

Domestic Contracts



**Public Legal Education
and Information Service
of New Brunswick**

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This publication looks at some general questions about domestic contracts. It explores some, though not all, of the legal rights and responsibilities of couples in a relationship or ending a relationship. It does not contain a complete statement of the law in the area. Anyone needing specific legal advice should consult a lawyer.

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What is a “domestic contract”?

A domestic contract is an agreement reached between two people living in a family relationship, which outlines their particular rights and responsibilities. These agreements are legally binding. You should be prepared to respect the promises made in your contract. The following are all domestic contracts:

- Marriage contracts
- Cohabitation agreements
- Separation agreements

What is a “marriage contract”?

A marriage contract is an agreement that a couple may enter into before their marriage or during their marriage while living together. In the contract, they define their rights and obligations during marriage, and upon death, divorce or separation.

What can we include in a “marriage contract”?

You may include requirements about the ownership or division of property, support obligations and other important issues, such as the education and religion of your children. However, a marriage contract cannot deal with custody and access of the children.

Note: Partners living in a common law relationship can enter into a cohabitation agreement, however, the use of the terms “marriage” and “spouse” refer only to partners entering into a marriage or who are already married.

What is a “cohabitation agreement”?

A cohabitation agreement is a contract that outlines each person’s rights and obligations during the period of cohabitation or upon death or separation. This type of agreement is appropriate for couples who are living together but who are not married to one another.

What can we include in a “cohabitation agreement”?

You may include requirements for the division or ownership of pensions and property, support obligations, and other matters on settling your affairs if you separate. As in a marriage contract, you cannot include clauses dealing with custody and access of your children.

What if we marry after signing a cohabitation agreement?

If you and your partner have entered into a cohabitation agreement and later marry, this agreement is considered to be a marriage contract.

What is a “separation agreement”?

A separation agreement is a contract which allows you and your spouse (or common law partner) to set out your rights and obligations at the time of your separation. You may enter into a separation agreement if you and your spouse (or common-law partner) were living together but have separated and are now living apart. A couple can prepare a separation agreement when they are still living together but have agreed to live separate.

Before preparing a separation agreement, it is a good idea for separating couples with children to participate in the free six-hour parenting after separation course, *“For the Sake of the Children”*, offered by Court Services Division, Department of Justice and Consumer Affairs. For more information or to register, call 1-888-236-2444.

What can we include in a “separation agreement”?

Your separation agreement should indicate your individual support obligations to each other and/or your children. As well, it should include decisions about ownership in and division of your property and any other matter related to the settlement of your affairs.

If you have children, your separation agreement should set out your parenting arrangement which would include custody and access rights.

For more information, see PLEIS-NB’s booklet on *Custody and Access in New Brunswick*.



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Once we have signed an agreement, is it possible to change it?


If one or both of the spouses wish to change a domestic contract, they must prepare and both sign a new agreement. Clauses that relate to child custody and access, and/or support are never written in stone. If a judge believes it is in the best interests of the child, he/she can ignore any clause concerning child support or the right to custody and/or access to the children.

Under the **Marital Property Act**, the court can ignore any clause of a domestic contract that creates an inequitable situation. For example, a spouse may challenge an agreement entered into without advice from independent legal counsel. This means that you should each have your own lawyer to ensure the validity of your agreement. Domestic contracts follow the same rules as any other contract. If the contract has clauses that violate the law or the public order, the courts will not enforce them.

What are the advantages of having a domestic contract?

Some of the advantages of having a domestic contract include:

- Couples can agree in advance about how to settle their family law matters. That means they do not have to apply to a court to decide these important matters for them.
- They often help families avoid conflicts about spousal and child support, custody to and access of their children as well as division of pensions and property.

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- They allow spouses to divide marital property in a manner other than the one indicated in the **Marital Property Act** (generally an equal share of marital property). For example, a marriage contract could replace the rules about property division in the **Act**.
 - They enable unmarried couples living in a common-law relationship who do not benefit from the **Marital Property Act** to set out their rights and obligations. The contract can then be enforced under this Act.

How can I be certain that my contract/agreement is valid?

In order to be valid, a domestic contract must be in writing and must be signed by you and your partner. The agreement must also be witnessed.

How do we prepare a domestic contract? Do we need a lawyer?

If you and your partner wish to enter into a domestic contract, you can start by sitting down together and coming to an agreement about the various family matters you want to address. Some couples may need help to negotiate their contract. You may wish to use the services of a mediator to resolve any differences.

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When you reach an understanding, one of you should take it to a lawyer who can draft the contract. The other person should take the draft contract to his/her lawyer for review. It is important that you each seek separate legal advice to ensure that you understand what your rights and responsibilities will be under the agreement. Sometimes it is best to have lawyers negotiate.

The agreement may be written up as a consent order which a judge would sign. However, a judge may ignore any provision in the contract if one of the parties did not receive independent legal advice and he/she challenges a provision.

If your contract or agreement includes provisions for child and/or spousal support, consider filing it with the **Family Support Orders Service** for the purposes of support enforcement.

What should I do if my spouse/partner does not follow conditions set out in the agreement?

If your former spouse or partner has not followed the terms of your domestic contract, you may sue him or her for breach of contract. As well, various laws provide rights and responsibilities for separating couples. See the booklet ***When Couples Separate: Rights and Responsibilities***.

