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Problems that arise with Do-It-Yourself Separation Agreements

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Many individuals do not perceive any value in retaining the services of a lawyer. They may believe that they are just as qualified to provide legal services, or that a lawyer is simply too expensive, or they may have a myriad of different reasons. Sometimes these individuals will develop their own separation agreements upon the breakdown of a marriage. These separation agreements can lead to an immense amount of trouble in the future, and can often end up costing the individuals more than they would have spent on a lawyer to draft the separation agreement in the first place.

How Ontario deals with Separation Agreements

Separation agreements are governed by the *Family Law Act* in Ontario. It stipulates what a separation agreement can contain in section 54:

54. Two persons who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including,
- (a) ownership in or division of property;
 - (b) support obligations;
 - (c) the right to direct the education and moral training of their children;
 - (d) the right to custody of and access to their children; and
 - (e) any other matter in the settlement of their affairs.

The *Family Law Act* also stipulates several requirements that a separation agreement must meet if it is to be considered legally enforceable:

55. (1) A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed.



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Unlike other contracts between individuals separation agreements, and domestic contracts can be set aside by the court. This power is held in section 56(4) of the *Family Law Act*:

- (4) A court may, on application, set aside a domestic contract or a provision in it,
 - (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
 - (b) if a party did not understand the nature or consequences of the domestic contract; or
 - (c) otherwise in accordance with the law of contract

One of the most important doctrines which can cause a contract to be set aside under this provision is the doctrine of unconscionability. The Supreme Court of Canada set out how unconscionability is dealt with in a Family Law context in the case of *Rick v. Brandsema*. In that case the court determined that unconscionability occurs when a contract is highly unfair either at the time the contract is signed, or later on.

Initial Problems

There are a number of possible mistakes individuals can make when they are first attempted to draft their own separation agreement. The first problem is that individuals are not trained to consider the sheer number of different issues which can occur when a marriage breaks down. It is difficult to believe that many individuals are aware how to properly value their pension, a notoriously difficult task under the current legislation.¹ There are other problems; individuals may not be aware of how divorce could affect their estate planning, or retirements planning as Canadian Pension Plan Credits are split upon the breakdown of a marriage. The main issue, however, is there are many situations in which one individual may be drafting the separation agreement. These scenarios are ripe for abuse, as one individual may have power over the other or there may be an imbalance in education. There is no protection against such imbalances in a do-it-yourself separation agreement. This can lead to wildly lopsided agreements which benefit only one partner in the marriage. Even if both individuals are drafting the agreement, it can still create inequities due to the fact that each partner may not be aware of all of the different issues which they should be concerned about. This is the advantage of a lawyer when drafting a separation agreement, a lawyer can advise individuals about their situation. A lawyer has the expertise that an individual, or an online kit, does not have. Retaining lawyers can ensure that both parties are educated about what their legal rights and obligations are, and that they are protected from power imbalances.

¹ There is new legislation in regard to the valuation of pensions, but it has yet to come into force and effect.



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Problems with Enforcement

Beyond just the problems with drafting the agreement, enforcing a self-made separation agreement can be problematic. A couple must have complied with the requirements set out in section 55(1). Even if they have done this, the contract could still be set aside by the court using under 56(4). One of the clearest ways this could be engaged is section 56(4)(b):

(b) if a party did not understand the nature or consequences of the domestic contract

A defence against an individual asserting this would normally be that the party claiming they did not understand the contract had independent legal advice. Without lawyers being involved, it is reasonable to believe that many individuals, especially those who do not draft the agreement, would be confused about the contract or its consequences. Lacking the education that a lawyer would normally provide can put a contract in serious doubt, especially if the parties become unhappy with the arrangements as time passes.

The doctrine of unconscionability can be particularly difficult for the average person in Ontario to predict. The doctrine of unconscionability is engaged when there is considerable unfairness in a domestic contract; either at its inception or if it becomes unfair as time passes. This means that a separation agreement which is initially enforceable and acceptable by the parties can become unenforceable over time as one of the parties decide they are no longer content with the terms of the agreement. This can be a real difficulty for individuals making self-made separation agreements; parties are not usually trained to create a flexible agreement that is capable of remaining fair as circumstances change between the parties. A family law lawyer, on the other hand, has the knowledge and experience to ensure that an agreement will not become unenforceable. Unconscionability can leave self-made separation agreements in doubt, especially if one of the parties is not completely satisfied with the agreement.

Conclusion

Self-made separation agreements may, at first, seem like a way to save money and avoid legal issues. This, ultimately, ignores the legal realities in Ontario. Separation agreements are vulnerable to being set aside by the court; and a separation agreement must be drafted in a manner that will make it less likely for the court to do so. A lawyer is capable of both ensuring that any separation agreement the parties enter into will be enforceable throughout its lifetime, and help individuals formulate goals in entering into the separation that will ensure their legal rights and reasonable interests are respected.