule is dealt with in the agreement. If there are five assets and four liabilities in the Schedule, for instance, each of these nine items should be addressed and dealt with in the body of the agreement. Leave nothing to the imagination.

In common-law relationships, where the parties are not married, but have lived together in a lasting marriage-like arrangement, the legislative arrangements will likely be wholly inapplicable. The parties will, however, be expected to share property acquired together, based on principles of "trust." The trust laws for Canadian families come from a long line of important cases culminating in the most recent Supreme Court of Canada decision in *Kerr v Baranow*. The Supreme Court of Canada website will lead you to this, if you are so inclined.

The essence of this principle is that common-law parties who are separating can anticipate a sharing of assets where there is contribution (enrichment) and a corresponding deprivation. Perhaps an example is best:

> *Assume an unmarried couple are together for 14 years. They raise two children during that time. Midpoint in their relationship, they buy a house together. The home is registered in the name of the male spouse (because he works for*

wages, and has good credit) and not in the name of the female spouse (who has assumed the role of stay-at–home caregiver to the children). On separation, the female spouse may have no legal remedy in respect to the house. She has no legal status because she's not on the title and is not a wife. She does, however, have a clear entitlement on trust principles. She can allege that she contributed directly and indirectly to the establishment of family equity by staying home and raising the children. She would say that her decision was good for the family, for her spouse, and for the children. This direct and indirect contribution profited the family generally, and that's a form of enrichment. In facilitating this enrichment, she has been correspondingly deprived because she has been out of the labor market, has lost opportunities, and is not on the title of the home. She is entitled to consideration for that. Kerr v. Baranow *provides the basis.*

Trust principles are applicable throughout Canada — they are very different in Quebec — but family law legislation about the division of property varies from one province to another. Accordingly, it's important to do some research about the property division rules in the province where you and your spouse reside.

Under Ontario law, when a marriage ends, the contribution of each spouse is recognized. The value or equity in property that was acquired must be divided, and the presumption is in favour of equal division. Also, any increase in the value of property owned by a spouse since the date of marriage is to be shared. The payment from one spouse to the other (to effect the equalization) is called an equalization payment, or an equalization of net family property.

In Ontario, some property is exempt from these rules. Exempt property would consist of property that was inherited, or acquired by gift. Note, however, that if the spouse who receives the gift or inheritance subsequently uses the monies or property in the relationship for a family purpose, the nature of that gift or inheritance becomes contaminated, and the entirety of the gift will end up in the family law blender.

The new British Columbia *Family Law Act* contains similar provisions in sections 81 through 97, and (for the first time ever) power is given to the court to divide or apportion liabilities for debt.

Depending on where you and your spouse reside, you will need to consider the property division rules in your geographic jurisdiction (province or territory) before specifics are agreed upon. Remember that it is often entirely possible to obtain preliminary legal advice from a competent family law lawyer (on an initial interview) — some lawyers do this for free. Whether you must pay for the advice or not, it's important to get information about property division before negotiating (and certainly before signing the separation agreement). Always be mindful of the risks inherent in taking advice from the Internet.

Some other general principles to remember when discussing how to divide assets:

(1) Good literature is available to help parties discuss their issues and negotiate calmly and frankly (with proper disclosure);

(2) Try to negotiate fairly and only with full disclosure. Keeping secrets about assets and liabilities invariably causes trouble later, and can result in your agreement being declared invalid. Aside from that, it's just plain dishonest. Treat your spouse during separation negotiations as you did on your first date, and expect the same in return;

(3) You should attach a complete description of your assets and liabilities to the Separation Agreement. Use Schedule A sample as a guide. You do not need to list every pot and pan, or include clothing and photos, but you do need to list all the "big ticket" items;

(4) Do not forget about RRSP, TFSAs, GICs, bonds, and other investments;

(5) Remember too that RRSPS can be transferred between separating spouses without triggering tax (by use of a T2220 rollover form). This is a significant tax advantage, and should not be squandered. If you have these savings instruments, get legal advice or, at the very least, talk to your banker or accountant.

The family home

If one of your major assets is a home (as is often the case), give careful consideration to this topic. Several solutions are included in the sample separation agreement. Consider all your options carefully.

Remember that if your family home is to be transferred (from joint ownership) to one spouse, the non-owning spouse may still be liable under the mortgage. Accordingly, if your agreement anticipates the transfer of the home in circumstances where the purchaser is not a third party (and so the mortgage will remain on title) you must consider obtaining a release of that obligation. In this, you will need the consent of the lender. Do so before the transfer is complete. Since you will likely need a lawyer or notary to facilitate the transfer, this issue should be discussed with him or her and/or the lender.

If your agreement provides for the transfer of property from one spouse to the other, keep in mind that there may be significant tax consequences. For example, while transfer of the family home can usually be done on a tax-free basis, that may not be the case with a summer cottage or business asset. Any investment property that has increased in value since the date of purchase may attract tax on the gain (except in particular circumstances). Conversely, savings (e.g., RRSPs, mutual funds) can be split tax free if proper steps are taken. If your agreement anticipates disposition of assets of this type, or any assets having significant value, you should get professional counsel from an accountant or a lawyer.

Pension plans

Canada Pension Plan credits and benefits accumulated during the marriage are usually split equally between the spouses, regardless of the relative contributions each made. Even spouses who have never worked outside the home, and who never contributed directly to the plan, are entitled to half of the pension credits earned during the marriage by the working spouse. The equal division rule also applies when both spouses worked but one paid more into the plan than the other. To qualify, spouses must have lived together for at least 12 consecutive months and separation must have lasted for at least 12 months. A clause in an agreement that says the parties will not share CPP benefits and credits may be unenforceable. If you and your spouse are definitely committed to "opting out" of the usual sharing provisions of the CPP, you should obtain legal advice on the topic.

Note: There may be time limitations on applications to divide CPP credits and benefits. It is best to make the application promptly after separation. Contact your local Service Canada office for further information. You will find their information helpful.

Each spouse is also typically entitled to one-half interest in the other spouse's employer-sponsored pension plan. When dealing with the division of such a plan, make certain you are complying with the current legislation. The plan administrator can often be very helpful, but if you remain uncertain, seek counsel.

Be very careful. Employment pensions can be an extremely valuable asset, and caution and expertise is required when dividing them. If you or your spouse has a valuable employer sponsored pension plan, a good starting point is to discuss the plan and the options with the administrator of the pension plan. These individuals often have sample forms, documents, and helpful advice that is available at no cost.

Because the valuation of pension plans is not simply a matter of adding up contributions and then dividing by two, it may be necessary to engage the services of an actuary to calculate the value of the pension if a trade-off or buyout is anticipated. As well, since there are several different types of pension plans, the way a plan is shared and divided will depend on what kind of plan it is.

ENFORCING YOUR SEPARATION AGREEMENT

Separation agreements are enforceable under contract law principles. In addition, some jurisdictions allow these agreements to be filed (or registered) in the court as an aid to enforcement. Accordingly, if you encounter a problem with the enforcement of your agreement (i.e., if your spouse is not honouring support commitments made in the agreement), you should speak to the staff at the court registry nearest to where you reside, and ascertain if your agreement can be filed at the registry.

In addition, most provinces maintain publicly funded programs that offer free advice and enforcement action where one party to an agreement or order is refusing or failing to pay spousal or child support. You should inquire about the availability of these programs as well.

If enforcement of the terms of your separation agreement has become problematic, do not delay. Take action immediately, and seek counsel if you have any questions or uncertainties about which way to proceed. Your failure to take action on a breached promise in the agreement could compromise your ability to effect the necessary remedy later.

MISCELLANEOUS

After separation, your will may not fairly reflect your intentions. Be sure to review and revise your will. The Self-Counsel Press title *Write Your Legal Will in 3 Easy Steps* is an excellent guide to consider.

In most jurisdictions, a separation agreement made in the absence of independent legal advice is nonetheless valid and binding. However, it is always wise to review the draft agreement with counsel before executing the agreement. The fees for such review vary widely, but a reasonable range is between $100 to $500. Usually, that's money well spent.

Finally, be frank and fair in the making of your separation agreement. Contracts that are decidedly one-sided or settled when one party is mistaken about material facts are likely to attract critical attention in court. If either of you is unsure about what is fair, do not execute the agreement until you have investigated further.