

WHY IS MY LAWYER MAKING ME PREPARE FINANCIAL DISCLOSURE WHEN ALL I NEED IS A SEPARATION AGREEMENT!

CLIENT TO LAWYER: "I KNOW WHAT MY HUSBAND HAS AND HE KNOWS WHAT I HAVE. WE'VE AGREED ON HOW WE'RE DIVIDING THE ASSETS. JUST DRAFT IT UP SO WE HAVE A LEGAL SEPARATION AGREEMENT!"

These are comments often made by clients who have retained lawyers to assist them in negotiating a Separation Agreement. Reasons include:

- *I (the client) don't have the time or patience to do this work;*
- *I don't want to pay for my lawyer's time in doing this;*
- *This is just a make-work project by the lawyers (after all that's why they're all rich, isn't it!); and*
- *I trust my spouse!*

Financial disclosure in negotiating separation agreements (and marriage contracts also!): Why is it necessary?:

The following are the answers:

- ***The necessity of Informed Consent:*** One of my clients, who works in the medical field, analogizes this requirement to the written consent - "informed consent" - that a patient must give that he/she has been told of the possible risks before consenting to a surgery. For example, before undergoing eye surgery, the patient must be told of and understand the possible risks of going blind in the surgery. Using this analogy, how can a husband and wife agree on how the assets and debts will be divided or distributed if they don't know what all the assets and debts are, or their values?
- ***The Terms of Agreements change once people are informed:*** As an example, I had a mediation case where, when I met each spouse separately at the outset as is my process when doing mediation, I ascertained that the husband had a pension of many years with his employer. When I met the wife she told me that "This will be the easiest open and shut mediation you have ever done!" When I said "You know he has a pension and you know that is considered an asset under our Ontario law" she said "Yes, but I don't want any part of it, I don't care what it's worth" and that her husband would have a fit if she asked for a share. I then asked her "What if I request an actuarial valuation of his pension

and it turns out it's worth 1 million dollars?" Knowing that she could be entitled (in the absence of any other assets) to half of that value, my client wisely told me to go ahead and have the pension valued. In fact the final point they ended up arguing about, prior to settling all terms of their Separation Agreement, was the pension value. The actuary provided 3 possible values based on 3 possible retirement ages of the husband, and guess which value each spouse argued!

- ***Ignorance is not bliss when it comes to negotiating a Separation Agreement or a Marriage Contract!*** It's easy to agree on things, e.g. "I don't want his pension," if one doesn't know what they're worth; or that "Each shall keep his/her own assets," without knowing what they're worth. In order to make an agreement that will stand the test of time, it must be based on the exchange of clear, thorough and complete financial disclosure, so that each party, when negotiating the terms of the agreement, will make their decisions based on knowledge and facts, i.e. informed consent.
- ***The case law:*** The law in Ontario mandates the exchange of full financial disclosure between spouses. The case law in Ontario abounds with examples of domestic contracts (Separation Agreements and Marriage Contracts) that have been set aside by subsequent Courts due to insufficient or lack of financial disclosure. The law is so stringent on this that, even in a case where the wife had a lawyer when she negotiated the Separation Agreement and insisted to her lawyer that she did not need to know the value of the husband's businesses, she was successful when she applied to the Court at a subsequent date to have the Agreement she had signed set aside!
- ***The fallacy that to disclose is to give away one's assets to one's spouse:*** In a spring 2013 Family Law Summit convened by the Law Society, a panel of judges was unanimous in declaring that the refusal or non-cooperation by one party to provide the required financial disclosure to the other is the biggest challenge the family Courts face today. There is often a notion by the more financially astute and wealthier spouse that revealing his/her assets will result in having to make a large payout to his/her spouse. In fact it is the person who has the majority of the assets that will be most protected by providing full financial disclosure, as failure to disclose all of his/her assets will most definitely make any agreement signed vulnerable to being set aside!
- ***Trust: "But I trust my spouse. She/he would not do that to me!"*** To rely on trust in the face of marriage breakdown is to behave like the proverbial 'ostrich in the sand'! Facts and information should be the basis of the spouse's decision making when she/he is negotiating the terms of the separation agreement. Often the terms will have lifelong ramifications and significance for each party. Feelings such as trust, guilt, and the desire for quick closure should be set aside by the parties when making their decisions, with the help and advice of their lawyers.

- **"Closure":** Clients often want to skip or shorten the necessary process, including the preparation and exchange of full financial disclosure, in the interests of "closure": Many people undergoing the pain of marriage breakdown feel that once they sign the Separation Agreement, they will have closure, i.e. the emotional and mental agony will end. Therefore many in the interests of this quick closure want to shortcut the process elements necessary to create a binding Separation Agreement, as these processes take time and also, legal fees. The reality is that closure is only achieved by the passage of time .Time truly does heal all. A "quick and dirty" Separation Agreement will open up the risks of prolonged agony in the form of an agreement that is not truly final and which will always be open and vulnerable to the possibility of a Court overhaul.

To conclude, It is the joint responsibility of the parties to themselves and their children to do their due diligence when negotiating the terms of a Separation Agreement which they will need/want to be able to rely on to govern their affairs from this point forward, and the responsibility of the party's lawyer to do her/his due diligence to ensure that the Separation Agreement that is made will stand up to any possible Court challenges later and will stand the test of time. True closure will only be achieved by engaging in the necessary process.

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