Annotated Standard Form Separation Agreement

September 2022

1. Definitions

> Precedents One software is a tool to help lawyers draft better agreements. The software cannot substitute for a lawyer's skill, knowledge and careful drafting. Each clause in your draft agreement must be carefully considered to ensure that it reflects the intention of the parties. If it does not, you must modify the draft agreement accordingly. The extensive annotations discuss the use of various clauses and offer substantive information to guide in the drafting process. These precedents are a guide to drafting a separation agreement. The drafter should be familiar with the province's Family Law and practice.
>
> Tax Caveat: There are numerous references to tax implications in the annotations to the various precedents. Those references are a guide only. Reference to the *Income Tax Act*, interpretation bulletins and other specific tax statutes may be required. In complicated situations, consultation with a tax specialist will be necessary.
>
> Date of Agreement: This date is for reference purposes. The date is not necessarily one on which the agreement becomes effective, since this is usually when the last of the parties has signed the agreement. Separation agreements (or any other domestic contract) should not be backdated and must not bear a date earlier than the date the parties actually reached accord. There can be significant income tax consequences relating to the agreement's date. Spousal support, for example, may not be deductible if the agreement is not signed in the year the payments are made or the following year.
>
> Parties to the Agreement: Most agreements will be between two parties only. Sometimes a third party, such as a trustee or a corporation, needs to be bound by the agreement and, therefore, must be a party. Trustees and escrow agents also fall into this category. The parties may choose, however, to use a separate agreement rather than incorporate the third party's rights and obligations into an essentially private agreement between spouses, most of which has nothing to do with the third party. If a third party is included in the agreement, to avoid ambiguity the definition section that follows must be clarified either to include or exclude the third party.

General Definitions

1.1 In this Agreement:

(a) child(ren)' means either Charles or Claire or both;

(b) "cohabit" means to live with another person in a relationship resembling marriage;

(c) "company" means [name of company];

(d) "cottage" means the property at [address] in [place];

(e) "CRA" means Canada Revenue Agency;

(f) "equalization payment" means the payment referred to in s. 5(1) of the *Family Law Act*;

(g) "FRO" means the Family Responsibility Office described in the *Family Responsibility and Support Arrears Enforcement Act*, or any successor support enforcement agency;

(h) "Guidelines" means the Federal Child Support Guidelines, as defined in s. 2(1) of the *Divorce Act*, [or, in the case of unmarried parents or spouses, "Guidelines" means the Child Support Guidelines as defined in s. 1(1) of the *Family Law Act*];

(i) "indexing factor" means the percentage change for a given month in the Consumer Price Index for [Canada] [Ontario] [Toronto] for prices of All-Items (as published by Statistics Canada) from the same month of the previous year;

(j) "matrimonial home" means the property at [address] in [place];

(k) "net family property" means net family property as defined in the *Family Law Act*;

(l) "property" means property as defined in the *Family Law Act*; and

(m) "section 7 expenses" means the special or extraordinary expenses for the children referred to in s.7 of the Guidelines.

"FRO": This definition serves as a reminder that when the parties deal with the issue of support enforcement, they may decide to elect not to have the Family Responsibility Office (the "FRO") enforce their agreement. Counsel must carefully consider the advantages and disadvantages of utilizing the FRO.

"Guidelines": This indicates which *Guidelines* are being used in the agreement, federal or provincial.

"matrimonial home": "Matrimonial home" is a defined term in the *Family Law Act*. The parties may have more than one matrimonial home. As the matrimonial home receives special treatment under the *Family Law Act*, counsel must be clear how they intend to use this term in the Agreement. Counsel must also be aware that a matrimonial home can be designated as such, limiting the special rights under Part II of the *Family Law Act* to one matrimonial home even where there may be more than one according to the definition. Before dealing with a matrimonial home in this Agreement, counsel should carefully review and understand s. 18 (the definition section) of the *Act*. Also, at this time, only married spouses can have a matrimonial home as defined. Common law partners must make property claims through unjust enrichment (ie. joint family venture) and resulting or constructive trust claims.

Short Form Statutory Reference Clause

1.2 Any reference to a statute means the legislation bearing that name at the time the Agreement is signed and includes its regulations and any amending or successor legislation. For example, "*Family Law Act*" means the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, and includes R.R.O. 1990, Reg. 368, R.R.O. 1990, Reg. 367, O.Reg. 391/97 and O.Reg 190/15.

It has been a traditional and common practice to name the statute with its short title and then to identify the

> statute with its full citation. It is unlikely that there will be any confusion over which statute is being discussed and, accordingly, instead of naming the statute twice, we propose a new introductory definition section which we prefer over the more traditional practice. The traditional method is also included for those who wish to continue to use it.

Alternate - Long Form Statutory Reference Clause

1.3 Any legislation defined in this section includes its regulations and any amending or successor legislation.

(a) "*Arbitration Act*" means the *Arbitration Act, 1991*, S.O. 1991, c. 17;

(b) "*Change of Name Act*" means the *Change of Name Act*, R.S.O. 1990, c. C.7;

(c) "*Children's Law Reform Act*" means the *Children's Law Reform Act*, R.S.O. 1990, c. C.12;

(d) "*Divorce Act*" means the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.);

(e) "*Estates Act*" means the *Estates Act*, R.S.O. 1990, c. E.21;

(f) "*Family Law Act*" means the *Family Law Act*, R.S.O. 1990, c. F.3;

(g) "*Family Orders and Agreements Enforcement Assistance Act*" means the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.);

(h) "*Family Responsibility and Support Arrears Enforcement Act*" means the *Family Responsibility and Support Arrears Enforcement Act*, 1996, S.O. 1996, c. 31;

(i) "*Family Statute Law Amendment Act, 2006*" means the *Family Statute Law Amendment Act, 2006*, S.O. 2006, c. 1;

(j) "*Garnishment, Attachment and Pension Diversion Act*" means the *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G.2;

(k) "Guidelines" means the applicable guidelines in s. 2(1) of the *Divorce Act* [or, in the case of unmarried parents or spouses, "Guidelines" means the Child Support Guidelines (*Family Law Act*), O.Reg. 391/97];

(l) "*Health Care Consent Act*" means the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch. A;

(m) "*Income Tax Act*" means the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.);

(n) "*Insurance Act*" means the *Insurance Act*, R.S.O. 1990, c. I.8;

(o) "*Partition Act*" means the *Partition Act*, R.S.O. 1990, c. P.4;

(p) "*Pension Benefits Act*" means the *Pension Benefits Act*, R.S.O. 1990, c. P.8;

(q) "*Pension Benefits Division Act*" means the *Pension Benefits Division Act*, S.C. 1992, c.

46, Sch. II;

(r) "*Public Service Superannuation Act*" means the *Public Service Superannuation Act*, R.S.C. 1985, c. P.36;

(s) "*Substitute Decisions Act*" means the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30;

(t) "*Succession Law Reform Act*" means the *Succession Law Reform Act*, R.S.O. 1990, c. S.26;

(u) "*Supplementary Retirement Benefits Act*" means the *Supplementary Retirement Benefits Act*, R.S.C. 1985, c. S.24; and

(v) "*Trustee Act*" means the *Trustee Act*, R.S.O. 1990, c. T.23.

> The following statute definitions are used when the parties opt for the longer definition of statutes. Do not include statutes that are not referred to in the balance of the Agreement.
>
> "*Health Care Consent Act*": Counsel should remind separated clients that they will not likely want their former spouses to be in charge of their health care. Counsel should pay attention to this statute, consider with whom the parties wish to entrust their future health care and remind the client to make appropriate arrangements under the statute.
>
> "*Insurance Act*": This section should also serve to remind the parties that a separation agreement does not end the beneficiary designations under the Insurance Act (or a will or RRSP, for that matter). Accordingly, if parties upon separation wish to benefit someone other than their spouse, they need to submit a change-of-beneficiary form to the appropriate insurance company and obtain an acknowledgment from the insurer that it accepts the designation. Counsel should remind parties to change their will, if necessary, and to change all other necessary beneficiary designations, such as in their RRSPs.
>
> "*Partition Act*": This section reminds parties that property held in joint tenancy after separation is not necessarily severed by the agreement and, accordingly, the right of survivorship may continue. Specific wording is required to sever a joint tenancy and turn it into a tenancy-in-common. Counsel should remind clients that they need to deal, specifically in the agreement and perhaps other documents such as a will or transfer deed, with property owned jointly by the spouses. Clients will need to consider whether they wish to sever the joint tenancy. A conveyance from one joint tenant to himself or herself will accomplish the severance, without the necessity of the other's consent.
>
> "*Substitute Decisions Act*": See the annotation relating to the *Health Care Consent Act* above. Counsel should carefully canvass this "Power of Attorney" issue with the client.

2. Background

> The editors ("We") have adopted the word "Background" instead of the word "Recitals". Recitals often perform an explanatory function, defining the nature and scope of the agreement and generally setting out the facts upon which the agreement is based. Some counsel, however, choose to avoid recitals and deal

> with the parties' obligations in the operative sections. Family law counsel have traditionally made considerable use of recitals, not only because clients are anxious to tell their stories in the agreement, but also because they wish to ensure that the essential facts upon which the agreement is based have been considered. Nevertheless, recitals can cause problems. They may be viewed by the courts as interpretive tools for other terms of the contract and if they contain a fact that turns out to be inaccurate, that may lead to a dispute as to whether there was a meeting of minds.
>
> Therefore, "Background" only indicates the context in which the agreement was reached. It can be very useful to understand the context at the time that the agreement was entered into, particularly if the agreement is ever challenged in the future, or if there is a variation/review of the agreement. If the parties want to use a different approach, they should consider using recitals. (Note that the "Background" facts can be incorporated into an agreement, not just for context, but for the truth of the statements as well, if one so desires, by the inclusion of the "Incorporation and Accuracy of Background" clause in the agreement).

Marriage [cohabitation] Date

2.1 Harold and Wendy were married [began cohabiting]on [date]. [They started living together before marriage on { CohabitationDate }}]

> Select only one of these 2 clauses: "Marriage [cohabitation] Date"; or "Never Married/Cohabited".
>
> If the parties are married, but lived together before marriage, the date that they began living together becomes relevant for the purposes of the duration of spousal support under the *Spousal Support Advisory Guidelines*.

Never Married/Cohabited

2.2 Harold and Wendy were never married, nor did they cohabit for the purposes of the common law. Accordingly, the parties agree that the *Family Law Act* and/or the *Divorce Act*, and/or any successor legislation and the common law do not apply to them, despite references to these Acts in the Agreement.

> Select only one of these 2 clauses: "Marriage [cohabitation] Date"; or "Never Married/Cohabited".
>
> This clause is generally used when the parties have had a child together, but have never married nor lived together.

Separation Date

2.3 Harold and Wendy separated on [date]. They will continue living separate and apart.

> Select only one of these 2 clauses: "Separation Date"; or "Separation Date while Living in Same Property".
>
> The clause is important, not only for the purposes of valuing the assets and setting the one year time period

> for a divorce, but also for the purpose of ensuring the tax deductibility of spousal support payments. Spousal support payments are deductible only if the parties are living separate and apart when the payments are made and continue living separate and apart for the remainder of that year (as well as meeting the other eligibility requirements for tax purposes).

Separation Date while Living in Same Property

2.4 Harold and Wendy separated on [date], and continue to live separate and apart, albeit in the same property, namely the matrimonial home. Upon the execution of this Agreement [and the transfer of Harold's interest in the matrimonial home to Wendy], Harold will vacate the matrimonial home. The parties will continue living separate and apart.

> Select only one of these 2 clauses: "Separation Date"; or "Separation Date while Living in Same Property".
>
> This clause is important to clarify the actual date of separation even though for financial or other reasons, the parties continue to live in the same property, albeit separately and independently, until the issues are resolved. The clarification of this date is important, not only for the purposes of valuing the assets and setting the one year time period for a divorce, but also for the purpose of ensuring the tax deductibility of spousal support payments. Spousal support payments are deductible only if the parties are living separate and apart when the payments are made and continue living separate and apart for the remainder of that year (as well as meeting the other eligibility requirements for tax purposes).

Date of Divorce

2.5 They were divorced on [date].

Birthdate and Age

2.6 Harold was born on [date of birth] and is currently [age] years old. Wendy was born on [date of birth] and is currently [age] years old.

Children of the Marriage/Relationship

2.7 They have [two] child[ren], Charles Doe, born April 1, 1990 ('Charles') and Claire Doe, born June 1, 1993 ('Claire').

[include details/history of the parties' parenting roles during the marriage that may be relevant to spousal support entitlement/claim and compensatory nature of spousal support]

> It is helpful, particularly if the Agreement is ever challenged in the future, or if there is a variation/review of the Agreement, to provide details/history of the parties' parenting roles during the marriage that may be relevant to spousal support entitlement/claim and the compensatory nature of spousal support.

Children from Prior Marriages/Relationships

2.8 [Harold or Wendy] has [number] child[ren] from a prior relationship, namely [specify name(s) of child(ren) and birthdate(s)] , who [lived] [did not live] with the parties during their [marriage] [relationship], and for whom [Harold or Wendy stood in loco parentis and therefore has a child support obligation.] [Harold or Wendy did not stand in loco parentis and therefore does not have a child support obligation.]

[include details/history of the parties' parenting roles during the marriage that may be relevant to child and spousal support entitlement/claim and compensatory nature of spousal support]

> Any other pertinent information relating to the children, their living arrangements, and their support may be included here, particularly where the step parent will not be paying child support for the children. Be advised that while this clause may be evidence of the parties' intentions, a court may still find child support payable for the step child in the event that the step parent stood in loco parentis. The best interests of the children will prevail.

Education/Employment Background

2.9 The parties' education/employment information is as follows:

(a) Harold is employed as [title/job description] by [specify employer] and earns an annual income of approximately $[amount].

[Harold is self-employed as (specify title/job description) and earns an annual (net/gross) income of approximately $(amount).]

[Harold has been unemployed for (specify period of time), and [is actively looking for employment] [intends to re-train as (specify details) which is estimated to take (specify period of time)] [plans to remain at home to care for the children for (specify period of time).]

[include any additional education/employment details/history that may be relevant to spousal support entitlement/claim and compensatory nature of spousal support]

(b) Wendy is employed as [title/job description] by [specify employer] and earns an annual income of approximately $[amount].

[Wendy is self-employed as (specify title/job description) and earns an annual (net/gross) income of approximately $(amount).]

[Wendy has been unemployed for (specify period of time), and [is actively looking for employment] [intends to re-train as (specify details) which is estimated to take (specify period of time)] [plans to remain at home to care for the children for (specify period of time).]

[include any additional education/employment details/history that may be relevant to spousal support entitlement/claim and compensatory nature of spousal support]

> This clause can and should be expanded to provide more detailed information with respect to the parties' education and employment situation. It is helpful, particularly if the Agreement is ever challenged in the future, or if there is a variation/review of the Agreement, to provide details/history of the parties' education/employment roles during the marriage that may be relevant to spousal support entitlement/claim and the compensatory nature of spousal support.

State of Health

2.10 Both Harold and Wendy currently enjoy excellent states of health.

[or instead detail any health issues/concerns, and provide any health details/history that may be relevant to spousal support entitlement/claim and compensatory nature of spousal support]

> This clause can and should be expanded to provide more detailed information with respect to the parties' health situation. It is helpful, particularly if the Agreement is ever challenged in the future, or if there is a variation/review of the Agreement, to provide details/history of the parties' health status during the marriage that may be relevant to spousal support entitlement/claim and the compensatory nature of spousal support.

Intended Purpose of Agreement

2.11 Harold and Wendy each intend this Agreement to be:

(a) a settlement of decision-making responsibility, parenting time, contact, and support with respect to the children;

(b) a [final] settlement of spousal support;

(c) a [final] settlement of:

i their respective rights in or to the property of the other and the property held by them jointly;

ii their respective rights in the estate of the other;

iii all issues otherwise arising out of their marriage [cohabitation].

> Select only one of these 2 clauses: "Intended Purpose of Agreement"; or "Interim Agreement".
>
> The new terminology found in the *Divorce Act* (effective March 1, 2021) replacing the terms "custody" and "access" with "decision-making responsibility", "parenting time" and "contact" is reflected in subparagraph (a) of this clause.

Interim Agreement

2.12 This Agreement is intended to be an Interim Agreement with respect to the following issues:

(a) [allocating decision-making responsibility and parenting time with respect to the children on an interim basis;]

(b) [interim child support;]

(c) [interim spousal support;]

(d) [specify any other interim issues to be addressed;]

and will expire on [date].

> Select only one of these 2 clauses: "Intended Purpose of Agreement"; or "Interim Agreement".
>
> Although Precedents One already includes an Interim Separation Agreement, it is limited. While this Separation Agreement is designed to be a final agreement between the parties, if a more extensive interim agreement is required, this Agreement can be modified as necessary.

Agree to be Bound

2.13 The parties agree to be bound by this Agreement which settles all issues between them.

> We intend this to be an operative section expressing the wish of the parties to comply with all of the terms of the Agreement. It allows counsel to use the word "will" instead of the word "shall" throughout the agreement.

Importance of Full Disclosure

2.14 Harold and Wendy recognize that full financial disclosure is essential to the conclusion of this Agreement, and each confirms that they have made full financial disclosure of their respective income, assets, and debts existing at the date of the marriage [or start of cohabitation], the date of separation and the date of this Agreement.

> This clause highlights the importance of full financial disclosure, without which the Agreement may be challenged and set aside in the future.

Assistance of Mediator

2.15 This Agreement has been made with the assistance of a mediator[, namely [specify name]].

Agreement Reached in Collaborative Law Setting

2.16 This Agreement has been reached through the collaborative law process on the following basis:

(a) At the commencement of the process, and throughout it, the parties agreed that the purpose of the collaborative process was to focus on reaching a comprehensive resolution of all issues relating to their marriage and separation.

(b) In arriving at this Agreement, the parties have each applied their individual standards of reasonableness and acceptability. The conclusions they have reached are based in part on their respect and regard for each other. From time to time, they have considered what might happen if any issue were decided by a judge in court, but they have elected to make their own agreement whether or not a court might have adjudicated issues in the same manner.

(c) Harold has worked with [name], a collaborative lawyer, to advise and assist Harold in connection with this Agreement. Wendy has worked with [name], a collaborative lawyer, to advise and assist Wendy in connection with this Agreement.

(d) [The parties have also jointly worked with [name], a family professional, and (name), a financial professional, to advise and assist them in connection with this Agreement.]

> This clause should be used when the parties have engaged in the collaborative process to reach an agreement.

No Application Commenced

2.17 No application claiming relief under the *Divorce Act*, the *Family Law Act* or the *Children's Law Reform Act*, has been commenced by either party in any court to resolve any of the parties' family law issues.

> Select only one of these 2 clauses: "No Application Commenced"; or "Application Commenced".

Application Commenced

2.18 Harold has commenced an application for relief under the [*Divorce Act*] [*Family Law Act*] [*Children's Law Reform Act*] against Wendy in the [Superior Court of Justice, Family Court] [Superior Court of Justice] [Ontario Court of Justice] at [specify court address], under court file number [specify court file number].

> Select only one of these 2 clauses: "No Application Commenced"; or "Application Commenced".

Incorporate Minutes of Settlement / MOBA

2.19 This Agreement incorporates the terms of the Minutes of Settlement [or Memorandum of

Binding Agreement] between the parties dated [specify date].

Replaces All Agreements

2.20 This Agreement replaces all oral or written agreements made between the parties.

> We have included this term to serve as a reminder to clients signing an agreement that the agreement replaces any agreement previously made, including oral agreements. It is a further reminder that there are no other oral representations upon which a party can rely once this agreement has been signed. If the parties have relied on other representations, then they should deal with them specifically in the agreement.

Replaces (varies) Domestic Contracts

2.21 This Agreement replaces [or varies] the [interim] domestic contract the parties made on [date].

> You may wish to further specify the nature of the former domestic contract (eg. cohabitation agreement, marriage contract, interim separation agreement etc.), and the subject matter (eg. dealing with interim decision-making responsibility or parenting time with respect to the children, interim child support paid by the payor to the recipient, or interim periodic spousal support made by payor to the recipient (or to third parties on the recipient's behalf) during a specified calendar year, etc.). If relevant, you may wish to attach a copy of the former domestic contract as a schedule to the Agreement.

Incorporation and Accuracy of Background

2.22 All background statements of fact form part of this Agreement. Each of the parties warrants that the background statements of fact are true and acknowledges that the other party is relying on them.

> This clause incorporates the background facts into the Agreement, not just for context, but for the truth of the statements as well (akin to recitals). Be aware that if a statement of fact turns out to be inaccurate, it may lead to a dispute as to whether there was a meeting of minds for the entire Agreement. Be sure that this is what the parties intend before including this clause in the Agreement.

3. Freedom From The Other

Respect & Privacy

3.1 Harold and Wendy will continue to respect each other and each other's privacy.

> Select only one of these 3 clauses: "Respect & Privacy"; "Non-harassment and Non-trespass (No Children)"; or Non-harassment and Non-trespass (With Children)".

> This clause is less inflammatory than the subsequent "non-harassment/non-trespass" clauses traditionally used in separation agreements, and may be preferred when parties are on fairly good terms with each other, or are using the collaborative process in reaching an agreement.

Non-harassment and Non-trespass (No Children)

3.2

(a) Harold and Wendy will not harass or speak ill of each other.

(b) Neither party will go on property where the other lives or works without the other's consent.

> Select only one of these 3 clauses: "Respect & Privacy"; "Non-harassment and Non-trespass (No Children)"; or Non-harassment and Non-trespass (With Children)".
>
> These clauses may not always be necessary and, in fact, may be considered inflammatory or offensive by some parties who are on relatively good terms with each other. It should be used in high conflict cases when there is some chance that one of the parties may have to resort to injunctive relief to deter the other spouse from interfering with his or her life after the Agreement is signed.

Non-harassment and Non-trespass (With Children)

3.3

(a) Harold and Wendy will not harass or speak ill of each other.

(b) Neither party will go on property where the other works without the other's consent.

(c) Neither party will go to the other's home except on reasonable notice and only for the purpose of picking up or dropping off the children.

> Select only one of these 3 clauses: "Respect & Privacy"; "Non-harassment and Non-trespass (No Children)"; or Non-harassment and Non-trespass (With Children)".
>
> This section may not always be necessary and, in fact, may be considered inflammatory or offensive by some parties who are on relatively good terms with each other. It should be used in high conflict cases with children, where the parties will likely have continual contact and when there is some chance that one of the parties may have to resort to injunctive relief to deter the other spouse from interfering with his or her life after the Agreement is signed.

4. Parenting

> With the changes to the *Divorce Act* ("*DA*"), effective March 1, 2021, and similar changes to Ontario's *Children's Law Reform Act* ("*CLRA*") and B.C.'s *Family Law Act* ("*FLA*"), the conflict inducing terms

"custody" and "access" have now been replaced with different terminology. Instead parenting arrangements or orders must consider "decision-making responsibility" (*DA*, s.16.3; *CLRA*, s.20) or "parental responsibilities" (*FLA*, ss.40, 41), "parenting time" (*DA*, s.16.2(1); *CLRA*, s.20; *FLA*, ss.40, 42) with respect to children, as well as contact with non-parents (*DA*, s.16.5; *CLRA*, s.21(3); *FLA*, ss.40, 42), with the best interests of the children to prevail at all times.

In determining the "best interests of the child", primary consideration is to be given "to the child's physical, emotional and psychological safety, security and well-being" (s.16(2), *CLRA*, s.24(2), *FLA*, s.37(3)) in considering certain factors set out in the legislation (*DA*, ss.16(3)-(4), *CLRA*, ss.24(3)-(4), *FLA*, ss.37(2) & 38).

Parenting Plan Attached

4.1 Harold and Wendy will honour their Parenting Plan, attached as a Schedule to this Agreement.

Parenting plans, in which the parties agree on their respective rights and responsibilities in raising their children in greater detail than is traditionally set out in a Separation Agreement, are becoming more popular these days. If the parties have a Parenting Plan, it should be appended to the Agreement, and likely means that all of the other clauses in this "Parenting" section have been covered in the Parenting Plan, and are therefore unnecessary in this Agreement.

With recent legislative changes to the *Divorce Act ("DA")*, effective March 1, 2021, and similar changes to its provincial counterparts - Ontario's *Children's Law Reform Act* ("*CLRA*") and B.C.'s *Family Law Act* ("*FLA*") - the conflict inducing terms "custody" and "access" have now been replaced with different terminology. Instead parenting arrangements or orders must consider "decision-making responsibility" (*DA*, s.16.3; *CLRA*, s.20) or "parental responsibilities" (*FLA*, ss.40, 41) and "parenting time" (*DA*, s.16.2(1); *CLRA*, s.20; *FLA*, ss.40, 42) with respect to children, with the best interests of the children to prevail at all times.

Section 16.6(1) of the *Divorce Act*, provides that any parenting plan submitted by the parties shall be included in a parenting order or contact order, as applicable.

Day-to-day Decisions

4.2 The party with whom the children are scheduled to be according to the parenting time schedule will make the day-to-day decisions affecting the children during that time.

The amended *Divorce Act*, effective March 1, 2021, specifically provides in s.16.2(2) that "[u]nless the court orders otherwise, a person to whom parenting time is allocated ... has exclusive authority to make, during that time, day-to-day decisions affecting the child." A similar provision is found in s.28(6) of Ontario's *Children's Law Reform Act*.

Joint Decision-Making

4.3 With respect to the decision-making responsibility for the children:

(a) Harold and Wendy will have joint decision-making responsibility and will make important decisions about the children's welfare together, including decisions about the children's:

i health[, including major non-emergency health care, as well as emergency health care as long as both parties can be reached immediately in the event of an emergency, failing which the party with parenting time will make the emergency decision];

ii education;

iii culture, language, religion and spirituality; and

iv significant extra-curricular activities.

(b) If the parties cannot agree, they will use [the dispute resolution paragraph [specify number] in the Parenting section of this Agreement] [the section of this Agreement entitled "Dispute Resolution"] to resolve the dispute.

> Select only one of these 4 clauses: "Joint Decision-Making"; ""Sole Decision-Making"; "Sole Decision-Making in Consultation with Other"; or "Bifurcated Decision-Making".
>
> With the changes to the *Divorce Act* ("*DA*") and Ontario's *Children's Law Reform Act* ("*CLRA*"), both effective March 1, 2021, the conflict inducing terms "custody" and "access" have now been replaced with different terminology. Instead parenting arrangements or orders must consider "decision-making responsibility" (*DA*, s.16.3; *CLRA*, s.20) and "parenting time" (*DA*, s.16.2(1); *CLRA*, s.20) with respect to children, with the best interests of the children to prevail at all times.
>
> This clause and the ones that follow focus on the "decision-making responsibility" component of parenting arrangements (formerly known as "custody"), with this clause proposing joint decision-making of those major items listed in s.2(1) of the *DA*, and s.18(1) of the *CLRA*.
>
> If the parties are co-operative and able to put the children's needs first, this clause needs no further particulars. It requires the parties to consult on all important matters and to parent cooperatively. The clause sets out the major items listed in s.2(1) of the *DA* and s.18(1) of the *CLRA*, but counsel should feel free to expand on or limit the clause as the case requires. Counsel must consider that the parties may not always agree and, therefore, should provide a dispute resolution mechanism to deal with these situations. (See the dispute resolution mechanism for parenting issues at the end of the Parenting section of the Agreement, for example.) If the parties are going to make decisions together, they must understand that this will maximize the contact between them after their separation. On every important decision involving the children, and some not-so-important decisions, the parties will have to consult each other and be involved in the resolution of the issue. While the literature may indicate that co-operative parenting is usually best for children, the clients must understand and accept this responsibility.

> Some may be very reluctant to enter into an agreement that requires them to consult with the other party on every issue involving the children, and care must be exercised in using this approach. Sole decision-making or a hybrid approach as set out in some of the other clauses that follow may be more appropriate depending on the parties' circumstances.

Sole Decision-Making

4.4 With respect to the decision-making responsibility for the children:

(a) Wendy will have sole decision-making responsibility and will make important decisions about the children's welfare, including decisions about the children's:

i health[, including major non-emergency health care, as well as emergency health care as long as Wendy can be reached immediately in the event of an emergency, failing which Harold will make the emergency decision];

ii education;

iii culture, language, religion and spirituality; and

iv significant extra-curricular activities.

> Select only one of these 4 clauses: "Joint Decision-Making"; "Sole Decision-Making"; "Sole Decision-Making in Consultation with Other"; or "Bifurcated Decision-Making".
>
> Some may be very reluctant to enter into an agreement that requires them to consult with the other party on every issue involving the children, and so an absolute sole decision-making term may be more appropriate.
>
> See the Commentary under "Joint Decision-Making" clause above for further information on decision-making generally.

Sole Decision-Making, in Consultation with Other

4.5 With respect to the decision-making responsibility for the children:

(a) Wendy will have sole decision-making responsibility and will make important decisions about the children's welfare, including decisions about the children's:

i health[, including major non-emergency health care, as well as emergency health care as long as Wendy can be reached immediately in the event of an emergency, failing which Harold will make the emergency decision];

ii education;

iii culture, language, religion and spirituality; and

iv significant extra-curricular activities.

(b) Wendy will, however, first consult with Harold in respect of all important decisions in subparagraph (a) above and will seek his input. It is only after this consultation process that Wendy will be at liberty to make a decision. Wendy will advise Harold of her decision[30 days in advance] [in writing].

(c) Notwithstanding any opposition or disagreement by Harold with respect to Wendy's decision, Wendy's decision will prevail.

> Select only one of these 4 clauses: "Joint Decision-Making"; "Sole Decision-Making"; "Sole Decision-Making in Consultation with Other"; or "Bifurcated Decision-Making".
>
> This clause requires the parties to consult on all important issues, but gives the ultimate decision-making authority to the party with decision-making responsibilities with the children. It is essentially a hybrid clause, falling somewhere between joint decision-making and the more traditional sole decision-making arrangement. (Note that subsection (c) could be altered to provide for the application of the dispute resolution mechanism in the Agreement in the event of disagreement, making it similar to the immediately preceding term.)
>
> If the parties are going to consult on all important decisions, they must understand that this will maximize the contact between them after their separation. On every important decision involving the children, and some not-so-important decisions, the parties will have to consult each other. While the literature may indicate that co-operative parenting is usually best for children, the clients must understand and accept this responsibility.
>
> See the Commentary under the "Joint Decision-Making" clause above for further information on decision-making generally.

Bifurcated Decision-Making

4.6 Harold and Wendy will have bifurcated (ie. split) decision-making responsibility for the children as follows:

(a) Harold will have sole decision-making responsibility and will make important decisions about the children's welfare with respect to the children's:

i [health [including major non-emergency health care, as well as emergency health care as long as Wendy can be reached immediately in the event of an emergency, failing which Harold will make the emergency decision];]

ii [education;]

iii [culture, language, religion and spirituality;]

iv [significant extra-curricular activities. for the children.]

(b) Wendy will have sole decision-making responsibility and will make important decisions about the children's welfare with respect to the children's:

i [health [including major non-emergency health care, as well as emergency health care as long as Wendy can be reached immediately in the event of an emergency, failing which Harold will make the emergency decision];]

ii [education;]

iii [culture, language, religion and spirituality;]

iv [significant extra-curricular activities. for the children.]

(c) Each party will, however, first consult with and seek the input of the other in respect of all important decisions over which that party has sole decision-making authority. It is only after this consultation process that the party with sole decision-making authority will be at liberty to make a decision. The deciding party will advise the other of the final decision[30 days in advance] [in writing].

> Select only one of these 4 clauses: "Joint Decision-Making"; "Sole Decision-Making"; "Sole Decision-Making in Consultation with Other"; or "Bifurcated Decision-Making".
>
> This clause requires the parties to consult on all important issues, but gives the ultimate decision-making authority for each issue to one parent. This is another hybrid clause like the one preceding, falling somewhere between joint decision-making and the more traditional sole decision-making arrangement, but this time with bifurcated decision-making authority depending on the issue.
>
> If the parties are going to consult on all important decisions, they must understand that this will maximize the contact between them after their separation. On every important decision involving the children, and some not-so-important decisions, the parties will have to consult each other. While the literature may indicate that co-operative parenting is usually best for children, the clients must understand and accept this responsibility.
>
> See the Commentary under the "Joint Decision-Making" clause above for further information on decision-making generally.

Emergency Decisions

4.7 If a child needs emergency medical care while with one party, that party will promptly notify the other of the emergency.

> Use this clause when there is a real concern that the parents cannot cooperate with each other. Ensure that it is consistent with the other parental responsibilities clauses above.

Equal Parenting Time - Alternate Weeks

4.8 The parenting time with the children will be allocated as follows:

(a) The children will live equally with Harold and Wendy in alternate weeks, from Monday

after school until the start of school on the following Monday.

(b) Each party will be responsible for transporting the children to/from school during the party's parenting time.

(c) For holidays, the children will live with the parties according to the holiday schedule set out below.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> With the changes to the *Divorce Act* ("*DA*"), effective March 1, 2021, and similar changes to Ontario's *Children's Law Reform Act* ("*CLRA*") and B.C.'s *Family Law Act* ("*FLA*"), the conflict inducing terms "custody" and "access" have now been replaced with different terminology. Instead parenting arrangements or orders must consider "decision-making responsibility" (*DA*, s.16.3; *CLRA*, s.20) or "parental responsibilities" (*FLA*, ss.40, 41) and "parenting time" (*DA*, s.16.2(1); *CLRA*, s.20; *FLA*, ss.40, 42) with respect to children, with the best interests of the children to prevail at all times.
>
> In determining the "best interests of the child", primary consideration is to be given "to the child's physical, emotional and psychological safety, security and well-being" in considering certain factors set out in *DA,* s.16(3), *CLRA*, s.16(3) , *FLA*, s.37(2).
>
> This set of clauses focuses on the "parenting time" component of parenting arrangements. This clause and the next few clauses set out arrangements for equal parenting time. The remainder of the clauses in this set outline other parenting time arrangements. It is important to discuss the various options with the client and determine the arrangement that makes the most sense for the children.
>
> While the *Divorce Act* embraces a principle of "maximum parenting time" in s.16(6) where it provides that a "child should spend as much time with each parent", this principle is qualified by the addition of the phrase "as is consistent with the child's best interests". A similar qualification is found in s.24(6) of the *CLRA*. It is important to note that this does not mean a presumption of equal time. A similar presumption against equal time is found expressly in s.40(4)(b) of the *FLA*.

Equal Parenting Time - Split Two-Week Rotation (2-2-5-5)

4.9 The parenting time with the children will be allocated as follows:

(a) The children will live equally with Harold and Wendy on the following repetitive two-week schedule:

i with Harold from Monday after school until the start of school on Wednesday;

ii with Wendy from Wednesday after school until the start of school on Friday;

iii with Harold from Friday after school until the start of school on Wednesday;

iv with Wendy from Wednesday after school until the start of school on Monday;

v repeat by going back to i above.

(b) Each party will be responsible for transporting the children to/from school during the party's parenting time.

(c) For holidays, the children will live with the parties according to the holiday schedule set out below.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> See the Commentary under the clause "Equal Parenting Time - Alternate Weeks" above.

Equal Parenting Time - Split Two-Week Rotation (2-2-3-2-2-3)

4.10 The parenting time with the children will be allocated as follows:

(a) The children will live equally with Harold and Wendy on the following repetitive two-week schedule:

i with Harold from Monday after school until the start of school on Wednesday;

ii with Wendy from Wednesday after school until the start of school on Friday;

iii with Harold from Friday after school until the start of school on Monday;

iv with Wendy from Monday after school until the start of school on Wednesday;

v with Harold from Wednesday after school until the start of school on Friday;

vi with Wendy from Friday after school until the start of school on Monday;

vii repeat by going back to i above.

(b) Each party will be responsible for transporting the children to/from school during the party's parenting time.

(c) For holidays, the children will live with the parties according to the holiday schedule

set out below.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> See the Commentary under the clause "Equal Parenting Time - Alternate Weeks" above.

Primary/Secondary Parenting Time - Alternate Weekends & One Evening

4.11 The parenting time with the children will be allocated as follows:

(a) The children will live primarily with Wendy.

(b) The children will live secondarily with Harold as follows:

i Wednesday evenings from after school until [8:00] p.m.;

ii alternate weekends, from Friday after school until the start of school on Monday morning (extended from Thursday after school if Friday is a school holiday to the start of school on Tuesday morning if Monday is a school holiday);

iii Harold will be responsible for transporting the children to/from school or Wendy's home, as applicable, during this parenting time.

(c) For holidays, the children will live with the parties according to the holiday schedule set out below.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> This clause and the one that follows contemplate a more traditional parenting time structure where the children live primarily with one parent, and spend alternate weekends and one evening or overnight with the other parent.
>
> See the Commentary under the clause "Equal Parenting Time - Alternate Weeks" above for further information about parenting time.

Primary/Secondary Parenting Time - Alternate Weekends & One Overnight

4.12 The parenting time with the children will be allocated as follows:

(a) The children will live primarily with Wendy.

(b) The children will live secondarily with Harold as follows:

i Wednesday evenings overnight from after school until the start of school on Thursday;

ii alternate weekends, from Friday after school until the start of school on Monday morning (extended from Thursday after school if Friday is a school holiday to the start of school on Tuesday morning if Monday is a school holiday);

iii Harold will be responsible for transporting the children to/from school during this parenting time.

(c) For holidays, the children will live with the parties according to the holiday schedule set out below.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> This clause and the one that precedes it contemplate a more traditional parenting time structure where the children live primarily with one parent, and spend alternate weekends and one evening or overnight with the other parent.
>
> See the Commentary under the clause "Equal Parenting Time - Alternate Weeks" above for further information about parenting time.

Split Parenting Time

4.13 The parenting time with the children will be split and allocated as follows:

(a) [Specify name(s) of child(ren)] will live primarily with Harold, and secondarily with Wendy as set out in subparagraph (c) below.

(b) [Specify name(s) of other child(ren)] will live primarily with Wendy, and secondarily with Harold as set out in subparagraph (c) below.

(c) Secondary parenting time will be as follows:

i Wednesday evenings [from after school until 8:00 p.m.] [overnight from after

school until the start of school on Thursday], with each party responsible for transporting the child(ren) in their care to/from school[, and alternating weeks picking up/dropping off the child(ren) on Wednesday evenings at 8:00 p.m.];

ii alternate weekends with [all] [both] children, from Friday after school until the start of school on Monday morning (extended from Thursday after school if Friday is a school holiday to the start of school on Tuesday morning if Monday is a school holiday), with the party spending the weekend with the children responsible for transporting them to/from school.

(d) For holidays, the children will live with the parties according to the holiday schedule set out below.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> This clause contemplates a parenting time structure where one/some of the children live(s) primarily with one parent, and secondarily with the other parent, while the remaining child(ren) live(s) primarily with the other parent and secondarily with the first parent.
>
> The secondary parenting time contemplates that the children will switch homes on Wednesday evenings/overnights, but will be all together on weekends.
>
> See the Commentary under the clause "Equal Parenting Time - Alternate Weeks" above for further information about parenting time.

Supervised Parenting Time - Access Centre

4.14 The parenting time with the children will be allocated as follows:

(a) The children will live primarily with Wendy.

(b) Harold's parenting time with the children will be supervised as follows:

i alternate Saturdays from [specify times];

ii at a supervised access centre run by the Ministry of the Attorney General, located at [specify location].

(c) Harold will be responsible for the costs of the supervised access centre.

(d) Wendy will be responsible for transporting the children to/from the supervised access centre.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time".
>
> This clause is used only where there is a perceived danger to the children. The manner and details of supervision should be carefully specified, including responsibility for the cost.

Supervised Parenting Time - Home

4.15 The parenting time with the children will be allocated as follows:

(a) The children will live primarily with Wendy.

(b) Harold's parenting time with the children will be supervised as follows:

i alternate Saturdays from [specify times];

ii at the home of Harold's parents, supervised at all times by one of Harold's parents; [or specify alternate location/details/supervisor, for example at a public location such as a community centre, a mall, or a restaurant].

(c) Harold's parents will be responsible for transporting the children to/from their home.

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)"; "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time".
>
> This clause is used only where there is a perceived danger to the children. The manner and details of supervision should be carefully specified.

No Parenting Time

4.16 The parenting time with the children will be allocated as follows:

(a) The children will live primarily with Wendy.

(b) Harold will have no parenting time with the children until further agreement or court order. Before seeking parenting time, Harold must first successfully complete [drug and alcohol rehabilitation, for example].

> Select only one of these 9 clauses: "Equal Parenting Time - Alternate Weeks"; "Equal Parenting Time - Split Two Week Rotation (2-2-5-5)"; "Equal Parenting Time - Split Two Week Rotation (2-2-3-2-2-3)";

> "Primary/Secondary Parenting Time - Alternate Weekends & One Evening"; "Primary/Secondary Parenting Time - Alternate Weekends & One Overnight"; "Split Parenting Time"; "Supervised Parenting Time - Access Centre"; Supervised Parenting Time - Home"; or "No Parenting Time".
>
> This is extremely rare, although sometimes, especially in paternity cases, parties may waive their rights to parenting time. Counsel should always bear in mind that the courts have consistently reiterated the principle that parenting time is the right of the child, not the parent, and the best interests of the child must be paramount.

Holiday Schedule - School Breaks

4.17 This holiday schedule is in addition to the regular parenting time above, and overrides the regular parenting time in the event of conflict. (The regular parenting time above and this holiday schedule are collectively referred to as the "parenting time schedule".)

Family Day Weekend

(a) The children will stay with Harold on Family Day Weekend in odd-numbered years and with Wendy in even-numbered years, from after school on Friday until the start of school on Tuesday.

Spring Break

(b) The children will stay with Wendy during the Spring Break in odd-numbered years and with Harold in even-numbered years, from after school as the break starts until the start of school following the break.

Easter Weekend

(c) The children will stay with Harold on Easter Weekend in odd-numbered years and with Wendy in even-numbered years, from after school on the Thursday before the Easter weekend until the start of school the following Tuesday.

Mother's Day

(d) If the children are not otherwise with Wendy on this weekend, the children will stay with Wendy on Mother's Day Weekend, from [Saturday] at [7:00 p.m.] until the start of school on Monday.

Victoria Day Weekend

(e) The children will stay with Wendy on Victoria Day Weekend in odd-numbered years and with Harold in even-numbered years, from after school on Friday until the start of school on Tuesday.

Father's Day

(f) If the children are not otherwise with Harold on this weekend, the children will stay

with Harold on Father's Day Weekend, from [Saturday] at [7:00 p.m.] until the start of school on Monday.

Summer Camp

(g) The children will attend overnight Summer Camp during the Summer Break. [Specify details.]

Summer Vacation

(h) With respect to the children's Summer Break, each party will spend uninterrupted Summer Vacation time with the children as follows:

i The children will stay with Harold for [number] [consecutive or non-consecutive] weeks, during which time Wendy's regular parenting time will be suspended.

ii The children will stay with Wendy for [number] [consecutive or non-consecutive] weeks, during which time Harold's regular parenting time will be suspended.

iii Harold will have first choice of Summer Vacation time in odd-numbered years and Wendy will have first choice of Summer Vacation time in even-numbered years. The party with first choice will advise the other, in writing, by [April 1st] of the chosen weeks, and the party with second choice will advise the other, in writing, by [May 1st] of the chosen weeks.

iv In making plans, each party will take into account the children's camp and other scheduled activities.

Canada Day Weekend and August Civic Holiday

(i) Subject to the Summer Vacation time above, which will take precedence:

i The children will stay with Harold on the Canada Day Weekend in odd-numbered years and with Wendy in even-numbered years, from [5:00 p.m.] on Friday until [9:00 p.m.] on Monday.

ii The children will stay with Wendy on the August Civic Holiday Weekend in odd-numbered years and with Harold in even-numbered years, from [5:00 p.m.] on Friday until [9:00 p.m.] on Monday.

Labour Day Weekend

(j) The children will stay with Harold on the Labour Day Weekend in odd-numbered years and with Wendy in even-numbered years, from [5:00 p.m.] on Friday until the start of school on Tuesday.

Thanksgiving Weekend

(k) The children will stay with Wendy on Thanksgiving Weekend in odd-numbered years and with Harold in even-numbered years, from after school on the Friday before Thanksgiving until the start of school on Tuesday.

Halloween

(l) The children will be with Harold for Halloween in odd-numbered years and with Wendy in even-numbered years, from after school until [9:00 p.m.]. The party who has the children for Halloween will be responsible for the children's costumes.

Christmas Break

(m) The parties will equally share the children's Christmas Break. The children will stay with Wendy for the first half of the Christmas Break in odd-numbered years and the last half of the Christmas Break in even-numbered years, and with Harold for the first half of the Christmas Break in even-numbered years and the last half of the Christmas Break in odd-numbered years. The first half will start after school on the last day of school in December and end at [noon] on the date that is the half way point of the Christmas Break. The second half will start at [noon] on the date that is the half way point of the Christmas Break and end at the start of school on the January return date.

Child's Birthday

(n) Each child will spend their birthday in accordance with the regular parenting time.

> We have included the major holiday events reflecting most public school systems.
>
> The suggestions set out in these provisions are not meant to apply to every situation. They are simply one example. There are a myriad of different ways to deal with the various holidays.
>
> If the parties observe a religion that includes other Holy Day events, then counsel must take these special days into account. For instance, Judaism, Islam and Hinduism have a number of Holy Days of special significance. Some of the holidays specific to a few of these religions have been included in the clauses that follow, but they are not comprehensive. Counsel who are not familiar with a particular religion must check the Holy Day calendars of their clients or consult with other advisers to ensure that the parties have their wishes and special days included in the agreement.
>
> Summer Vacation: Care should be taken with the drafting of summer arrangements, particularly when summer overnight camp is involved. How is the balance of the summer to be divided? How is Visitors Day at camp to be handled? If day camp is involved, are the summer arrangements to be altered and, if so, how?
>
> Child's Birthday: The parents could rotate birthdays each year, but encouraging them to have separate parties for children on the first available date, not necessarily on the child's birthday, reduces the number of transitions and, therefore, reduces conflict for the children.
>
> Halloween: Halloween seems to have become more significant for parents over the past decade. As a result, this special day now serves as a flashpoint for further disagreement and has been added here to try

> to eliminate the conflict before it begins, making it clear which parent will have the responsibility and the benefits of the Halloween evening.

Additional Holiday Schedule - Christian

Christmas Eve/Morning and Christmas Day

(o) Regardless of the Christmas Break schedule set out above, the children will stay with Wendy on Christmas Eve/Morning until Christmas Day at [noon], and with Harold from [noon] on Christmas Day until [9:00 p.m.] on Boxing Day in odd-numbered years, and with Harold on Christmas Eve/Morning until Christmas Day at [noon], and with Wendy from [noon] on Christmas Day until [9:00 p.m.] on Boxing Day in even-numbered years.

> For those who celebrate Christmas, this is one holiday that should probably be dealt with explicitly. Families celebrate it in different ways. For some, it is the Christmas Eve dinner and family get-together that is most significant. For others, it may be Christmas lunch or Christmas dinner or the opening of presents on Christmas morning.
>
> Of primary importance, of course, is the children's need to ensure that the holiday takes place without conflict. Moving children back and forth over a short period can aggravate an already difficult situation and should be avoided since transitions are usually difficult for children.
>
> The parties may create a variety of solutions for the Christmas holiday, including dividing Christmas Eve and Christmas Day, as opposed to carrying out transfers during the day. The literature supports the view that the smaller the number of transitions between homes, the better for the children. This principle should be kept in mind when structuring this holiday.

Additional Holiday Schedule - Jewish

Passover/Pesach

(p) The children will stay with Wendy on Erev Passover in odd-numbered years and with Wendy in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) until 4:00 p.m. the next day.

(q) The children will stay with Harold on the first day of Passover in odd-numbered years and with Wendy in even-numbered years, from 4:00 p.m. until the start of school (or noon if it is not a school day) the next day.

Rosh Hashana

(r) The children will stay with Wendy on Erev Rosh Hashana in odd-numbered years and with Harold in even-numbered years, from after school (or 4:00 p.m. if it is not a

school day) until 4:00 p.m. the next day.

(s) The children will stay with Harold on the first day of Rosh Hashana in odd-numbered years and with Wendy in even-numbered years, from 4:00 p.m. until 4:00 p.m. the next day.

Yom Kippur

(t) The children will stay with Harold on Erev Yom Kippur in odd-numbered years and with Wendy in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) until noon the next day.

(u) The children will stay with Wendy on Yom Kippur in odd-numbered years and with Wendy in even-numbered years, from noon until the start of school (or noon if it is not a school day) the next day.

Sukkot

(v) The children will stay with Wendy on Erev Sukkot in odd-numbered years and with Harold in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) until 4:00 p.m. the next day.

(w) The children will stay with Harold on the first day of Sukkot in odd-numbered years and with Wendy in even-numbered years, from 4:00 p.m. until the start of school (or 4:00 p.m. if it is not a school day) the next day.

(x) The children will stay with Wendy on the second to last evening of Sukkot in odd-numbered years and with Harold in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) until 4:00 p.m. the next day.

(y) The children will stay with Harold on the last evening of Sukkot in odd-numbered years and with Wendy in even-numbered years, from 4:00 p.m. until the start of school (or 4:00 p.m. if it is not a school day) the next day.

> Some of the Holy Days/holidays specific to Judaism have been included in this clause. Counsel should consult with their client on other special days to be included in the Agreement.

Additional Holiday Schedule - Islamic

Eid al-Fitr

(z) The children will stay with Harold for Eid al-Fitr in odd-numbered years and with Wendy in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) the day before until the start of school (or noon if it is not a school day) the day after.

Eid al-Adha

(aa) The children will stay with Wendy for Eid al-Adha in odd-numbered years and with Harold in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) the day before until the start of school (or noon if it is not a school day) the day after.

> Some of the Holy Days/holidays specific to Islam have been included in this clause. Counsel should consult with their client on other special days to be included in the Agreement.

Additional Holiday Schedule - Hindu

Holi

(ab) The children will stay with Wendy on Holika Dahan in odd-numbered years and with Harold in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) until the start of school (or noon if it is not a school day) the next day.

(ac) The children will stay with Harold on Holi in odd-numbered years and with Wendy in even-numbered years, from after school (or noon if it is not a school day) until the start of school (or noon if it is not a school day) the next day.

Diwali

(ad) The children will stay with Wendy for Diwali in odd-numbered years and with Harold in even-numbered years, from after school (or 4:00 p.m. if it is not a school day) until the start of school (or noon if it is not a school day) the next day.

> Some of the Holy Days/holidays specific to Hinduism have been included in this clause. Counsel should consult with their client on other special days to be included in the Agreement.

Right of First Refusal for Both Parties

4.18 Harold and Wendy agree that it is in the children's best interests to spend time with the other party [or the children's grandparents]rather than with a third party. Accordingly, if a party with whom the children are scheduled to be according to the parenting time schedule above [or that party's parent(s)]cannot care for the children, that party will notify the other party and give the other party [or the other party's parent(s)]the opportunity to do so. If the other party [or the other party's parent(s)]cannot care for the children, the party with whom the children are scheduled to be according to the parenting time schedule above will be solely and financially responsible for making alternate childcare arrangements.

> Select only one of these 2 clauses: "Right of First Refusal for Both Parties"; or "Right of First Refusal for Secondary Party".
>
> This is only one example of the many possible variations of a "right of first refusal" clause. This clause gives both parents a right of first refusal (more akin to a joint parenting time arrangement) to care for the

> children when the other parent (or the other party's parent(s) - ie. the children's grandparent(s) to be consistent with the grandparents' contact term below) is unable to do so. Compare this clause to the next alternate "right of first refusal" term, which is more in keeping with the traditional primary/secondary parenting time arrangement.
>
> If the parties wish this type of first refusal clause, it may be necessary to have a very detailed section setting out the precise arrangements, including detailed notice and time provisions.

Right of First Refusal for Secondary Party

4.19 Harold and Wendy agree that it is in the children's best interests to spend time with Harold [or the children's grandparents]rather than with a third party when Wendy [or Wendy's parent(s)]cannot care for the children. Accordingly, if Wendy [or Wendy's parent(s)]cannot care for the children, Wendy will notify Harold and give Harold [or Harold's parent(s)]the opportunity to do so.

> Select only one of these 2 clauses: "Right of First Refusal for Both Parties"; or "Right of First Refusal for Secondary Party".
>
> This is another example of the many possible variations of a "right of first refusal" clause. This clause is more in keeping with the traditional primary/secondary parenting time arrangement, giving more parenting time to the secondary parent (and grandparent(s) if so desired to be consistent with the grandparents' contact clause below)) in the event that the primary parent is (or grandparent(s) is/are) unable to care for the children.
>
> If the parties wish this type of arrangement, it may be necessary to have a very detailed clause setting out the precise arrangements, including detailed notice and time provisions.

General Terms re: Parenting Time

4.20 With respect to the parenting time schedule for the children set out above, Harold and Wendy further agree as follows:

[Delete subparagraphs that do not apply or revise as necessary.]

(a) Both parties will provide each other with their email addresses, current addresses and a phone number where they can be reached at all times.

(b) With respect to the children's transitions between the parties, where possible, the children will be picked up or dropped off directly at school. If the parenting time schedule contemplates a pick up or drop off at school, but the children are not in school that day, the transition time will be 9:00 a.m. unless otherwise specified, and the party with the children will be responsible for dropping them off at the end of the parenting time at the other party's home.

(c) The parenting time schedule will only be altered if both parties agree.

(d) The party with whom the children are scheduled to be according to the parenting time schedule will be solely and financially responsible for making childcare arrangements during their parenting time, including making alternate childcare arrangements when unable to care for the children as a result of illness, employment responsibilities, etc. [after first confirming that the other party is [and the other grandparents are] not available pursuant to the right of first refusal section above.]

(e) If the children will be in the care of a third party for more than one overnight during a party's scheduled parenting time[, after first confirming that the other party is [and the other grandparents are] not available pursuant to the right of first refusal section above], that party will advise the other party by email and will provide the name, address and phone number of the third party.

(f) [There will be no make-up time for missed parenting time, unless the parties agree otherwise.] [If a party misses their parenting time, the parties will arrange make-up time.]

(g) Neither party will object to the other's plans with the children and each must respect the other's ability to care for the children appropriately.

(h) Neither party will arrange activities for the children during the other party's scheduled parenting time without the other party's consent.

(i) Both parties may attend extracurricular activities and scheduled school events regardless of the parenting time schedule.

(j) If a child is sick, the transition from one party's care to the other party's care is to proceed according to the parenting time schedule unless the child is too sick to travel between the parties' homes according to the child's doctor.

(k) The children will be permitted to take any personal item, toy, gift or article of clothing between the parties' homes, without restriction.

(l) The children's health cards will travel with the children between the parties' homes.

(m) Notwithstanding the above subparagraphs, the parties will at all times maintain a reasonable and flexible position respecting the parenting time schedule for the children and at all times the best interests of the children will prevail. Accordingly, if special occasions, extracurricular activities, excursions or other opportunities become available to the children, or to either party, neither party will insist that the parenting time schedule set out herein be adhered to without exception.

> This clause is intended to provide more detail respecting the parenting arrangements, and is more likely necessary in higher conflict situations.
>
> (f): We include this clause to encourage counsel and parties to think about the issue. We do not necessarily believe that a "make-up time" provision is useful. It can lead to constant rescheduling and uncertainty for

> the children and can sometimes put the rights of the parents ahead of those of the children. In high-conflict cases where there is a fear of parental alienation or a fear that the parent with primary parenting time will interfere with the other party's parenting time on a regular basis, however, a make-up time term may be necessary and, in fact, salutary. As a general rule, however, it is probably unnecessary and counter-productive. While there are parents with secondary parenting time who have difficult schedules, the parties must understand that children need stability and predictability and, accordingly, a make-up time clause is not always advisable.
>
> (m): This clause is intended to promote flexibility in the access schedule, as unforeseen events arise from time to time. This clause should only be included if the parties are able to cooperate and communicate effectively. If the relationship is plagued with conflict, it is best to spell out all obligations and remove any "gray areas" that can be a source of further conflict.

Temporary COVID-19 Measures

4.21 In light of the COVID-19 pandemic, Harold and Wendy agree to the following parenting arrangements [for the next [specify period ie. number of weeks/months] or]until the provincial government no longer recommends social distancing practices[, and reopens schools and day care]:

(a) The above-noted parenting time schedule will remain in effect, except as modified as follows:

i There will be no extracurricular activities[, except as agreed upon by the parties].

ii [Specify other modifications.]

(b) Each party will practice strict social distancing, both during and outside of their parenting time. This means following public health recommendations regarding:

i remaining at home as much as possible and avoiding unnecessary out-of-home errands;

ii working from home and conducting virtual meetings as much as possible;

iii maintaining at least a 2-metre distance from other people except those sharing the household;

iv avoiding in-person gatherings, and instead using technology to keep in touch with friends and family;

v frequent hand-washing;

vi use of disinfectants and sanitizers; and

vii any other public health directives.

(c) For necessities like groceries, each party will either arrange for delivery or reduce attendances at grocery stores or elsewhere to the minimum possible, and whenever possible will go to the grocery store or other sites without the children present.

(d) During their parenting time, each party will impose strict social distancing on the children. This includes no in-person play dates and no use of public playgrounds, community centres, restaurants or other public gathering places[, except as the parties agree].

(e) During their parenting time, each party will ensure that the children complete all daily school work as assigned by the school in person or via the appropriate technology if the children are not in school.

(f) If a party or other member of the party's household is isolating due to travel or contact with a person with symptoms of COVID-19, that party will immediately notify the other party and will commence a 14-day period of isolation. If the children are with the isolating party at that time, the other party will have the option of coming and taking care of the children until the end of the 14 days, or having the children remain with the isolating party. During periods of isolation, the parties will facilitate daily video calls between the children and the party without them.

(g) If a party or other member of the party's household exhibits symptoms of or is confirmed as having COVID-19, that party will immediately notify the other party and will cease to spend time with the children until that party (or their household member) has fully recovered and is able to care for the children without risk to the children, or for a minimum of 14-days, whichever is longer. During this period, the parties will facilitate daily video calls between the children and the party without them.

(h) If a party notices that a child is showing symptoms of COVID-19 or is feeling unwell, the party who is currently with the child will immediately notify the other party and will commence a 14-day period of isolation with the child. [Specify whether any remaining child(ren) will remain in isolation with the sick child or will be moved to the other party's household].

(i) [It is acknowledged that [specify party] [(or specify name of person) in (specify party)'s household] is at an increased risk of exposure to COVID-19 as that person is an essential services worker working with the public. [Specify party] will continue to have parenting time, but acknowledging the increased risk, there will be complete transparency with [specify other party] regarding whether or not there has been any contact with someone who has been diagnosed or has been exhibiting symptoms of COVID-19.]

(j) [[Specify party] lives in a home with older family members or individuals who are immune-compromised. As a result, until such time as the parties determine, the

children should not be in that home; instead, the parties will facilitate daily video calls between the children and [specify party], and will facilitate alternate parenting time with [specify party] [specify details of alternate parenting time, such as location/times].]

(k) [Harold's [supervised] parenting time with the children at [specify public location such as a community centre, a mall, or a restaurant] is temporarily suspended; instead, the parties will facilitate video calls between the children and Harold [specify details.]

(l) [Harold's's supervised parenting time with the children at [specify supervised location] is temporarily suspended; instead, the parties will facilitate video calls between the children and Harold [specify details].]

> In light of the COVID-19 pandemic and the federal and provincial health practices and protocols, you may wish to include some of the following clauses in your agreements or interim agreements for guidance during the pandemic. These clauses are based on a presentation by Professor Nick Bala to the Ontario Association of Family Conciliation Courts ("AFCC") on April 23, 2020, and we thank both Professor Bala and the AFCC for their permission to include these clauses here.

Statement of Mutual Obligations and Communication Parameters

4.22 Harold and Wendy agree to:

(a) prefer the children's interests to their own and at all times keep the best interests of the children in mind;

(b) encourage the children to have a good relationship[with each other and] with each party;

(c) refrain from making disparaging or negative remarks to the children about the other party, and discourage others from doing so in the presence of the children;

(d) exchange information and communicate about the children, such communications to be by email, private, respectful, related solely to the children, not shared with the children or third parties without the other's consent, and no more than once per day, except in the case of an emergency;

(e) share all documents regarding the children by scanning the document and then emailing it to the other party, rather than requiring the children to transport documents between them;

(f) refrain from discussing with the children, or with a third party in the presence of the children, present or past legal proceedings, issues between the parties in any such legal proceedings or any conflicts between the parties;

(g) ensure that all information or documentation pertaining to the parties' separation

and divorce, including all personal correspondence or email communications in respect thereof, is not accessible to the children;

(h) attend counselling together to improve their communication and parenting skills;

(i) enroll the children in counselling to assist the children in coming to terms with the separation.

> This clause is designed to signal to both parents their mutual obligations to and communications respecting their children. While this clause is general and thus difficult to enforce, it sends a message to the parents that they have entered into an agreement in good faith and provides an express acknowledgement that they will take steps to prefer their children's interests to their own and set some general parameters for communications regarding the children.
>
> Counsel should remind parents of the detrimental effect of separation on children and the emotional and psychological harm for children that conflict can cause. The desirability of counselling in order for parties to learn how to better parent their children was expressly noted by the Ontario Court of Appeal in *Kaplanis v. Kaplanis* (2005), 10 R.F.L. (6th) 373 (Ont. C.A.). The court in *Kaplanis*, however, found the order in question, which forced the parties to engage in counselling in order to resolve disputes, to be problematic for a number of reasons: there was no evidence that the parties could agree on whom to appoint as a counsellor; there was no procedure as to how to appoint a counsellor in the case of a disagreement; there was no evidence that the parties were willing to submit their disputes to a counsellor outside the court process without recourse to the courts. The C.A. did seem to suggest that an order for counselling may be within the court's inherent jurisdiction, although it recognized the difficulty of enforcing this kind of order.
>
> If there are issues between the parties that require more specific language, these clauses must be drafted with great precision.

Daily Communication

4.23 Harold and Wendy may telephone [and] [or] communicate by text or email with the children on a [once] daily basis. The children may telephone, text or email Harold or Wendy whenever they wish.

> Telephone communication can become a form of harassment when overused. Counsel and parties should consider whether specific rules on telephone communication are necessary. The degree of specificity will vary with the degree of conflict in the family. Telephone communication arrangements should be delineated in high-conflict cases. Parties may also wish to consider whether they wish children and parents to communicate by text or email. Modern technology brings with it modern problems and this is an area for counsel and clients to consider. Counsel must take into account the clients' personalities and the degree of communication that will be reasonable in each context. Once-a-day telephone contact is normally sufficient, as more frequent telephone and email communication may prove to be disruptive.

Cell Phone for Children

4.24 [Harold and Wendy will share] [Harold [or Wendy] will pay] the cost of a cell phone and monthly plan for each of the children.

> Nowadays, depending on the ages of the children, it is likely practical to provide the children with their own cell phones. A cell phone makes direct communication between the child and both parents, particularly in high-conflict cases, significantly easier. This clause allows the parties to specify who will cover the cost of the cell phone and monthly plan.

Education

4.25 With respect to the children's education, the parties agree as follows:

(a) Both parties may attend all school functions regardless of the parenting time schedule.

(b) The parties will attend parent-teacher meetings [preferably together, but if that is not practical, then individually] [individually, or together if both parties consent].

(c) Each party will obtain their own school calendar and school notices.

(d) With respect to school field trips or classroom events, [the parties will alternate attendance. If one party is unable to attend, that party will immediately notify the other party, who may attend instead] [a party will only attend field trips and participate in classroom events when the children are in that party's care according to the schedule].

> These education-related clauses create greater certainty and avoid disputes every time a school function occurs. (Note that there is slight overlap here in subparagraph (a) with the "General Terms re: Parenting Time" clause above, subparagraph (i)). The requirement that each parent may obtain his or her own school calendar may not be effective if the school is unwilling to provide duplicates, in which case, one parent should be obliged to provide a copy of the calendar or notices to the other parent as they become available.

Information from Third Parties

4.26 Harold and Wendy may make inquiries and be given information by the children's teachers, school officials, doctors, dentists, health care providers, summer camp counsellors or others involved with the children. The parties intend this paragraph to provide each of them with access to any information or documentation to which a parent of a child would otherwise have a right of access. If, for whatever reason, this paragraph itself is not sufficient (although both parties intend it to be sufficient authority for either of them), the parties will cooperate and execute any required authorization or direction necessary to enforce the intent of this paragraph. To this end, Wendy will execute an "Authorization and Direction" substantially in the form attached as a Schedule to this Agreement.

> In high-conflict cases, the parents may have difficulty obtaining information from third parties. The parties may wish to attach to this Agreement a specific direction allowing or requiring teachers, school officials or doctors to provide information directly to the other parent. This will avoid any further misunderstanding and will make it clear that each parent has the right to receive information from these third parties. This, of course, is a statutory right under Ontario's *Children's Law Reform Act* (s. 20(5)), B.C.'s *Family Law Act* (s. 41(j)), and the *Divorce Act* (s. 16(5)). These terms, however, seem to be honoured more in the breach than in the observance and are often unknown to school and medical authorities. Accordingly, the use of a written direction (attached as a schedule) may help eliminate the problem and provide for a free flow of information between third parties and the parents.

Grandparents' Contact

4.27 It is in the children's best interests to continue a relationship with their maternal and paternal grandparents[, specifically [provide names]]. Accordingly, the grandparents will have contact with the children as follows:

(a) reasonable telephone contact;

(b) reasonable contact, to be exercised for the most part when the party that is their child has parenting time with the children;

(c) the right to care for the children when the party that is their child has parenting time with the children but is unavailable to care for them.

> Note that this clause might conflict with a right of first refusal given to the other parent above, and so some modification may need to be made to ensure that the terms can co-exist.
>
> Normally, grandparents see their grandchildren when their child (ie. the party) has parenting time with the children. While this clause does not give the grandparents specified contact outside of the party's parenting time, it does provide a court with some evidence of the parties' intentions regarding the issue and the best interests of the children, especially in the event that a grandparent brings an application for an independent right of contact. The courts will always be governed by the best interests of the children in relation to contact.
>
> It should be noted that the changes to the *Divorce Act*, effective March 1, 2021, provide that anyone, including grandparents, may apply for a contact order, granting an independent right of contact with the children.

Change of Local Residence

4.28

(a) Harold and Wendy will live near each other to facilitate the parenting time with the children, set out in this Agreement.

(b) If a party proposes to change their residence or that of the children[within [number] kilometres from the municipal boundary of [area]], such that the other party's relationship with the children will not be significantly impacted, the moving party will give written notice [at least 30 days before the proposed change]to the other party of:

i the date on which the change is expected to occur;

ii the address of the new residence; and

iii the contact information of the moving party and the children, as the case may be[, including any new telephone number(s)].

> This clause only deals with a local move, not a relocation. In other words, it is for a move that will *not* significantly impact the other party's relationship with the children. It is to ensure that parties understand that having children requires them to notify and update the other of the move as soon as possible.
>
> This notice required for a local move is now codified in s. 6.8 of the amended *Divorce Act* (effective March 1, 2021), and s.39.2 of the amended Ontario *Children's Law Reform Act* (effective March 1, 2021), although there is no minimum time limit set out for the notice period in the legislation.
>
> Given that more and more people (and children) have cell phones these days, it is unlikely that a new telephone number will be necessary.

Relocation

4.29

(a) Harold and Wendy will live near each other to facilitate the parenting time and the decision-making responsibility with respect to the children, as set out in this Agreement.

(b) In the event that a party intends to undertake a relocation with or without the children that will significantly impact the other party's relationship with the children, the relocating party must provide the other party with at least 60 days' written advance notice of the intended relocation, in the form prescribed by the [applicable legislation, or if no form is prescribed] [*Divorce Act*] [*Children's Law Reform Act*, or if no form is prescribed], setting out, among other things:

i the expected date of the proposed relocation;

ii the address of the new place of residence and contact information of the relocating party or the children, as the case may be;

iii a proposal as to how parenting time[and decision-making responsibility] with respect to the children could be exercised;

iv any other information in the prescribed form or regulations under the [applicable legislation] [*Divorce Act*] [*Children's Law Reform Act*].

(c) Once the other party receives notice of the proposed relocation:

i the parties will work together and use their best efforts [independently or with the assistance of their respective counsel if necessary]to review and revise, as necessary, the parenting time schedule[and the decision-making responsibility], as well as any related support or other issues, to accommodate the relocation and the other party's relationship with the children, taking into account the best interests of the children and the factors set out in the legislation;

ii [the parties [may] [will] mediate the dispute, in accordance with paragraph [specify mediation paragraph from the Dispute Resolution section of the Agreement] below, if they require more assistance in resolving the dispute, keeping in mind the deadline for notice of any objection to the relocation set out in subparagraph (d) below.]

(d) If the parties have not resolved the dispute, no later than 30 days after receiving the notice from the relocating party, the other party will provide notice of their objection to the relocation in the form prescribed by the [*Divorce Act*] [*Children's Law Reform Act*, or if no form is prescribed], setting out, among other things:

i a statement that the party objects to the proposed relocation;

ii the reasons for the objection;

iii the party's views on the proposal for the exercise of parenting time[and the decision-making responsibility], set out in the relocating party's notice;

iv any other information prescribed by the regulations under the [*Divorce Act*] [*Children's Law Reform Act*].

(e) If the other party has provided notice of their objection to the relocation in subparagraph (d) above, [the parties will arbitrate the dispute, in accordance with paragraph [specify paragraph from the Dispute Resolution section of the Agreement] below,] [the parties will mediate/arbitrate the dispute, in accordance with paragraph [specify paragraph from Parenting Dispute Resolution section of the Agreement] below,] [[the relocating party will] [that party will] [either party may] bring an application to the applicable court]to determine the dispute.

(f) In the event that any one of the following have occurred:

i the parties have resolved the matter, and entered into an amending agreement before witnesses setting out any changes to this Agreement;

ii the non-relocating party has not provided the requisite objection to the relocation required in subparagraph (d) above, and there is no [mediation/arbitration or] [arbitration or] court application on relocation pending; or

iii there is no [arbitration award or]court order prohibiting the relocation;

the party seeking to relocate will be free to do so as of the date set out in the notice in subparagraph (b) above, or in any [arbitration award or]court order.

(g) This paragraph is not intended to limit the parties' ability to take the children out of the jurisdiction for the purposes of travel in accordance with the travel term below.

This clause reflects the recent changes to the *Divorce Act* ("*DA*") and the Ontario's *Children's Law Reform Act* ("*CLRA*") (both effective March 1, 2021) regarding relocation (also sometimes referred to as mobility). While previously, the issue of relocation was determined by common law (particularly the S.C.C. decision of *Gordon v. Goertz*, [1996] 2 SCR 27), the legislation now codifies the procedure and the factors to be considered in making a decision (see *DA*, ss. 16.9-16.96; *CLRA*, ss.39.3-39.4).

The legislation requires notice of the proposed relocation to be provided in writing at least 60 days before the proposed relocation date. The notice must be provided to anyone who has parenting time, decision-making responsibility *or contact*. This clause in the Agreement does not reference contact, but if the parties have clauses regarding contact with non-parents, the notice must be extended to them as well, and this clause should be revised accordingly.

The legislation also requires that if any party who has received this notice objects to the relocation, they **must** provide written notice of their objection, or bring a court application, *within 30 days after receipt of the original notice.* The clients must be made aware of this important requirement of the legislation. This clause contemplates that a notice of objection will be provided initially, rather than the commencement of a court application at this stage.

Both the *DA* and the *CLRA* provide some general information that must be included in the notice of relocation and the notice of objection. While the *DA* states that the notices must be "in the form prescribed by the regulations", and the necessary regulation and forms have in fact been enacted, the *CLRA* qualifies this to anticipate that "if no form is prescribed", the factors are as set out in the *CLRA*. As of the date of this update, no regulation has been enacted under the *CLRA* in this regard.

This clause provides that the parties will negotiate (or mediate) this issue initially. Note that a parenting coordinator cannot make a determination regarding relocation. If negotiation and/or mediation fails, the non-relocating party may provide a notice of objection any time after receipt of the notice of relocation, with a hard deadline of 30 days. Once a notice of objection is provided, the parties can either mediate/arbitrate, arbitrate, or bring an application to the court to determine the dispute, as they decide in subparagraph (e). If they opt for mediation/arbitration or arbitration, they must be aware that they cannot contract out of their right to appeal an arbitration award with leave on a question of law. It may be wise to require the relocating party to provide advance notice earlier than the requisite 60 days specified in the legislation, in order to allow enough time for these alternate dispute forums and/or court to determine the

matter, always keeping in mind that the notice of objection must be filed within 30 days of the original notice.

Assuming the purpose of this relocation clause is not to limit a parent's ability to travel with the children, it may be helpful to make this intention explicit as in subparagraph (g). Needless to say, parents who have a genuine concern that their children might be abducted must carefully consider this subparagraph as well as the clause below regarding travel with the children.

With the Children

4.30 If either party plans a vacation with the children, the travelling party will:

(a) give the other party a detailed itinerary at least [number] days before the vacation begins, including the name of any flight carrier and flight times, accommodation, including address and telephone numbers, and details as to how to contact the children during the trip;

(b) obtain a notarized travel authorization from the other party [if the vacation is outside Canada] [if the vacation is outside (specify another jurisdiction)], by providing the other party with a [draft letter] ["Travel Consent Form" substantially in the form attached as a Schedule to this Agreement], authorizing the children to travel, for the other party to execute and have notarized[at the travelling party's expense].

A parent who has a genuine concern that their children might be abducted must carefully consider this clause, and may need to amend it accordingly. The parties may wish to restrict where one or both parties can travel, or depending on where a party is taking the child, specific permission may be needed from the other parent to travel.

Subparagraph (a) reflects the need, particularly for young children, to be in regular contact with their parents. Accordingly, specific details of travel plans should be provided.

Subparagraph (b) requires the notarized consent of the other parent to travel outside of the specified jurisdiction. These days, most travel outside of the country will require the notarized consent of the other parent in any event. Logistically, it is easier to have the travelling parent provide the draft consent form/letter authorizing the travel to the other parent, who then simply needs to arrange for the document to be notarized, rather than having to create the document him/herself.

Without the Children

4.31 If either party plans a vacation without the children, the travelling party will give the other a telephone number where they can be reached in case of emergency or if the children wish to contact that party.

This clause is likely unnecessary these days when most people have cell phones, which allows privacy, but also allows the children to reach them if they wish.

Passports

4.32 Wendy will apply for a Canadian passport for each child. Harold will sign the passport application. Wendy will keep the passports and give them to Harold when he needs them for travel. [Harold will return the passports promptly after travelling.]

> This clause assumes a parenting arrangement where one parent has sole decision-making responsibility, and therefore is the only one that can apply for a passport for the children under 16, with the consent of the other parent, assuming this parent has parenting time with the children. If the parents have joint decision-making responsibility, then either parent may apply with the written consent of the other, and this clause should be modified accordingly. If a relocation restriction exists, no passport can be issued without a new court order. The applicant parent is required to submit copies of all legal documents (including separation agreements and court orders) in their entirety when applying for a passport. Passport Canada reviews these documents to ascertain decision-making responsibility and parenting time arrangements and relocation restrictions. For further information, visit https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/children.html.
>
> Needless to say, parents who have a genuine concern that their children might be abducted must carefully consider this clause. In addition, depending on where a party is taking the child outside of the country, specific permission may be needed from the other parent to travel. See "Travel - With the Children" clause above.
>
> Counsel must also consider that many countries now permit dual citizenship, including the United States of America, and accordingly, the consent to obtain a passport should also delineate the country. Knowing that your client has the child's passport in his or her possession does not necessarily mean that the child is safe from abduction, as the other spouse may already have a passport in the child's name from a different country.

Religious Upbringing

4.33 The children will be raised in the [name of religion] faith.

> Select only one of these 2 clauses: "Religious Upbringing"; or "No Religious Affiliation".
>
> This is one of the key issues to be determined under the "decision-making" component of parenting arrangements, and the allocation of who makes major decisions regarding religion will presumably be determined above under "Decision-Making Responsibility".
>
> However, given that religion can cause serious disagreements, the parties may wish to set out some initial parameters or agreements in this regard up front. Religion may cause serious disagreements and, in appropriate cases, the issue may need to be addressed in more detail. The parties must have a clear understanding of what they intend and should set out the arrangement in the agreement. For example, what does being raised Catholic or Jewish mean? Does it mean there will be strict adherence to religious tenets? Do the parties wish their children to be exposed to the other parent's religion and, if so, to what degree? Do the parents wish to prevent certain religious practices without consent, such as a Baptism, Confirmation or

> Bar Mitzvah? A simple clause such as this one is probably unsatisfactory if there is any risk of future misunderstanding, and so should be modified to provide more detail.

No Religious Affiliation

4.34 The children will have no religious affiliation and will not undergo any religious ritual at the request of either party.

> Select only one of these 2 clauses: "Religious Upbringing"; or "No Religious Affiliation".
>
> This is one of the key issues to be determined under the "decision-making" component of parenting arrangements, and the allocation of who makes major decisions regarding religion will presumably be determined above under "Decision-making Responsibility".
>
> However, given that religion can cause serious disagreements, the parties may wish to set out some initial parameters or agreements in this regard up front.

Name Change

4.35 Harold and Wendy will not change the children's names without the other's written consent.

> This clause prohibits an application to change a child's name under Ontario's *Change of Name Act*, B.C.'s *Name Act,* or similar legislation in any other jurisdiction. It ensures that neither parent will change the children's names without the other's written consent. This should be unnecessary, but for reasons that escape us, the legislation in many jurisdictions (including Ontario) allows a parent with sole decision-making responsibility to change a child's name without the consent of the other parent, unless a separation agreement requires it.

Death Of One Party

4.36 If Harold or Wendy dies, the other party will assume all primary parenting responsibilities, including parenting time and decision-making responsibility for the children. Harold and Wendy will make wills consistent with this section.

> The parties should always have valid wills, consistent with the terms of their Agreement.
>
> Under Ontario's *Children's Law Reform Act*, a parent with decision-making responsibility (previously a custodial parent prior to the changes to the *CLRA*, effective March 1, 2021) may appoint someone to have decision-making responsibility for the children (ie. the other parent) in a will, in the event of that parent's death.
>
> Note that if the deceased parent was also the guardian of the children's property (as appointed by court order), he or she may in turn appoint someone (ie. the other party) to act as the guardian of the children's property in his or her will. This clause may be modified accordingly to include this appointment of the other party as a guardian of the children's property.

> If both parents share decision-making responsibility and are guardians of the children's property, and both die at the same time, they must both have appointed the same person in their will in order for the appointment to take effect.
>
> Note that this appointment expires 90 days after the appointment becomes effective, and so while not binding in the long term, it is evidence of the parties' intentions in any subsequent application for a parenting order.

Death Of Both Parties

4.37 If both parties die, [name of chosen appointee(s)] will assume decision-making responsibility for the children. Harold and Wendy will make wills consistent with this section.

> The parties should always have valid wills, consistent with the terms of their Agreement.
>
> Under Ontario's *Children's Law Reform Act*, a parent with decision-making responsibility (previously a custodial parent prior to the changes to the *CLRA*, effective March 1, 2021) may appoint someone to have decision-making responsibility for the children in a will, in the event of that parent's death.
>
> Note that if the deceased parent was also the guardian of the children's property (as appointed by court order), he or she may in turn appoint someone (ie. the other party) to act as the guardian of the children's property in his or her will. This clause may be modified accordingly to include this appointment of the other party as a guardian of the children's property.
>
> If both parents share decision-making responsibility and are joint guardians of the children's property, and both die at the same time, they must both have appointed the same person in their will in order for the appointment to take effect.
>
> Note that this appointment expires 90 days after the appointment becomes effective, and so while not binding in the long term, it is evidence of the parties' intentions in any subsequent application for a parenting order.

Motor Vehicle Insurance

4.38 Each party will obtain motor vehicle insurance that includes $[amount] of third-party liability coverage for any vehicle which that party:

(a) owns or leases;

(b) uses to transport the children; or

(c) permits the children to drive.

> This clause is designed to reduce the risk that a parent will face an unexpected liability arising out of the use of the motor vehicle by his or her children.

Parenting Coordinator

4.39 If Harold and Wendy are unable to resolve a parenting issue/dispute, other than disputes regarding a change in the allocation of decision-making responsibility, a substantial change to parenting time or contact, and/or the relocation of a child, the parties will engage a parenting coordinator to assist them on the following terms:

(a) The parties wish to engage [name of parenting coordinator]. If, however, [name of original parenting coordinator] is unable or unwilling to act, [name of original parenting coordinator] will recommend and refer the matter to an alternate parenting coordinator. If this alternate parenting coordinator is unable or unwilling to act, the parties will select another mutually agreeable parenting coordinator by [specify how this final alternate is to be decided].

(b) The parties will share the [up front]cost of the parenting coordinator [equally] [on the basis that Harold will pay (number) percent and Wendy will pay (number) percent of the total cost].

(c) If the parties have not reached a resolution of the parenting dispute after [number] days, the parenting coordinator will arbitrate the dispute[, and will have the right to reapportion costs].

(d) Any arbitration will be conducted in accordance with the *Arbitration Act*, and will constitute a secondary arbitration under the *Arbitration Act* and the *Family Law Act*.

(e) The parenting coordinator's decision ("award") will be binding. The award may be appealed to the court[in accordance with section 45(1) of the *Arbitration Act*, with leave on questions of law only.] [as of right on questions of (law) (fact) (mixed law and fact).]

(f) Because the parenting coordinator and the arbitrator are the same person, the parties waive section 35 of the *Arbitration Act*.

(g) The parties will enter into a Parenting Coordination Agreement consistent with the terms herein[, attached as a Schedule to this Agreement].

This clause and the one that follows are some of the most important clauses in the Agreement. They provide for a dispute resolution mechanism if the parties are unable to resolve a parenting issue. Joint parenting or any other arrangement that requires ongoing co-operation will likely lead to a disagreement sooner or later. If the parties adopt this kind of regime, they must have a clear dispute resolution method that allows them to resolve the problem expeditiously.

With careful advice from counsel, the parties must address how they wish to resolve future disputes regarding the parenting provisions of their Agreement. This section provides two of the most popular options for resolving parenting issues: using a parenting coordinator to assist in interpretation and implementation of the parenting clauses of the Agreement; and/or using a mediator/arbitrator to dispute

more significant parenting issues.

Note that we have not included independent mediation or arbitration clauses for parenting issues here; if after discussion with the client, they wish to include these separate processes for parenting issues, you may either replicate the clauses from the Dispute Resolution section below here with the necessary modifications; or you may amend the "Application of Dispute Resolution", "Mediation" and/or "Arbitration" clauses in the Dispute Resolution section below to include parenting issues. Counsel must ensure that the client understands the interrelationship between these dispute resolution clauses of parenting issues and the dispute resolution clauses later in the Agreement of reviewable or variable terms, or anything else specified, and counsel must ensure consistency throughout the Agreement in respect of these clauses.

This first option, a parenting coordinator, can be extremely helpful resolving parenting issues such as minor parenting time matters, contact with a child, or other day-to-day parenting issues. A parenting coordinator does not have jurisdiction over a change to the allocation of decision-making responsibility, a substantial change to parenting time or contact, the relocation of a child, support, or property division. In other words, a parenting coordinator cannot change anything in a separation agreement, but can assist in interpreting and adding detail to assist in following the parenting provisions of a separation agreement.

The parenting coordinator's authority must be set out in a parenting coordination agreement that may be appended to the Agreement. In the event that the parties cannot agree on an issue that is covered by the parenting coordination agreement, the parenting coordinator moves to arbitration to decide the issue and makes a binding decision.

This kind of arbitration is known as a secondary family arbitration under the *Arbitration Act* and the *Family Law Act*, which unlike other family arbitrations, can address future disputes relating to the management or implementation of a separation agreement, order or award, in this case the parenting provisions specifically. Secondary arbitrations also do not require independent legal advice, and they are less formal in their requirements for delivery of an award than family arbitrations.

While an arbitration award is binding, the parties cannot contract out of their right to appeal an arbitration award on a question of law, with leave pursuant to subsection 45(1) of the *Arbitration Act* (even if the Agreement is silent in this regard), or if the parties expressly provide, on questions of law, questions of fact, or questions of mixed law and fact, as of right (ie. no leave required).

Be aware that religious based arbitrations in the family law context are not legally effective, and the parties cannot submit to arbitration in accordance with any law outside of Canada.

A parenting coordinator's authority is typically anywhere between 6 months and 2 years, as the parties agree, and may be extended if the parties wish.

Counsel (and clients) should be aware of the decision, *Finch v. Finch*, 2003 CarswellOnt 3205 (S.C.J.), where the court directed the parties to undertake the dispute resolution process outlined in their agreement and ordered costs against the applicant who ignored the terms of the agreement and resorted to litigation instead.

Mediation/Arbitration

4.40 If Harold and Wendy are unable to resolve a parenting issue/dispute[regarding a change in the allocation of decision-making responsibility, a substantial change to parenting time or contact, and/or the relocation of a child], the parties will engage a mediator/arbitrator to assist them on the following terms:

(a) The parties wish to engage [name of mediator/arbitrator]. If, however, [name of original mediator/arbitrator] is unable or unwilling to act, [name of original mediator/arbitrator] will recommend and refer the matter to an alternate mediator/arbitrator. If this alternate mediator/arbitrator is unable or unwilling to act, the parties will select another mutually agreeable mediator/arbitrator by [specify how this final alternate is to be decided].

(b) The parties will share the [up front]cost of the mediation/arbitration [equally] [on the basis that Harold will pay (number) percent and Wendy will pay (number) percent of the total cost].

(c) If the parties have not reached a resolution of the parenting dispute through mediation after [number] days, the mediator/arbitrator will arbitrate the dispute[, and will have the right to reapportion costs].

(d) Any arbitration will be conducted in accordance with the *Arbitration Act*, and will constitute a secondary arbitration under the *Arbitration Act* and the *Family Law Act*.

(e) The mediator/arbitrator's decision ("award") will be binding. The award may be appealed to the court[in accordance with section 45(1) of the *Arbitration Act*, with leave on questions of law only.] [as of right on questions of (law) (fact) (mixed law and fact).]

(f) Because the mediator and the arbitrator are the same person, the parties waive section 35 of the *Arbitration Act*.

(g) The parties will enter into a Mediation/Arbitration Agreement consistent with the terms herein[, attached as a Schedule to this Agreement].

> Mediation/Arbitration ("Med/Arb") is an alternate dispute resolution that is very effective in resolving parenting issues expeditiously. The chosen mediator/arbitrator first attempts to resolve the problem through mediation. Failing agreement, the mediator then has the power to immediately arbitrate the dispute. The parties will need to enter into a Mediation/Arbitration Agreement setting out the terms of the mediation/arbitration, keeping in mind all of the requirements of the *Arbitration Act* and the *Family Law Act*.
>
> See the Commentary under the "Parenting Coordinator" clause above for more information about arbitrations, separating the mediation and arbitration processes, and the dispute resolution of parenting issues generally.

5. Child Support

> The clauses in this section of the Agreement have been drafted to take into account the requirements of the *Child Support Guidelines* (the "Guidelines") under the *Divorce Act.* The sections in this part are a starting point for drafting agreements related to child support, but counsel must keep up-to-date with the case law and commentary as it develops. For the most part, child support is determined based on the payor's income in accordance with the applicable federal (or provincial) tables. There are circumstances, however, where a straight application of the table amount may be inappropriate and discretion is to be exercised. Such circumstances include cases where the children are age of majority or over, where the party stands in place of a parent (eg. step-parent), circumstances of undue hardship, or where the payor's income is over $150,000 annually.
>
> We assume that agreements now being drafted, will not likely carry forward support agreements or orders that were in place prior to May 1, 1997. Therefore, these precedents will be used in cases where the child support is non-deductible to the payor and non-taxable to the recipient. We have drafted child support precedent clauses to take into account all of the various sections of the Guidelines, including equal and shared parenting time, primary/secondary parenting time, split parenting time, undue hardship and support other than that prescribed by the Guidelines. Since the Agreement will often be used to satisfy a court that reasonable arrangements have been made for the support of the children (see s. 11(1)(b), *Divorce Act*), the child support arrangements must not be different from those set out in the Guidelines, unless the court has sufficient evidence to assess the reasonableness of the arrangements. The basis for the departure from the Guidelines should be set out in the Agreement. Where the parties reside in different provinces, care must be exercised in using the appropriate Tables. If the payor resides in Canada, it will be the province in which the payor ordinarily resides at the time the Agreement is made that determines what Tables apply. If the payor resides outside of Canada, the applicable Tables under the Guidelines will be those for the province where the recipient ordinarily resides (see s. 3(3)).

Definitions

5.1 In this section:

(a) "Table" and "income" mean "Table" and "income" as those terms are defined in s. 2(1) of the *Child Support Guidelines* (the "Guidelines");

(b) "section 7 expenses" means "special or extraordinary expenses" as this phrase is defined in s. 7(1) of the Guidelines;

(c) "child support" refers to the monthly amount upon which the parties have agreed and may include both Table support and section 7 expenses.

> The clauses in this section of the Agreement have been drafted to take into account the requirements of the *Child Support Guidelines* (the "Guidelines") under the *Divorce Act.* The sections in this part are a starting point for drafting agreements related to child support, but counsel must keep up-to-date with the case law and commentary as it develops. For the most part, child support is determined based on the payor's income

in accordance with the applicable federal (or provincial) tables. There are circumstances, however, where a straight application of the table amount may be inappropriate and discretion is to be exercised. Such circumstances include cases where the children are age of majority or over, where the party stands in place of a parent (eg. step-parent), circumstances of undue hardship, or where the payor's income is over $150,000 annually.

We assume that agreements now being drafted, will not likely carry forward support agreements or orders that were in place prior to May 1, 1997. Therefore, these precedents will be used in cases where the child support is non-deductible to the payor and non-taxable to the recipient. We have drafted child support precedent clauses to take into account all of the various sections of the Guidelines, including equal and shared parenting time, primary/secondary parenting time, split parenting time, undue hardship and support other than that prescribed by the Guidelines. Since the Agreement will often be used to satisfy a court that reasonable arrangements have been made for the support of the children (see s. 11(1)(b), *Divorce Act*), the child support arrangements must not be different from those set out in the Guidelines, unless the court has sufficient evidence to assess the reasonableness of the arrangements. The basis for the departure from the Guidelines should be set out in the Agreement. Where the parties reside in different provinces, care must be exercised in using the appropriate Tables. If the payor resides in Canada, it will be the province in which the payor ordinarily resides at the time the Agreement is made that determines what Tables apply. If the payor resides outside of Canada, the applicable Tables under the Guidelines will be those for the province where the recipient ordinarily resides (see s. 3(3)).

Declaration Of Income

5.2 For purposes of determining child support for Charles and Claire, Harold's annual income is $[amount] and Wendy's annual income is $[amount].

Sections 15 to 20 of the Guidelines set out the rules for determining income for the purposes of calculating child support. The parties can, however, agree on the annual income to be used for the calculation and the court will generally accept the agreed upon amount, provided it is reasonable, having regard to the income information provided (see s.15(2)). We have assumed for the purposes of this Agreement that the parties' incomes are verifiable from their income tax returns. Where that is not the case, counsel may wish to set out in detail how they arrived at the income figures.

It is only necessary to refer to the recipient's income if there is an issue of undue hardship, split or shared parenting time, a child is over the age of majority, the payor's income exceeds $150,000.00, or it will be necessary to determine the proportion of responsibility for the sharing of special or extraordinary expenses.

As previously noted, the extent to which parties can depart from the Guidelines is part of the case law. The parties should note and acknowledge in the Agreement any departure from the Guidelines.

Equal Parenting Time

5.3 The parties have an equal parenting time arrangement with the children, as set out in the parenting time paragraph above. The parties accordingly have shared parenting time with the

children for the purposes of child support. In determining the appropriate child support to be paid, the parties have considered the Table amounts for each party, the increased cost of this shared parenting time arrangement (including appropriate housing, transportation, and the duplication of toys, equipment and clothes), the condition, means, needs and other circumstances of each party and the children, and the children's section 7 expenses. To satisfy each party's obligation to pay child support:

(a) Harold will pay to Wendy monthly Table child support[as adjusted] in the amount of $[amount], starting [date], and on the [first] day of each month thereafter;

(b) Wendy will pay to Harold monthly Table child support[as adjusted] in the amount of $[amount], starting [date], and on the [first] day of each month thereafter; and

(c) the parties will contribute to the children's section 7 expenses as set out in the section 7 expenses paragraphs below;

until a terminating event under [specify termination paragraphs] below, or a review/variation or other change in child support set out in the Agreement.

Select only one of the following 6 clauses: "Equal Parenting Time"; "Shared Parenting Time"; "Primary Parenting Time"; "Split Parenting Time"; "No Child Support Payable"; or "Lump Sum Child Support". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses. Make sure they are consistent with the parenting time arrangement set out in the "Parenting" section above.

The Guidelines contemplate three different parenting time arrangements: (1) equal (50-50) or shared parenting time (where the parties have anywhere between 40-60% of the parenting time with the children); (2) primary/secondary parenting time; (3) split parenting time (where each of the parties has primary parenting time with one or more children). Different rules apply for calculating child support in each case. This clause should be used the parties have equal (ie. 50-50) parenting time with the children.

The Guidelines provide that "where a parent or spouse exercises a right of access to, or has physical custody of, a child for not less than 40% of the time over the course of a year," child support is determined in accordance with s.9. If the parenting time provisions of the agreement do not specify the percentage of time, it is important to specify it in the support section. There is no universally accepted method for determining when the 40% threshold has been met, which can be extremely problematic. Many courts avoid rigid calculations and instead look at whether physical custody of the children is truly shared (see *Froom v. Froom* (2005), 11 R.F.L. (6th) 254 (Ont. C.A.); *Berry v. Hart* (2003), 233 D.L.R. (4th) 1 (B.C.C.A.)).

In this clause, where the parties have equal parenting time with the children (ie. 50-50 split of the parenting time), it is an obvious case of shared parenting time under s.9 of the Guidelines.

Counsel will note that this is not simply the difference between the Table amounts payable by each party because this is not a split custody clause, but rather a shared custody clause. Section 9 of the Guidelines mandates that the increased costs of shared custody arrangements and the condition, needs and means or

other circumstances of the parties and the children must be taken into account in determining the appropriate amount of support to be paid. This is particularly so in light of the Supreme Court of Canada's decision in *Contino v. Leonelli-Contino.*

The S.C.C. in *Contino v. Leonelli-Contino*, 2005 SCC 63, examined the application of s.9 of the Guidelines, and found that all three factors listed in subsections (a), (b) and (c) must be considered equally; none prevail. Nor is there a presumption in favour of awarding more or less than the Guidelines amount. Under s. 9(a), the court must consider the financial situations of both parties. The simple set off amount is a starting point, followed by an examination of the continuing ability of the recipient parent to meet the needs of the child, given that many costs are fixed. Courts must be especially careful in variation applications where a rigid application of a set-off would result in a drastic change in support. Each party's actual contributions must be compared to the Table amount he/she would be required to contribute, to determine whether adjustments to the simple set-off amount are necessary. The court retains discretion to vary the set-off amount where it would lead to a significant variation in the household standards of living. Section 9(b) recognizes that the total cost of raising children may be greater in shared parenting situations than in primary/secondary parenting situations. The court must therefore look at the payor parent's increased costs and the actual spending patterns of both parents to determine whether shared parenting time has resulted in increased costs globally. These expenses will be apportioned between the parties in accordance with their respective incomes. Finally, s. 9(c) requires the court to analyse the resources and needs of both parents and the children. The court will consider the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain an appropriate standard of living. The analysis in ss. 9(b) and (c) requires actual evidence to be led on increased costs by way of financial statements and/or children's expense budgets. The court should demand this information from the parties when it is lacking or deficient. The court should NOT make "common sense" assumptions about the payor parent's costs, nor apply a multiplier to account for the fixed costs of the recipient parent, as has been done in previous cases.

In cases of shared parenting time, the Canada Child Benefit (including the Child Disability Benefit if applicable), the refundable children's GST/HST credits, and the provincial Child Benefit are automatically shared between the parties. Each party's six months' share of the benefits will be paid out on a monthly basis (except for the refundable children's GST/HST credits which will be paid out quarterly), presumably to better manage the administration of the payments and cash flows.

With respect to the eligible dependant credit (formerly, equivalent-to-spouse credit), in cases of shared parenting time, where both parties make support payments for a child (hence the wording in this term setting out the parties' respective support obligations), the parties may agree on which of them is entitled to claim the eligible dependant credit. If, however, the parties cannot agree, neither party may claim the credit. Be aware of the recent Tax Court of Canada case, *Harder v. R.*, 2016 TCC 197, where not only must the order/agreement say that both parties are paying support, but the factual or evidentiary record (ie. cheques; e-transfers; etc.) must support this dual payment. In other words, the parties must actually have proof that they are each, in fact, making these payments, and not offsetting them. (As well, it is likely wise to refrain from referencing s.9 of the Guidelines expressly in this section, as it has been held to be a statutory scheme that contemplates a single set-off payment and therefore disqualifies allocation of the eligible dependant credit.) Refer to the Canada Revenue Agency's "General Income Tax and Benefit

Guide", the Government's website re: "Child custody and the amount for an eligible dependant", and the CRA Guide P102, "Support Payments" (specifically the section on "Shared custody and the amount for an eligible dependant") for further details.

Where there are two or more children in shared custody, it would appear that both parties may claim the dependant credit provided that both parties are required to make (and are in fact making) support payments for the children. The language in this clause reflects this CRA requirement by providing for both parties to pay child support.

Also note that where both parties are incurring childcare costs for children in shared custody, CRA appears to allow both parties to claim the childcare tax deduction up to the maximum amount. See CRA's Income Tax Folio S1-F3-C1: Child Care Expenses Deduction, specifically Clauses 1.33-1.36.

It is important to keep in mind, however, that CRA's various Guides and Folios are just that - guides - and CRA (and the tax court) retain the ultimate decision-making power with respect to these credits and deductions.

If the parents do not live in the same province, the payor's residence determines which Table will be used. In shared parenting time situations, both parents are treated as payors.

This clause must be modified if the parties are paying special or extraordinary expenses directly, rather than to each other.

Different wording should be used if the parties are paying more or less than the Table amount of support. See the terms entitled "Child Support More than the Table Amount" and "Child Support Less than Table Amount" below.

The parties may wish to append a DivorceMate Tools One printout to the Agreement as a schedule to demonstrate how the child support amount was determined in this clause. This allows the parties and, subsequently, a court or mediator/arbitrator to understand the basis of the support clauses and more easily determine whether there has been a material change in financial circumstances in the event of a review or variation in the future.

Shared Parenting Time

5.4 The children live primarily with Wendy, but Harold has parenting time with the children not less than 40% of the year, as set out in the parenting time paragraph above. The parties accordingly have shared parenting time with the children for the purposes of child support. In determining the appropriate child support to be paid, the parties have considered the Table amounts for each party, the increased cost of this shared parenting time arrangement (including appropriate housing, transportation, and the duplication of toys, equipment and clothes), the condition, means, needs and other circumstances of each party and the children, and the children's section 7 expenses. To satisfy each party's obligation to pay child support:

(a) Harold will pay to Wendy monthly Table child support[as adjusted] in the amount of $[amount], starting [date], and on the [first] day of each month thereafter;

(b) Wendy will pay to Harold monthly Table child support[as adjusted] in the amount of $[amount], starting [date], and on the [first] day of each month thereafter; and

(c) the parties will contribute to the children's section 7 expenses as set out in the section 7 expenses paragraphs below;

until a terminating event under paragraph[s] [specify termination paragraphs] below, a variation of child support, a review resulting in a change of child support, or any other change in child support set out in the Agreement.

> Select only one of the following 6 clauses: "Equal Parenting Time"; "Shared Parenting Time"; "Primary Parenting Time"; "Split Parenting Time"; "No Child Support Payable"; or "Lump Sum Child Support". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses. Make sure they are consistent with the parenting time arrangement set out in the "Parenting" section above.
>
> See the Commentary under the "Equal Parenting Time" clause above.

Primary Parenting Time

5.5 The children live primarily with Wendy, and Harold has secondary parenting time with the children, as set out in the parenting time paragraph above. Accordingly, Harold will pay to Wendy as child support for Charles and Claire:

(a) monthly Table child support in the amount of $[amount], starting [date] and on the [first] day of each month thereafter; and

(b) his share of the children's section 7 expenses as set out in the section 7 expenses paragraphs below;

until a terminating event under paragraph[s] [specify termination paragraphs] below, a variation of child support, a review resulting in a change of child support, or any other change in child support set out in the Agreement.

> Select only one of the following 6 clauses: "Equal Parenting Time"; "Shared Parenting Time"; "Primary Parenting Time"; "Split Parenting Time"; "No Child Support Payable"; or "Lump Sum Child Support". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses. Make sure they are consistent with the parenting time arrangement set out in the "Parenting" section above.
>
> The *Guidelines* contemplate three different parenting time arrangements: (1) equal (50-50) or shared parenting time (where the parties have anywhere between 40-60% of the parenting time with the children); (2) primary/secondary parenting time; (3) split parenting time (where each of the parties has primary parenting time with one or more children). Different rules apply for calculating child support in each case. This clause should only be used when one parent has primary parenting time (ie. more than 60% of the parenting time with the children).

This clause must be modified if the payor pays special or extraordinary expenses directly, rather than to the recipient.

Different wording should be used if the payor is paying less or more than the table amount of support. See the clauses entitled "Child Support Less than the Table Amount" and "Child Support More than Table Amount."

We have adopted the use of a termination section, a review section, a disclosure section, a variation section and a resolution section in order to avoid repetition of these sections throughout the Agreement.

The parties may wish to append a DivorceMate Tools printout to the Agreement as a schedule to demonstrate how the child support amount was determined in this clause. This allows the parties and, subsequently, a court or mediator/arbitrator to understand the basis of the support clauses and more easily determine whether there has been a material change in financial circumstances in the event of a review or variation in the future.

Split Parenting Time

5.6 The parties have a split parenting time arrangement, as set out in the parenting time paragraph above. Each party will therefore pay to the other party child support for the child[/children] in the other party's primary care as follows:

(a) Harold owes Wendy monthly Table child support in the amount of $[amount] for the support of [child(ren)'s name(s)];

(b) Wendy owes Harold monthly Table child support in the amount of $[amount] for the support of [other child(ren)'s name(s)];

(c) To satisfy each party's obligation to pay child support in accordance with the Guidelines, starting [date], and on the [first] day of each month thereafter:

i [party's name] will pay to [party's name] net monthly Table child support in the amount of $[amount] (ie. an offset of the two Table child support amounts in subparagraphs in (a) and (b) above); and

ii each party will pay their share of the children's section 7 expenses as set out in the section 7 expenses paragraphs below;

until a terminating event under paragraph[s] [specify termination paragraphs] below, a variation of child support, a review resulting in a change of child support, or any other change in child support set out in the Agreement.

Select only one of the following 6 clauses: "Equal Parenting Time"; "Shared Parenting Time"; "Primary Parenting Time"; "Split Parenting Time"; "No Child Support Payable"; or "Lump Sum Child Support". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses. Make sure they are consistent with the parenting time arrangement set out in the "Parenting" section above.

The *Guidelines* contemplate three different parenting time arrangements: (1) equal (50-50) or shared parenting time (where the parties have anywhere between 40-60% of the parenting time with the children); (2) primary/secondary parenting time; (3) split parenting time (where each of the parties has primary parenting time with one or more children). Different rules apply for calculating child support in each case. This clause should be used when the parents have split parenting time (ie. at least one child lives with each of the parties on a primary basis).

If the parents do not live in the same province, the payor's residence determines which Table will be used. In split parenting time situations, both parents are treated as payors.

This clause must be modified if the parties are paying special or extraordinary expenses directly, rather than to each other.

Different wording should be used if the parties are paying more or less than the Table amount of support. See the clauses entitled "Child Support More than the Table Amount" and "Child Support Less than Table Amount" below.

The parties may wish to append a DivorceMate Tools One printout to the Agreement as a schedule to demonstrate how the child support amount was determined in this clause. This allows the parties and, subsequently, a court or mediator/arbitrator to understand the basis of the support clauses and more easily determine whether there has been a material change in financial circumstances in the event of a review or variation in the future.

No Child Support Payable

5.7

(a) The parties will each support the children without contribution from the other. [Specify details/reasons for this arrangement.]

(b) Given the circumstances, the application of the Guidelines would result in an amount of child support that is inequitable and inappropriate. The parties' child support arrangement is reasonable and meets the objectives of the Guidelines.

Select only one of the following 6 clauses: "Equal Parenting Time"; "Shared Parenting Time"; "Primary Parenting Time"; "Split Parenting Time"; "No Child Support Payable"; or "Lump Sum Child Support". Make sure they are consistent with the parenting time arrangement set out in the "Parenting" section above.

This clause may be used when the parties are each supporting an equal number of children and their incomes are about the same. It is useful to set out those specific facts or others which may give rise to this type of arrangement.

See the Commentary in the "Special Provisions" clause below under "Child Support Less Than Table Amount" for the potential dangers of paying less than the Table amount of child support.

Lump Sum Child Support

5.8 Harold will pay Wendy lump sum child support of $[amount] as follows:

(a) $[amount] when the Agreement is signed; and

(b) $[amount] from [his share of the matrimonial home sale proceeds].

This payment fully satisfies all of Harold's child support obligations forever. This payment is a special provision that benefits the children. The application of the Guidelines would result in an amount of child support that is inequitable in the circumstances. Harold and Wendy's child support arrangements are reasonable and meet the objectives of the Guidelines.

> Select only one of the following 6 clauses: "Equal Parenting Time"; "Shared Parenting Time"; "Primary Parenting Time"; "Split Parenting Time"; "No Child Support Payable"; or "Lump Sum Child Support". Make sure they are consistent with the parenting time arrangement set out in the "Parenting" section above.
>
> Child support was rarely settled by a lump sum prior to the *Guidelines* because a lump sum would not be deductible. While that consideration has been eliminated, lump sums are still risky and rarely advisable. Firstly, the courts do not allow the parties to contract out of the child's rights and there is always a risk that, if the recipient used up the lump sum, recklessly or not, child support could be re-opened. It is also possible that the child would move from one parent to the other but the lump sum could not be recovered. There is even the tragic possibility that the child would become ill or die. Counsel are, therefore, reluctant to negotiate lump sum settlements, although they occur more frequently in paternity cases, particularly when the father does not want any contact with the child. These lump sum arrangements should only be used in very limited circumstances and the parties, particularly the payor, should be cautioned about the significant risks that lie ahead.

Child Support More Than Table Amount

5.9 Harold is paying more than the Table amount of child support under the Guidelines because [he recognizes that the costs of maintaining the residence in which the children reside and the other needs of the children require this greater contribution.] [or specify other reason] Accordingly, the parties have settled on the amount of child support in this Agreement to reflect those circumstances and specifically acknowledge that the amount payable by Harold is not based on the Table amount for Harold's income.

> The parties may wish to agree upon child support in an amount different from the Table amount. The Agreement must make it clear that the parties considered the Guidelines and it must set out why the parties settled on an amount that is different from the Guidelines.
>
> For example, the parties may have agreed that no spousal support is to be paid and the child support is to be higher than the Table amount. In these circumstances, it will be critical to explain in the agreement the reasons for the arrangement. There will be no difficulty in obtaining court approval when the amount being

> paid is greater than the Guidelines.

Special Provisions

5.10

(a) Harold is paying less than the Table amount of child support under the Guidelines because the parties have made the following special provisions which benefit the children:

i [Specify details of the special provisions including their nature, value, delivery, and receipt. The following subparagraphs are some possible examples.]

ii [Harold has transferred his equity in the matrimonial home worth $[amount] to Wendy;]

iii [Wendy has exclusive possession of the matrimonial home [and Harold is paying all associated costs of the matrimonial home];]

iv [Harold has made a lump sum payment in the amount of $[amount] to Wendy;]

(b) The parties acknowledge that these special provisions worth $[amount] have been paid and received and that they directly benefit the children because [specify how the children benefit].

(c) Given these special provisions, the application of the Guidelines would result in an amount of child support that is inequitable and inappropriate. The parties' child support arrangement is reasonable and meets the objectives of the Guidelines.

> The parties may wish to agree upon child support in an amount different from the Table amount. The Agreement must make it clear that the parties considered the Guidelines and it must set out why the parties settled on an amount that is different from the Guidelines. While there will be no difficulty in obtaining court approval when the amount being paid is greater than the Guidelines this is much more difficult when the amount is less than the Guidelines. Of course, different considerations will apply in cases where the payor's income is over $150,000.00 and in cases where the children are over the age of majority. In those cases, the parties should state with specificity why they have agreed upon the amount set out. (See s. 15.1(5) of the *Divorce Act*.)
>
> The Ontario Court of Appeal decision in *Deiter v. Sampson* (2004), 50 R.F.L. (5th) 338, as well as the decision in *McConville v. McConville*, 2003 CarswellOnt 4158 (Ont.S.C.J.) make it clear that paying amounts other than the Guidelines amounts based on special provisions is a trap for the unwary; the courts will always undertake very close scrutiny of an agreement where children's rights are affected and, that in order to qualify as a special provision, the terms of an agreement must essentially replace or significantly add to the child's ongoing need for support. Lawyers drafting agreements in which child support is released or reduced below the Guidelines amount must be sure that the agreements clearly delineate the benefits to

> the child as well as the connection between the property or money being transferred and the child support provisions before the court will give the so-called special provisions any weight.
>
> Accordingly, it is not enough to say in an agreement that the child support is not being paid in accordance with the Guidelines because of special provisions. The special provisions must be carefully set out and a value placed on the special provisions. Further, both parties must acknowledge that there is a delivery and receipt of the special provisions which benefit the child. The special provisions must, in fact, benefit the child because any transfer between the husband and wife that does not benefit the child cannot be construed as a special provision. The *McConville* and the *Deiter v. Sampson* cases make it clear that unless these steps are carried out, the court will give no weight to the special provisions section, and Guidelines support will be ordered.

Payor's Income over $150,000

5.11

(a) Harold is paying less than the Table amount of child support under the Guidelines because Harold's income is over $150,000 and it is inappropriate for him to pay the Table amount considering the condition, means, needs and other circumstances of the children and the financial ability of each party to contribute to the children's support.

(b) In assessing the children's circumstances and the parties' financial abilities, the parties have reviewed Wendy's budget for the children and the parties' financial disclosure [specify anything else reviewed in the assessment of the condition, means, needs and other circumstances of the children and the parties' financial abilities], and have determined that the child support agreed upon is sufficient for the children's support.

(c) Given the circumstances, the application of the Guidelines would result in an amount of child support that is inequitable and inappropriate. The parties' child support arrangement is reasonable and meets the objectives of the Guidelines.

> See the Commentary under the "Special Provisions" clause above.
>
> While the Guidelines expressly contemplate reduced child support for children when the Payor's income is over $150,000 (see s.4(b)), it is important to review the caselaw in this area, which does not support such a reduction merely on the "sheer size" of such child support. See the Supreme Court of Canada's decision in *Francis v. Baker*, [1999] 3 SCR 250.

Children Over the Age of Majority

5.12

(a) Harold is paying less than the Table amount of child support under the Guidelines

because [child name] [is] [are] the age of majority or over, and it would accordingly be inappropriate to apply the standard Guidelines approach as if [child name] [was] [were] under the age of majority.

(b) [Specify details warranting less support for older child(ren)].

(c) Given the circumstances, the application of the Guidelines would result in an amount of child support that is inequitable and inappropriate. The parties agree that this child support arrangement is reasonable and meets the objectives of the Guidelines.

See the Commentary under the "Special Provisions" clause above for the potential dangers of paying less than the Table amount of child support.

Having said that, the most common and widely accepted reason for paying a reduced Table amount of support is for children over the age of majority who are attending school away from home. (Note that rather than this general clause, where support is to be reduced specifically for older children pursuing post-secondary education, the parties may prefer to address this issue with the clauses below specifically tailored for reduced support in these circumstances.)

Most courts have adopted the general rule that the Table amount of support is inappropriate for children attending school away from home, given the potential for double accounting of post-secondary expenses also included in the Table amount, and given that the Table amount is premised on an economy of scale based on sharing common expenses. (See *Park v. Thompson* (2005), 13 R.F.L. (6th) 415 (Ont. C.A.); *N. (W.P.) v. N. (B.J.)* (2005), 10 R.F.L. (6th) 440 (B.C.C.A.); but see the case of *Lewi v. Lewi* (2006), 28 R.F.L. (6th) 250, where the Ontario Court of Appeal seemed to suggest that it would still be open for the court to order unreduced Table support, apply that support to reduce the living expenses of the child attending school away from home, and then resort to s. 7 for the additional costs of post-secondary education).

Accordingly, the parties may agree on a percentage reduction of the Table amount for those months when the child is attending school away from home.

Another common practice that has emerged is to provide that the full Table amount will be paid for the child when the child is home (ie. 4 months of the summer), and then no Table amount for the balance of the year. (DivorceMate's Tools can assist in the calculation of support in this manner with the "Summer" option for Table Support in the desktop, or the "Partial" option for Table Support in DM Cloud.)

There are, of course, other ways of calculating the appropriate amount to be paid in these circumstances. For example, a straight reduction of the Table amount by a certain percentage may be a reasonable approach. For a court-ordered reduction in a similar fashion, see *Brans v. Brans* (2000), 13 R.F.L. (5th) 335 (Ont. S.C.J.). Or a more budget-based approach may be suitable in the circumstances.

If there is more than one child being supported, counsel will have to set out how support for each child will be dealt with. For example, for the remaining child at home, the Table amount for one child will be paid and a specific amount will be paid for the child away at school. In the *Lewi* case referred to above, where both children were attending university, one living at home and the other away, the motion judge ordered child support at the Table amount for one child plus one-third of the difference between the Table amount

> for one child and the Table amount for two children, before turning to the additional post-secondary expenses.

Undue Hardship

5.13

(a) Harold is paying less than the Table amount of child support under the Guidelines because the Table amount would cause undue hardship and Harold's household standard of living is less than Wendy's household standard of living.

(b) [Specify details/reasons for undue hardship.]

(c) Given the circumstances, the application of the Guidelines would result in an amount of child support that is inequitable and inappropriate. The parties' child support arrangement is reasonable and meets the objectives of the Guidelines.

> Reasons supporting an undue hardship are set out in section 10 of the Guidelines, and include: payor having responsibility for high level of debt incurred for benefit of family; payor has unusually high access costs; payor has legal duty to support (a) another person pursuant to court order or agreement, (b) a child from another relationship, (c) another person unable to obtain necessaries of life due to illness/disability.
>
> If the payor is to pay less than the Table amount because of undue hardship, the details of that hardship should be specifically spelled out, since undue hardship is often temporary, i.e., when the undue hardship disappears, the support ought to revert to the Table amount. Accordingly, it is necessary for counsel and the parties to clearly understand s. 10 of the Guidelines. Firstly, there must be circumstances that constitute undue hardship (see the list of reasons above, although the list is not exhaustive). And secondly, there can be no relief if the household of the spouse who claims undue hardship would, after determining the amount of child support to be paid, have a higher standard of living than the household of the other spouse.

Review Of Undue Hardship

5.14

(a) The parties will review the issue of undue hardship and the appropriate amount of child support to be paid by Harold [on [date]] [at the request of either party after a minimum of [one] year from the date of this Agreement].

(b) The parties will exchange the information specified in the disclosure paragraph [number] below [[by [date]] [within [30] days of any request for review].

(c) If the undue hardship no longer applies, Harold will pay to Wendy the Table amount of child support and Harold's share of the section 7 expenses, in accordance with the Guidelines, starting [date] and on the [first] day of each month thereafter.

(d) If the parties cannot agree on the amount of child support to be paid in accordance

with subparagraph (c) above, the parties will use the section of this Agreement entitled "Dispute Resolution" below to resolve the issue.

> Select only one of the following 2 clauses: "Review of Undue Hardship"; or "Fixed Termination Date for Undue Hardship".

Fixed Termination Date For Undue Hardship

5.15

(a) Harold's undue hardship will end by [date].

(b) Starting [later date] and on the [first] day of each month thereafter, Harold will pay to Wendy the Table amount of child support and Harold's share of the section 7 expenses, in accordance with the Guidelines.

(c) The parties will exchange the information specified in the disclosure paragraph [number] below [[by [date]] in order to determine the appropriate Table amount of child support and sharing of section 7 expenses to be paid by Harold.

(d) If the parties cannot agree on the amount of child support to be paid in accordance with subparagraph (b) above, the parties will use the section of this Agreement entitled "Dispute Resolution" below to resolve the issue.

> Select only one of the following 2 clauses: "Review of Undue Hardship"; or "Fixed Termination Date for Undue Hardship".
>
> Unless the parties specify a date when the support will increase and also fix the dollar amount payable at that time, the FRO cannot enforce the Agreement. Accordingly, to ensure that the amount can be enforced, the parties will have to follow through and sign an amending agreement, as required in the Dispute Resolution section of the Agreement.

Current/Estimated Section 7 Expenses

5.16 The children's [current] [estimated] annual section 7 expenses, before the application of any subsidies, benefits or income tax deductions or credits relating to the expenses, are:

(a) [details of section 7 expense and amount];

(b) [details of section 7 expense and amount]; and

(c) [details of section 7 expense and amount].

> Section 7 of the Guidelines - special or extraordinary expenses ("section 7 expenses") - has attracted significant judicial attention since the passage of the Guidelines. Section 7 expenses under the Guidelines are:

(a) child care expenses incurred as a result of employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to the child;

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

Note that there is a significant difference between "special" and "extraordinary" expenses and that child care expenses, health expenses and expenses for post-secondary education need not be extraordinary. Those expenses will be "add-ons", provided they meet the threshold of s. 7: they must be necessary in relation to the child's best interests, reasonable having regard to the means of the spouses and those of the child, and in accordance with the family's spending pattern prior to the separation.

Certain other expenses, however, namely educational expenses (s.7(1)(d)) and extracurricular expenses (s.7(1)(f)), must be "extraordinary" pursuant to section 7. "Extraordinary expenses" has been defined in the May 1, 2006 amendment to the Guidelines as expenses that exceed what the requesting spouse can cover in light of his/her income, or alternatively, as expenses extraordinary in relation to the following five factors: requesting spouse's income; nature and number of programs/activities; any special needs and talents of the child(ren); overall costs of the programs/activities; any other relevant similar factors.

In determining the amount of the section 7 expense to be proportionately shared, the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

This clause is intended to show the agreed upon (or the estimated) section 7 expenses, *before* any such subsidies, benefits etc. An example of some of these expenses in this clause might be:

(a) Charles' tuition at [institution] of $10,000;

(b) Claire's childcare costs at [institution or caregiver] of $5,000;

(c) Charles' hockey expenses of $2,000; and

(d) Claire's summer camp costs of $2,000.00.

There may be many other special or extraordinary expenses that should be considered. They could include such items as academic tutoring, ski club dues, driver's education and violin lessons.

Clearly, some extracurricular activities may not qualify as extraordinary expenses for the reasons noted above. Therefore, to avoid subsequent arguments about what is or is not an "add-on", the parties must have a very clear understanding before they sign and should make clear provision in the Agreement as to exactly who is paying for what under the Agreement.

Payment of Section 7 Expenses - One Party

5.17

(a) Wendy will be responsible for paying up front for all section 7 expenses in paragraph [specify] above, which work out to a total net cost to Wendy of $[amount]], after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].

(b) For apportioning of section 7 expenses, Harold's income[, after taking into consideration the spousal support paid/received pursuant to paragraph [specify] below] is [number]% of the parties' combined incomes. Therefore, Harold will pay to Wendy his proportionate share (ie. percentage) of the net cost of the section 7 expenses incurred by Wendy, in the amount of $[amount]/month, starting [date] and on the [first] day of each month thereafter.

(c) A DivorceMate Tools calculation, supporting the net cost of the section 7 expenses, the proportionate sharing under the Guidelines, and the section 7 payment owing is attached as a Schedule to this Agreement.

> Select only one of the following 4 clauses: "Payment of Section 7 Expenses - One Party"; or "Payment of Section 7 Expenses - Both Parties"; "Yearly Reconciliation of Section 7 Expenses - One Party"; or "Yearly Reconciliation of Section 7 Expenses - Both Parties".
>
> In determining the amount of the section 7 expense, the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
>
> Note that spousal support, if any, is deducted from the payor's income and included in the recipient's income in determining each party's proportionate share of section 7 expenses and respective contribution to the expenses. (Keep in mind that in arriving at spousal support pursuant to the SSAG, the section 7 expenses must be taken into account, and the section 7 expense apportioning is dependant on the amount of spousal support paid. This results in a circular "iteration" calculation best done by DivorceMate's Tools software.)
>
> The parties may wish to append a DivorceMate Tools printout to the Agreement as a schedule to demonstrate how the section 7 expense payment has been determined in this clause. This allows the parties, and subsequently a court or mediator/arbitrator, to understand the basis of the support clauses and more easily determine whether there has been a material change in financial circumstances in the event of a review or variation in the future.

Payment of Section 7 Expenses - Both Parties

5.18 The section 7 expenses in paragraph [specify] above will be allocated between the parties as follows:

(a) Wendy will be responsible for paying up front for the section 7 expenses in subparagraph[s] [specify] above, which work out to a total net cost to her of $[amount]], after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].

(b) Harold will be responsible for paying up front for the section 7 expenses in subparagraph[s] [specify] above, which work out to a total net cost to him of $[amount]], after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].

(c) For apportioning of section 7 expenses[, after taking into consideration the spousal support paid/received pursuant to paragraph [specify] below], Harold's income is [number]% of the parties' combined incomes, and Wendy's income is [number]% of the parties' combined incomes. Therefore, each party will pay to the other their proportionate share (ie. percentage) of the net cost of the section 7 expenses incurred by the other party, namely monthly payments of $[amount] by Harold and $[amount] by Wendy, resulting in a setoff payment by [specify party] to [specify party] in the monthly amount of $[amount], starting [date] and on the [first] day of each month thereafter.

(d) A DivorceMate Tools calculation, supporting the net cost of the section 7 expenses, the proportionate sharing under the Guidelines, and the section 7 payment owing is attached as a Schedule to this Agreement.

> Select only one of the following 4 clauses: "Payment of Section 7 Expenses - One Party"; or "Payment of Section 7 Expenses - Both Parties"; "Yearly Reconciliation of Section 7 Expenses - One Party"; or "Yearly Reconciliation of Section 7 Expenses - Both Parties".
>
> In determining the amount of the section 7 expense, the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
>
> Note that spousal support, if any, is deducted from the payor's income and included in the recipient's income in determining each party's proportionate share of section 7 expenses and respective contribution to the expenses. (Keep in mind that in arriving at spousal support pursuant to the SSAG, the section 7 expenses must be taken into account, and the section 7 expense apportioning is dependant on the amount of spousal support paid. This results in a circular "iteration" calculation best done by DivorceMate's Tools software.)
>
> The parties may wish to append a DivorceMate Tools printout to the Agreement as a schedule to demonstrate how the section 7 expense payment has been determined in this clause. This allows the parties, and subsequently a court or mediator/arbitrator, to understand the basis of the support clauses and more easily determine whether there has been a material change in financial circumstances in the event of a

review or variation in the future.

Yearly Reconciliation of Section 7 Expenses - One Party

5.19

(a) Wendy will be responsible for paying up front for all section 7 expenses estimated in paragraph [specify] above.

(b) By [date] each year, Wendy will provide reasonable proof/evidence, in writing, of the amounts she incurred for the children's section 7 expenses for the previous calendar year [or the previous 12-month period].

(c) The parties will determine the annual net cost of the section 7 expenses Wendy incurred, after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].

(d) The parties will determine Harold's proportionate share of the net cost of the section 7 expenses[, after taking into consideration the spousal support paid/received pursuant to paragraph [specify] below], based on his percentage of the parties' combined incomes, and Harold will immediately reimburse Wendy.

(e) A DivorceMate Tools calculation [or financial professional] will assist in determining the net cost of these section 7 expenses, the proportionate sharing under the Guidelines, and the section 7 payment owing in subparagraph (d) above.

Select only one of the following 4 clauses: "Payment of Section 7 Expenses - One Party"; or "Payment of Section 7 Expenses - Both Parties"; "Yearly Reconciliation of Section 7 Expenses - One Party"; or "Yearly Reconciliation of Section 7 Expenses - Both Parties".

This clause allows the parties to review the annual amount spent on section 7 expenses, and to make an appropriate adjustment at the end of the year. It sometimes takes a few months to obtain receipts for certain expenses and it may be better for the accounting to take place a few months after the period in which the section 7 expenses were incurred.

There are, however, enforcement problems with this approach. Provincial enforcement agencies, such as Ontario's FRO and B.C.'s FMEP, will only enforce section 7 expenses if the Agreement requires the payor to actually pay a specific dollar amount to the recipient, so a clause like this will not be enforceable.

Yearly Reconciliation of Section 7 Expenses - Both Parties

5.20

(a) Wendy will be responsible for paying up front for the section 7 expenses estimated in subparagraph[s] [specify] above, and Harold will be responsible for paying up front

for the section 7 expenses estimated in subparagraph[s] [specify] above.

(b) By [date] each year, the parties will provide reasonable proof/evidence, in writing, of the amounts they incurred for the children's section 7 expenses for the previous calendar year [or the previous 12-month period].

(c) The parties will determine the annual net cost of the section 7 expenses they each incurred, after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].

(d) The parties will determine their respective proportionate shares of the net cost of the section 7 expenses[, after taking into consideration the spousal support paid/received pursuant to paragraph [specify] below], based on their respective percentages of the parties' combined incomes, and the party who has underpaid their proportionate share will immediately reimburse the other party for their overpayment.

(e) A DivorceMate Tools calculation [or financial professional] will assist in determining the net cost of these section 7 expenses, the proportionate sharing under the Guidelines, and the section 7 payment owing in subparagraph (d) above.

> Select only one of the following 4 clauses: "Payment of Section 7 Expenses - One Party"; or "Payment of Section 7 Expenses - Both Parties"; "Yearly Reconciliation of Section 7 Expenses - One Party"; or "Yearly Reconciliation of Section 7 Expenses - Both Parties".
>
> See the Commentary for the "Yearly Reconciliation of Section 7 Expenses - One Party" clause above. Note that this clause pertains to section 7 expenses incurred by both parties.

Agreement as to Future Section 7 Expenses

5.21 Future section 7 expenses not already included or estimated above, will be handled as follows:

(a) Future section 7 expenses may include the following:

i [details of future section 7 expense];

ii [details of future section 7 expense];

iii [details of future section 7 expense]; and

iv [any other reasonable future section 7 expense, on which the parties agree; in the event of a disagreement, the parties will use the the section of this Agreement entitled "Dispute Resolution" to resolve this issue].

[OR rather than iv above: This list is exhaustive.]

(b) If either party incurs the up front cost of any of these future section 7 expenses, the

other party will pay their proportionate share of the net cost of any such section 7 expenses to the paying party, after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].

(c) The proportionate share to be paid by each party towards the net cost of any of these future section 7 expenses pursuant to subpararaph (b) above [is [number]% by Harold and [number]% by Wendy.] [will be determined at the end of the year [no later than January 31 of the next year], with the assistance of a DivorceMate Tools calculation [or financial professional], to determine the net cost of these section 7 expenses, the proportionate sharing under the Guidelines, and the section 7 payment owing from the party who has underpaid to the party who has overpaid their proportionate share.]

This clause provides for the proportionate sharing of any agreed upon future section 7 expenses. Because there is no set amount payable, there will likely be an enforcement problem. Provincial enforcement agencies, such as Ontario's FRO and B.C.'s FMEP, will only enforce section 7 expenses if the Agreement requires the payor to actually pay a specific dollar amount to the recipient.

This clause does, however, solve the problem of future section 7 expenses in a way that will be satisfactory in many cases, by either providing the percentage to be paid by each of the parties towards the net cost of the section 7 future expenses, or by providing a reconciliation at the end of the year to determine the appropriate section 7 payment to be made by the party who underpaid to the party who overpaid. Note that first option setting out the percentage to be paid in advance will not be entirely accurate without the inclusion of all section 7 expenses - both current/estimated and future - and it will be difficult to determine the net cost of the future expenses in isolation. The second option of a yearly reconciliation will be more accurate, but will also likely require some assistance to determine.

This clause also requires the parties to identify and agree upon which future expenses will be considered section 7 expenses, thus avoiding a dispute when those expenses arise, although it may be difficult to anticipate future expenses.

Or they may wish to agree that the section 7 expense list in the Agreement is exhaustive. The latter approach may not solve the problem since, under the Guidelines, any change of circumstances provided for in the applicable Guidelines may give rise to a change in support. If section 7 expenses arise after the Agreement that were not contemplated, this may well lead to a variation. The parties might as well deal with that issue in the Agreement. See the next paragraph "Agreement as to What are NOT Section 7 Expenses".

In any event, the parties may agree that if an expense arises and the parties cannot agree on whether it is a section 7 expense, then that matter can be resolved under the Dispute Resolution section.

Agreement as to What are NOT Section 7 Expenses

5.22 These expenses will not constitute section 7 expenses:

(a) [all customary and recurring expenses, such as clothing, food, supplies, and transportation to and from school];

(b) [any school event that costs less than $[amount]];

(c) [specify any other item not considered a section 7 expense, for example, piano lessons].

> If section 7 expenses arise after the Agreement that were not listed/contemplated, this may well lead to a variation. It would likely be wise for the parties to deal up front with any children's expenses that may arise that will *not* be considered section 7 expenses.

Consent Required for Contribution

5.23 The parties will only contribute to a child's [additional] [future] section 7 expenses if the parties consent to the expenses in advance, in writing. Neither party will unreasonably withhold consent. If the parties cannot agree, they will use the section of this Agreement entitled "Dispute Resolution" to resolve this issue.

> This clause can be used where (1) there are no section 7 expenses in the Agreement, or (2) there are section 7 expenses already agreed upon, but the parties anticipate that there may be additional/future section 7 expenses.
>
> Once again, there will likely be enforcement problems with this approach, as provincial enforcement agencies, such as Ontario's FRO and B.C.'s FMEP, will only enforce section 7 expenses if the Agreement requires the payor to actually pay a specific dollar amount to the recipient.

Termination - Detailed

5.24 Child support terminates for each child when:

(a) the child ceases to be a ["child of the marriage" as defined in the *Divorce Act*];["child" entitled to support pursuant to the *Family Law Act*];

(b) the child no longer lives with the parties ("lives" includes the child living away from home for school, summer employment or vacation);

(c) the child turns 18, unless the child is unable to become self-supporting due to illness, disability, education or other cause;

(d) the child becomes self-supporting;

(e) the child obtains one post-secondary degree or diploma;

(f) the child turns [age] years of age;

(g) the child marries;

(h) the child dies; or

(i) a party dies, provided that the security in the section of this Agreement entitled "Life Insurance" is in place at the time of death.

Select only one of the following 2 clauses: "Termination - Detailed"; or "Termination - Simple".

It was the intention of the drafters of the Guidelines that children over the age of majority (ie. 18 in Ontario) of divorced or separated parents who continue in school are still to be considered children of the marriage. Although there was a slight change in wording in s. 2(1) of the *Divorce Act* where "child of the marriage" was defined, it was never the intention that children over the age of 18 be left to their own resources if they were pursuing education. This section has become controversial. It was challenged in the Senate at the time of the passage of the Guidelines on the theory that married parents do not have an obligation to pay for their children through university and, therefore, divorced parents should not be placed in a worse position. There is, however, the argument that children of divorced parents are almost always disadvantaged by their parents' divorce and are often caught between warring parents.

Caselaw, for the most part, has reaffirmed that a child attending post-secondary school is still a child of the marriage. Note, however, that there still remains some controversy as to the period for which support continues to be payable. Some western cases and the odd Ontario case have made it clear that an undergraduate degree does not make the child particularly suitable for the marketplace in these current economic conditions and so long as the child remains in full-time school pursuing education, the child remains a child of the marriage for child support purposes. That would mean that a child pursuing medical or legal studies might still be a child of the marriage, as might a child pursuing post-graduate work to a Ph.D. Case law will set upper limits on the definition of "child of the marriage". Further, the parties must decide whether the monthly amount payable should be lower when a child lives away from home to attend a post-secondary educational institution. (See section "Review of Support if Child Lives Away from Home" below.)

Note that some caselaw would indicate that a child who moves in with a partner has, in Ontario, lost the status of "child", notwithstanding the fact that the child may still be impecunious and dependent. (See *Vandervort v. Brettler* (1989), 22 R.F.L. (3d) 160 (Ont. H.C.), affd. 1997 CarswellOnt 1334 (C.A.).)

Counsel and the parties may try to set the upper limits of child support if they are resolving the matter by agreement, but should note that the courts will have the last word. If the parties reach an agreement that does not cover child support for the requisite period of time, it is always open to one of the parties to bring an application under the Guidelines to extend the support. The Agreement will not end the support obligation, since the court will always have jurisdiction to award support in the best interests of the child, even in the face of an Agreement to the contrary.

Note that it is always necessary to provide security for the support. If life insurance is not provided as security and the obligation is binding on the estate of the payor, the FRO will not enforce against an estate.

Termination - Simple

5.25 Child support for a child terminates when the child is no longer a ["child of the marriage" as defined in the *Divorce Act*.] ["child" entitled to support pursuant to the *Family Law Act.*]

> Select only one of the following 2 clauses: "Termination - Detailed"; or "Termination - Simple".
>
> This clause has been used as an alternate because it is sometimes difficult to determine in advance when the child will cease to be a "child" as defined under the applicable legislation. Be wary, however, that without further fleshing out when the child is no longer entitled to support (as in the prior clause), disputes may ensue, particularly in high conflict cases.

Notice Of Terminating Event

5.26 When an event terminating child support occurs, Wendy will immediately notify Harold (and the FRO if applicable) in writing. If Wendy does not notify Harold (and the FRO if applicable), and Harold must end or vary Harold's support obligation by court application, Wendy will reimburse Harold for any overpayment of support, and for all Harold's legal costs and out-of-pocket expenses and damages.

> This is an attempt to reduce the necessity for proceedings when a terminating event occurs. The parties should be told and encouraged to exchange information about a terminating event so that the payor is not required to continue to pay after a terminating event and be put to the expense of having to take steps through the courts to terminate the enforcement. The recipient should be warned that he/she will have to pay the payor's expenses if the payor is required to take steps to formally end the support.

Determining Child Support for Remaining Children

5.27 If [Harold's obligation to support a child terminates] [the parties' obligations to support a child terminate], the parties will review the child support payable for the other remaining child[ren] at that time, and if they cannot agree, will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> We have not determined support in advance for the other child(ren) since the parties' circumstances and incomes at the applicable time, not to mention the caselaw, may considerably alter the amount to be paid. This section provides that there will be a review at the appropriate time.
>
> An alternative is to agree in advance on the amount to be paid for one child. For example, when the support for Charles ends, Harold will pay Wendy $400.00 monthly for Claire. Other circumstances might have changed by that time, making $400.00 inappropriate for one child, so the parties may want to provide instead that the amount will be $400.00 unless either party asks for a determination of the appropriate amount to be paid under the Guidelines. In that case, the amount will be determined under this review section, and resolved under the Dispute Resolution sections.

Support Resumes if Child Returns to School

5.28 If a child ceases to be a ["child of the marriage" as defined in the *Divorce Act*] ["child" entitled to support pursuant to the *Family Law Act*] because of an interruption to schooling for any purpose, but then later returns to school full-time and is still under the age of [age], then the child will be deemed once again to be a ["child of the marriage" as defined in the *Divorce Act*] ["child" entitled to support pursuant to the *Family Law Act*], and support will resume until an event terminating child support occurs.

> Counsel must consider what happens if a child leaves school for a period of time, resulting in the termination of child support, and then returns to school. This clause provides that support will resume if the child returns to full-time school and still qualifies as a "child" for whom support is payable. The parties may wish a reduction in support for the period of time that the child is living away at school, particularly if the payor is also contributing to those school and residency expenses. There may also be a reduction in support when the child is engaged in summer employment.

Review if Child Lives Away from Home

5.29 When a child moves away from home to attend a post-secondary educational institution, the parties will review the amount of child support (both the Table child support and the section 7 expenses) payable by [Harold] [the parties] in order to take into account the reduced customary and recurring expenses, such as clothing, food, supplies, etc. to [Wendy] [the parties] and the fact that [Harold] [the parties] will now contribute to the child's post-secondary educational expenses, including tuition, residence or equivalent shelter and food costs, books and supplies. If the parties cannot agree about any change in child support, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue(s).

> Select only one of the following 2 groupings of clauses:
>
> 1) "Review if Child Lives Away from Home"; OR
>
> 2) [["No Change in Table Support" (whether at home or school) or "Summer Table Support" or "% Reduction of Table Support"] OR
>
> ["No Change in Table Support" (if living at home) and ("Summer Table Support" or "% Reduction of Table Support")]]
>
> AND [("Section 7 Expenses - % Paid Directly" or "Section 7 Expenses - % Paid to Party")].
>
> Most courts have adopted the general rule that the Table amount of support is inappropriate for children attending school away from home, given the potential for double accounting of post-secondary expenses also included in the Table amount, and given that the Table amount is premised on an economy of scale based on sharing common expenses. (See *Park v. Thompson* (2005), 13 R.F.L. (6th) 415 (Ont. C.A.); *N. (W.P.) v. N. (B.J.)* (2005), 10 R.F.L. (6th) 440 (B.C.C.A.); but see the case of *Lewi v. Lewi* (2006), 28 R.F.L. (6th) 250, where the Ontario Court of Appeal seemed to suggest that it would still be open for the

court to order unreduced Table support, apply that support to reduce the living expenses of the child attending school away from home, and then resort to s.7 for the additional costs of post-secondary education).

If the child is the age of majority or younger at the time the child attends school away from home, the parties will have to agree that the adjustment is being made on the basis that it is reasonable and that the objectives of the Guidelines have been met.

This clause provides for a review of child support in the event a child moves away from home to attend school, and while more vague than some of the alternate clauses, it may be appropriate, especially if the children are young and the parties anticipate that their circumstances and incomes will change significantly by the time the children attend post-secondary education.

Note that this clause can be modified to provide that child support will be reviewed once the child begins post-secondary education, even if the child remains at home.

No Change in Table Support

5.30 When a child attends a post-secondary educational institution, full monthly Table child support will continue to be paid [by Harold to Wendy] [by the parties], [for so long as the child remains living at home with [Wendy] [the parties].] [notwithstanding that the child may remain living at home with [Wendy] [the parties].]

Select only one of the following 2 groupings of clauses:

1) "Review if Child Lives Away from Home"; OR

2) [["No Change in Table Support" (whether at home or school) or "Summer Table Support" or "% Reduction of Table Support"] OR

["No Change in Table Support" (if living at home) and ("Summer Table Support" or "% Reduction of Table Support")]]

AND [("Section 7 Expenses - % Paid Directly" or "Section 7 Expenses - % Paid to Party")].

See the Commentary for the "Review if Child Lives Away from Home" clause above for some general information about child support in the event that a child lives away from home to pursue post-secondary education.

The parties may agree that despite a child pursuing post-secondary away from home, they do not want the Table amount of child support to be reduced. See, for example, the case of *Lewi v. Lewi* (2006), 28 R.F.L. (6th) 250, where the Ontario Court of Appeal seemed to suggest that it would still be open for the court to order unreduced Table support, apply that support to reduce the living expenses of the child attending school away from home, and then resort to s.7 for the additional costs of post-secondary education.

Note that if the parties agree that there will be no change in Table child support for a child pursuing post-secondary education only if the child remains at home, this clause can be modified accordingly, as set out in the options provided.

Summer Table Support

5.31 When a child moves away from home to attend a post-secondary educational institution, Table child support for the child will change as follows:

(a) [Harold will pay the full monthly Table child support to Wendy] [The parties will pay the full monthly Table child support] for the child for [[number] months] [the four summer months of September to April, inclusive], and will pay no monthly Table child support for the child for the balance of the months[, which total amount will then be averaged over 12 months to determine a blended monthly Table amount for the year].

(b) [If there [is another child] [are other children] living with [Wendy primarily] [the parties], the Table amount attributable to the child attending a post-secondary educational institution away from home for the purposes of subparagraph (a) above will be the difference between the Table amount for [both] [all] children, and the Table amount for the child[ren] remaining at home.]

(c) A sample DivorceMate Tools calculation, showing the mechanics of the calculation of the Table child support amount above[based on the following sample assumptions: [specify]], is attached as a Schedule to this Agreement.

(d) If Harold and Wendy cannot agree on the appropriate Table child support pursuant to this paragraph, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> Select only one of the following 2 groupings of clauses:
>
> 1) "Review if Child Lives Away from Home"; OR
>
> 2) [["No Change in Table Support" (whether at home or school) or "Summer Table Support" or "% Reduction of Table Support"] OR
>
> ["No Change in Table Support" (if living at home) and ("Summer Table Support" or "% Reduction of Table Support")]]
>
> AND [("Section 7 Expenses - % Paid Directly" or "Section 7 Expenses - % Paid to Party")].
>
> See the Commentary for the "Review if Child Lives Away from Home" clause above for some general information about child support in the event that a child lives away from home to pursue post-secondary education.
>
> A common practice that has emerged regarding Table child support in these circumstances is to provide that the full Table amount will be paid for the child when the child is home (ie. 4 months of the summer), and then no Table amount for the balance of the year. DivorceMate's Tools can assist in the calculation of support in this manner with the "Summer" option for Table Support in the desktop, or the "Partial" option for Table Support in DM Cloud (which can actually allow for the Table amount to be paid for more or less than 4 months).

If there is more than one child being supported, it will be necessary to set out how the Table child support attributable to the child attending post secondary education away from home is to be calculated. See subparagraph (b) in this clause. A DivorceMate Tools calculation can also assist in this regard.

% Reduction of Table Support

5.32 When a child moves away from home to attend a post-secondary educational institution, Table child support will change as follows:

(a) Harold will reduce the amount of monthly Table child support attributable to the child and payable to Wendy by [number]% for [[number] months.] [the four summer months of September to April, inclusive.]

(b) [If there [is another child] [are other children] living with [Wendy primarily] [the parties], the Table amount attributable to the child attending a post-secondary educational institution away from home for the purposes of subparagraph (a) above will be the difference between the Table amount for [both] [all] children, and the Table amount for the child[ren] remaining at home.]

(c) A sample DivorceMate Tools calculation, showing the mechanics of the calculation of the Table child support amount above[based on the following sample assumptions: [specify]], is attached as a Schedule to this Agreement.

(d) If Harold and Wendy cannot agree on the appropriate Table child support pursuant to this paragraph, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

Select only one of the following 2 groupings of clauses:

1) "Review if Child Lives Away from Home"; OR

2) [["No Change in Table Support" (whether at home or school) or "Summer Table Support" or "% Reduction of Table Support"] OR

["No Change in Table Support" (if living at home) and ("Summer Table Support" or "% Reduction of Table Support")]]

AND [("Section 7 Expenses - % Paid Directly" or "Section 7 Expenses - % Paid to Party")].

See the Commentary for the "Review of Support if Child Live Away from Home" clause above for some general information about child support in the event that a child lives away from home to pursue post-secondary education.

This particular clause is based on a percentage reduction of the Table amount for those months when the child is attending school away from home. The parties can agree on the percentage reduction that seems suitable in the circumstances. For a court-ordered reduction in a similar fashion, see *Brans v. Brans* (2000), 13 R.F.L. (5th) 335 (Ont. S.C.J.).

If there is more than one child being supported, it will be necessary to set out how the Table child support

attributable to the child attending post secondary education away from home is to be calculated. For example, if there were 2 children in total (ie. one at home and one at school), the Table amount would be paid for the one child at home, and a percentage of the difference between one child and two children at home would be paid for the child at school. See subparagraph (b) in this clause. A DivorceMate Tools calculation can also assist in this regard.

In the case of *Lewi v. Lewi* (2006), 28 R.F.L. (6th) 250, where both children were attending university, one living at home and the other away, the motion judge ordered child support at the Table amount for one child plus one-third of the difference between the Table amount for one child and the Table amount for two children, before turning to the additional post-secondary expenses.

Section 7 Expenses - % Paid Directly

5.33 When a child moves away from home to attend a post-secondary educational institution:

(a) Harold will pay [number]% and Wendy will pay [number]% of the net cost of the child's post-secondary educational expenses, including tuition, residence or equivalent shelter and food costs, books and supplies, directly to the institution and/or the child.

(b) If the tuition income tax credits for the child's post-secondary educational institution are not fully used by the child and will not be banked for the child's future use, [specify Harold or Wendy, not both] will claim the maximum unused portion of the tuition income tax credit eligible to be transferred to a party.

(c) If Harold and Wendy cannot agree on the appropriate post-secondary educational section 7 expenses pursuant to this paragraph, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

Select only one of the following 2 groupings of clauses:

1) "Review if Child Lives Away from Home"; OR

2) [["No Change in Table Support" (whether at home or school) or "Summer Table Support" or "% Reduction of Table Support"] OR

["No Change in Table Support" (if living at home) and ("Summer Table Support" or "% Reduction of Table Support")]]

AND [("Section 7 Expenses - % Paid Directly" or "Section 7 Expenses - % Paid to Party")].

This clause addresses the section 7 expenses (ie. tuition, residence or equivalent shelter and food costs, books and supplies) for a child who is pursuing post-secondary education, and provides that each party will contribute a certain percentage of these expenses to the institution or the child directly. It also specifies who will claim the associated tuition tax credit.

Section 7 Expenses - % Paid to Party

5.34 When a child moves away from home to attend a post-secondary educational institution,

(a) [Wendy will pay for all of the child's post-secondary educational section 7 expenses, including tuition, residence or equivalent shelter and food costs, books and supplies, and Harold will reimburse Wendy for [number]% of the total net cost of these expenses to Wendy, after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses, including any available tuition tax credit[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].]

(b) [Harold will pay for all of the child's post-secondary educational section 7 expenses, including tuition, residence or equivalent shelter and food costs, books and supplies, and Wendy will reimburse Harold for [number]% of the total net cost of these expenses to Harold, after the application of any subsidies, benefits or income tax deductions or credits relating to the expenses, including any available tuition tax credit[, and taking into consideration the spousal support paid/received pursuant to paragraph [specify] below].]

(c) If Harold and Wendy cannot agree on the appropriate post-secondary educational section 7 expenses and/or the net cost of these expenses pursuant to this paragraph, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> Select only one of the following 2 groupings of clauses:
>
> 1) "Review if Child Lives Away from Home"; OR
>
> 2) [["No Change in Table Support" (whether at home or school) or "Summer Table Support" or "% Reduction of Table Support"] OR
>
> ["No Change in Table Support" (if living at home) and ("Summer Table Support" or "% Reduction of Table Support")]]
>
> AND [("Section 7 Expenses - % Paid Directly" or "Section 7 Expenses - % Paid to Party")].
>
> This clause addresses the section 7 expenses (ie. tuition, residence or equivalent shelter and food costs, books and supplies) for a child who is pursuing post-secondary education, and provides that one party will pay for these expenses, and the other party will pay a percentage of the net cost of these expenses to the paying party (ie. after applying the associated tuition tax credit, if applicable).

Child's Contribution to Section 7 Expenses

5.35 Prior to determining each party's obligation for the child's post-secondary educational section 7 expenses above, Harold and Wendy shall first deduct a reasonable contribution to these expenses expected from the child. [Specify details and the source of the child's contribution, whether it is to be funded from savings, trust funds, investments, gifts, summer or part-time employment, scholarships, loans, bursaries etc.] In the event that Harold and

Wendy cannot agree on the child's reasonable contribution to these expenses, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> This clause is included to address the potentially contentious issue of how much an adult child is expected to contribute to his/her own education. At the very least, this section will require the parties to turn their minds to the various sources of income/capital/credit that may/will be available to the child at the applicable time, and to determine whether these monies are expected to be used towards the child's education, in whole or in part.
>
> It is an attempt to address the problem in the case of *Lewi v. Lewi*, (2006), 28 R.F.L. 250 (Ont. C.A.), where the mother maintained that none of the children's capital gifted by the paternal grandfather was to be used to fund university expenses, and where the father maintained the exact opposite, namely that all of it should be applied to the children's schooling. The Ontario Court of Appeal set out a number of principles to be applied in determining child support for adult children attending school, including the overarching general expectation that a child with means will be expected to contribute something towards his/her schooling, the exact amount of the contribution to be determined based on the particular facts of each case.

RESP

5.36

(a) Harold and Wendy acknowledge that they have been contributing to a Registered Education Savings Plan ("RESP") for the children, and that the current amount of the RESP is approximately $[amount].

(b) [Harold and Wendy will continue to equally contribute to the RESP in the amount of $(specify) per month until such time as the children commence post-secondary education.]

(c) Prior to determining each party's respective obligation to the children's post-secondary educational section 7 expenses, Harold and Wendy shall first apply the RESP to these expenses as follows: [specify the approximate amount of the RESP to be applied each year, and any other details. In the case of more than one child, specify how much is to be applied for each child.]

(d) In the event that Harold and Wendy cannot agree on the appropriate application of the RESP to the post-secondary educational section 7 expenses, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> This clause addresses any RESP for the child(ren), whether the parties will continue to contribute to the RESP (in whatever proportion they decide, or equally as set out in this option), and how the parties intend to use the RESP once the child pursues post-secondary education.

Annual Review on Request

5.37

(a) [In addition to any automatic child support reviews in the rest of the Agreement, once] [Once] a year, if either party asks in writing, Harold and Wendy will review the child support arrangements in this Agreement and, if they do not agree about any change, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue(s).

(b) Until the child support is adjusted by an amending agreement, arbitration award, or court order, Harold will continue to pay the child support and any contribution to the children's section 7 expenses under the parties' most recent written agreement, arbitration award, or court order.

> Select only one of the following 2 clauses: "Annual Review on Request"; or "Automatic Annual Review".
>
> The parties may set out when they wish the review to take place. It may be preferable in some cases to set out a specific date when the review will occur. The parties may also wish an accounting for the previous year in order to deal with any under or over-payment of the "add-on" expenses. But caution should be exercised here, as an accounting can lead to endless disputes between some parties. This clause is really an optional review and if neither party requests it, it will not take place. A fixed date will likely encourage an annual review. Therefore, counsel should discuss with their clients which approach they prefer.
>
> Keep in mind that the Supreme Court of Canada decisions *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, highlight the importance of a recipient making a formal request for income information and increased child support from the payor in writing on a regular basis, as well as following up on any such request, in any subsequent claim for retroactive child support. The court found that a recipient's delay in seeking child support is not presumptively justifiable (unless there is a reasonable excuse.) The majority held that the date of retroactivity is the date on which the topic was broached (and followed up on) by the recipient, limited to not more than three years before formal notice given to the payor (unless the payor engaged in blameworthy conduct, in which case the date of retroactivity moves back to the time when the payor's circumstances changed materially.)
>
> If this clause is not in the Agreement, s.25 of the Guidelines requires every spouse against whom a child support order has been made, at the written request of the other spouse, to provide documentary disclosure. The request may not be made more than once a year after the order is made and only as long as a child is a "child" within the meaning of the Guidelines. Under the Guidelines, the continuing obligation is only triggered by a child support order and not by an agreement. Therefore, the party who wants, at a minimum, to obtain the s.25 disclosure must provide for it in the Agreement. If the Agreement is subsequently registered in the court, it becomes a Guidelines order, and this entitlement for information is triggered. If the Agreement provides that a court order be taken out to incorporate the terms, then this is also a Guidelines order with an entitlement to the information.

Automatic Annual Review

5.38

(a) [In addition to any automatic child support reviews in the rest of the Agreement, on] [On] or before [May 1st] of each year, commencing in the year following the execution of this Agreement, the parties will exchange income information for the prior calendar year. They will use this information to adjust the child support payable, including both the Table Amount and the proportionate sharing of the section 7 expenses.

(b) Any change in the Table Amount and the proportionate sharing of the section 7 expenses will commence on [July 1st] of each year, commencing in the year following the execution of this Agreement. If the parties do not agree about any change in child support, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue(s).

> Select only one of the following 2 clauses: "Annual Review on Request"; or "Automatic Annual Review".
>
> The parties may provide for an automatic review every year on a specific date.
>
> See the Commentary under the clause "Annual Review on Request" above, highlighting the importance of making a formal request for income information.

Disclosure - short form

5.39 [Within 30 days of any written request for disclosure by either party,] [On or before May 1st of each year,] both parties will, in writing, provide the following information to the other:

(a) the documents required in s. 21(1) of the Guidelines that have not previously been provided;

(b) current information about the children's section 7 expenses;

(c) current information about a party's claim of undue hardship, if any, and the household's standard of living;

(d) details of Canada Child Benefit or other child benefits received in the previous year and anticipated in the coming year; and

(e) any other information needed to review child support.

> Select only one of the following 2 clauses: "Disclosure - short form"; or "Disclosure - long form".
>
> Other child benefits include the Child Disability Benefit (if applicable) component of the Canada Child Benefit, the refundable children's GST/HST credits, applicable refundable medical credits, and other provincial child benefits, such as the Ontario Child Benefit and the B.C. Family Bonus.
>
> The parties may wish to include a specific date for the exchange of information. This clause is really an optional disclosure clause, so if neither party requests it, it will not take place. A fixed date will likely encourage an annual disclosure. Therefore, counsel should discuss with their clients which approach they prefer.

> It may not be necessary to agree that the parties are going to exchange information because in some cases where one parent has primary parenting time with the children, the information of that parent (ie. recipient) will not be needed (unless there are special or extraordinary expenses for the children). However, to be fair and even-handed, it is probably better to draft a clause so that both parties will exchange their information.
>
> The period intended by the year should be specified, i.e., calendar or a specific 12-month period.
>
> See the Commentary under the clause "Annual Review on Request" above, highlighting the importance of making a formal request for income information.

Disclosure - long form

5.40 [Within 30 days of any written request for disclosure by either party,] [On or before May 1st of each year,] both parties will, in writing, provide the following information to the other:

(a) the documents required in s. 21(1) of the Guidelines that have not previously been provided, which includes:

i a copy of every personal income tax return filed by the party for each of the three most recent taxation years;

ii a copy of every notice of assessment and reassessment issued to the party for each of the three most recent taxation years;

iii where the party is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the party's employer setting out that information including the party's rate of annual salary or remuneration;

iv where the party is self-employed, for the three most recent taxation years

1. the financial statements of the party's business or professional practice, other than a partnership; and

2. a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the party does not deal at arm's length;

v where the party is a partner in a partnership, confirmation of the party's income and draw from, and capital in, the partnership for its three most recent taxation years;

vi where the party controls a corporation, for its three most recent taxation years

1. the financial statements of the corporation and its subsidiaries; and

2. a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

vii where the party is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and

viii in addition to any income information that must be included under paragraphs (iii) to (vii), where the party receives income from employment insurance, social assistance, a pension, workers compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year, or if such a statement is not provided, a letter from the appropriate authority stating the required information.

(b) current information about the children's section 7 expenses;

(c) current information about a party's claim of undue hardship, if any, and the household's standard of living;

(d) details of Canada Child Benefit or other child benefits received in the previous year and anticipated in the coming year; and

(e) any other information needed to review child support.

Select only one of the following 2 clauses: "Disclosure - short form"; or "Disclosure - long form".

This disclosure clause sets out the disclosure required under s. 21(1) of the Guidelines in great detail.

See the Commentary under the "Disclosure - short form" clause above for other general information about disclosure.

Annual Retroactive Adjustment of Child Support Table Amount

5.41 The parties will adjust the Table amount of child support paid each calendar year based on Harold's [the parties'] actual income[s] for that calendar year as follows:

(a) By no later than May 1st [June 15th (if self-employed)] of each year, Harold shall provide a copy of Harold's income tax return, as filed, for the prior calendar year (the "applicable calendar year") to Wendy [or, in the case of shared or split parenting time, the parties shall exchange copies of their income tax returns, as filed, for the applicable calendar year].

(b) The parties will then determine Harold's [or the parties'] appropriate Table amount for the applicable calendar year, in accordance with the Guidelines.

(c) If Harold has underpaid the Table amount for the applicable calendar year, Harold will pay to Wendy the additional amount owing for the applicable calendar year immediately [or, within 30 days].

(d) If Harold has overpaid the Table amount for the applicable calendar year, Harold may deduct the overpayment from Harold's current child support over [number] months in equal instalments.

(e) If the parties do not agree about the adjustment to be made, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> This clause is an "after the fact" adjustment of child support, based on hindsight (ie. the parties' actual incomes). Child support obligations pursuant to the Guidelines are to be based on the most current information available, or in other words, the payor's current annual income (ie. not just historical information as disclosed in the prior year's tax return). This was highlighted in the case, *L. (R.E.) v. L. (S.M.)*, 2007 CarswellAlta 690, where the Alberta Court of Appeal held that the "child is entitled to be supported according to the payor's current income, if ascertainable, and if not, by a reasonably accurate estimate of the payor's current income with an adjustment at year's end once the actual income is known" (para 22).
>
> This clause could be adjusted/expanded if the parties wish to also adjust the special or extraordinary expenses apportionment for the applicable year based on the parties' actual incomes.
>
> Be aware that this clause will be unenforceable by provincial enforcement agencies, such as Ontario's FRO and B.C.'s FMEP.

Variation Because of Material Change

5.42

(a) [In addition to a yearly review, either] [Either] Harold or Wendy may seek a variation (ie. change) in child support if there is a material change in the condition, means, needs or other circumstances of Harold, Wendy, Charles or Claire that would affect child support.

(b) A material change in the condition, means, needs or other circumstances of Harold, Wendy, Charles or Claire in subparagraph (a) above, may be foreseen or unforeseen, foreseeable or unforeseeable, and may include:

i a [material] change in either party's financial position[by more than $[amount] per year];

ii a change causing undue hardship for either party or the children;

iii a change in the number of children entitled to receive support under this Agreement;

iv a [material] change in the children's section 7 expenses [by more than $[amount] per year];

v a change in a child's living arrangement (ie. parenting time with the parties) that impacts the amount of child support under the Guidelines;

vi a child turning the age of majority;

vii a change in a child's need for support; or

viii [specify any other material change(s)].

(c) The following will not be considered material and accordingly will not justify a variation of child support:

i a child earning up to $[amount] from personal earnings, scholarships, bursaries, grants, loans, inheritances or gifts from third parties;

ii a child residing with Harold during the summer months, even if this amounts to parenting time for more than 40% of the year;

iii [a drop in Harold's income by less than (number) percent];

iv [a party taking a sabbatical;]

v [a party becoming a parent of a child outside of this relationship;] or

vi [specify any other change that will not be considered material].

(d) Whoever seeks a change will give the other, in writing:

i notice of the proposed change;

ii evidence supporting the proposed change; and

iii any request for information necessary to determine the issue.

(e) If the parties cannot agree about any change, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue(s).

> A variation of child support is different from a review. A review does not require a material change in order to adjust the amount.
>
> A variation requires that the parties meet the threshold under s.17 of the *Divorce Act* and s.14 of the Guidelines, or in the applicable provincial jurisdiction. In this clause, we have used the word "material", but that word is narrower than s.14 of the Guidelines, which states that a variation may occur:
>
> > (1) in the case where the amount of child support includes a determination made in accordance with the applicable Table, [if there is] any change in circumstances that would result in a different child support order or any provision thereof; [and]
> >
> > (2) in the case where the amount of child support does not include a determination made in

> accordance with a table, [if there is] any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support...

It may be that a material change clause is not necessary since the amount of child support is variable under the Guidelines whenever there is a change of circumstances that would require a different amount to be paid.

However, we have included a material change clause because there may be some circumstances in which the parties have agreed not to use the Guidelines annually and wish certainty or to reduce the opportunity for variation or review by relying on this Agreement instead of the Guidelines, hence subparagraph (c) of this clause. Although the parties cannot oust the jurisdiction of the court to award the appropriate amount under the Guidelines, a variation clause based on a material change in circumstances may be appropriate.

Indexing Factor

5.43 On the [first] day of [month] ("indexing date") in each year, starting on [date], child support will increase by the indexing factor for the third month immediately before the indexing date in that year. For example, if the indexing date is April 1, the indexing factor applicable on April 1, 2022 will be the indexing factor for January 1, 2021. An example of this calculation is set out as a Schedule ("Indexing Calculation") to this Agreement.

Select only one of the following 2 clauses: "Indexing Factor"; or "Increase Other Than by Indexing Factor".

When indexing was first introduced into the legislation, virtually every separation agreement adopted similar provisions so support would keep pace with the cost of living. Quite frequently, the indexing clause provided that the payor would pay the lesser of the cost of living and the payor's increase in income. Sometimes the indexing figure was capped to, say, 2% or 3%, in order to ensure that the payor did not have to keep up with runaway inflation.

The introduction of the Guidelines has changed the fashion of using indexing for those who use the Guidelines as the means of determining support. Any change in the income of the payor results in a different amount of support and, accordingly, if the payor's income increases by 3%, it would change the Table amount. Thus, many counsel have stopped using indexing clauses.

On the other hand, our experience with the Guidelines has demonstrated that many people are not anxious to bother with an annual review. Many will still prefer an indexing clause. Since it is not possible to draft an enforceable agreement that eliminates the right to a review under the Guidelines, the parties may wish to have both in their agreement - that is, an indexing clause that applies unless there is a review under the review section in the agreement. Although indexing may not be the choice for parties dealing with child support alone, counsel must keep in mind that it will continue to be an important factor for spousal support.

Dates must be specified. It is common to set out a month for calculation purposes that is at least three months earlier than the commencement date of support because Consumer Price Index figures for the month of the change are not published for some time after the change is scheduled to take place.

> See *McMahon v. Hodgson*, 2002 CarswellOnt 620, 25 R.F.L. (5th) 102 (S.C.J.) where the court held that the onus was on a payor (not the recipient of support) who agreed to a COLA clause to find out the rate and pay it or risk paying the increase retroactively.
>
> Also see the commentary under the clause "Cost of Living Increase" in the "Spousal Support" section below.

Increase Other Than by Indexing Factor

5.44

(a) In this section, "Relevant Year" means the calendar year immediately before the calendar year in which the particular indexing date occurs, and "percentage annual increase in Harold's income for the Relevant Year" means the percentage increase, if any, in Harold's income for the Relevant Year compared to the calendar year immediately before the Relevant Year. For example, if the particular indexing date is April 1, 2022, (i) the Relevant Year is calendar year 2021, and (ii) the percentage annual increase in Harold's income for the Relevant Year is the percentage increase, if any, in Harold's annual income for calendar year 2021 compared to that for calendar year 2020.

(b) If the indexing factor applicable on any particular indexing date is greater than the percentage annual increase in Harold's income for the Relevant Year, Harold may choose to increase child support for the year beginning on that particular indexing date by the percentage annual increase in Harold's income for the Relevant Year instead of by the applicable indexing factor. An example of this calculation is set out as a Schedule ("Calculation of Adjustment if Payor's Income Change is Less Than Indexing Factor") to this Agreement. To so choose, Harold must provide Wendy with copies of Harold's income tax returns, including all schedules and attachments and notices of assessment and reassessment for the previous two years and any other documents Wendy may need to confirm Harold's income. If the increase will be other than the indexing factor, the parties will sign an amending agreement setting out the new amount of child support [and Wendy will file the amending agreement with the court and the provincial enforcement agency (ie. FRO in Ontario/FMEP in B.C.)].

> Select only one of the following 2 clauses: "Indexing Factor"; or "Increase Other Than by Indexing Factor".
>
> See the Commentary in the "Indexing Dates" clause above for general information about indexing.
>
> The FRO/FMEP will not enforce a "lesser of" clause because the increase cannot be determined from the face of the Agreement (as it is expressed as a percentage of the payor's income or is dependent on another variable that does not appear in the Agreement). If the parties are going to use this method of "indexing", the Agreement must provide that the parties sign an amending agreement at the time of any change under this section in order to make it enforceable.

Indexing Pending Review

5.45 If neither Harold nor Wendy asks for a review of child support in any year, child support will be indexed as set out in the Agreement, and will continue to be indexed yearly until such time as child support is reviewed pursuant to the Agreement.

Equal/Shared Parenting Time

5.46 For the children for whom the parties have equal or shared parenting time:

(a) Each party is entitled to one-half of the following income tax benefits/credits:

i Canada Child Benefit (including the Child Disability Benefit, if applicable), paid out monthly;

ii refundable children's GST/HST credits, paid out quarterly;

iii Climate Action Incentive, paid out quarterly;

iv Ontario Child Benefit, paid out monthly; and

v Ontario Trillium Benefit, paid out monthly.

The parties will complete any application necessary to effect this one-half sharing of these benefits/credits.

(b) [Specify either Harold or Wendy, not both] may claim the Ontario Tax Reduction for low income families, if applicable.

(c) [Specify either Harold or Wendy, not both] may claim the Eligible Dependant Credit for [name(s) of child(ren)]. [[Name of other party] may claim the Eligible Dependant Credit for [name(s) of other child(ren) if more than one].]

(d) These benefits/credits/tax reductions in subparagraphs (a), (b) and (c) above will not affect the Table amount of child support in this Agreement.

> Select only one of the following 3 clauses: "Equal/Shared Parenting Time"; "Primary Parenting Time"; or "Split Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> Also to be considered are any other provincial credits/benefits and the federal refundable medical credits.
>
> This clause ensures certainty when the parties prepare their tax returns. It cannot be used if the equal/shared parenting time arrangement does not exist.
>
> The Canada Child Benefit (including the Child Disability Benefit if applicable), the refundable children's GST/HST credits, the Climate Action Incentive, the Ontario Child Benefit and Ontario Trillium Benefit are paid to the taxpayer who has primary responsibility for the children. If the children are in an

> equal/shared parenting time arrangement, the parties are required to share these benefits/credits, so essentially they each get one-half of the benefits/credits based on their individual entitlement, paid out over the course of the year. (Note that for 2021 only as a COVID-19 supplemental measure, the Canada Child Benefit will include a Young Children Benefit, if applicable, paid quarterly. Also note that effective July, 2022, the Climate Action Incentive is now a federal benefit, paid quarterly, as opposed to a refundable credit.) The Ontario Tax Reduction for low income families, if applicable, can only be claimed by one party in an equal/shared parenting time arrangement.
>
> In cases of equal/shared parenting time, where both parties make support payments for a child, the parties can decide who will be entitled to the eligible dependant credit (formerly, equivalent-to-spouse credit). If, however, the parties cannot agree, no one gets the credit. Be aware of the recent Tax Court of Canada case, *Harder v. R.*, 2016 TCC 197, where not only must the order/agreement say that both parties are paying support, but the factual or evidentiary record (ie. cheques; e-transfers; etc.) must support this dual payment. In other words, the parties must actually have proof that they are each, in fact, making these payments, and not offsetting them. (As well, it is likely wise to refrain from referencing s.9 of the Guidelines expressly in the support provisions of the Agreement, as it has been held to be a statutory scheme that contemplates a single set-off payment and therefore disqualifies allocation of the eligible dependant credit.) Refer to the Canada Revenue Agency's "General Income Tax and Benefit Guide", the Government's website re: "Child custody and the amount for an eligible dependant", and the CRA Guide P102, "Support Payments" (specifically the section on "Shared custody and the amount for an eligible dependant") for further details.
>
> Where there are two or more children in shared custody, it would appear that both parties may claim the dependant credit provided that both parties are required to make (and are in fact making) support payments for the children.
>
> It is important to keep in mind, however, that CRA's various Guides and Folios are just that - guides - and CRA retains the ultimate decision-making power with respect to these credits and deductions.
>
> Note that the dependent child must be related to the party claiming the credit by blood, marriage, common-law partnership or adoption. The credit cannot be claimed by more than one individual in the year for the same child, nor can the credit be claimed if the party is remarried, has a new common law spouse or is claiming a spousal credit.
>
> While the benefits/credits do not affect the Table amount of support, be aware that they may impact the net cost and sharing of special expenses, as well as spousal support (if applicable).
>
> All clauses relating to tax benefits/credits eligibility should be verified by your family law accounting professional/tax specialist.

Primary Parenting Time

5.47 Wendy may claim the following income tax benefits/credits/tax reductions for the children living primarily with Wendy:

(a) Canada Child Benefit (including the Child Disability Benefit, if applicable), paid out monthly;

(b) refundable children's GST/HST credits, paid out quarterly;

(c) Climate Action Incentive, paid out quarterly;

(d) Ontario Child Benefit, paid out monthly;

(e) Ontario Trillium Benefit, paid out monthly;

(f) Ontario Tax Reduction for low income families, if applicable; and

(g) Eligible Dependant Credit.

These benefits/credits/tax reductions will not affect the Table amount of child support in this Agreement.

> Select only one of the following 3 clauses: "Equal/Shared Parenting Time"; "Primary Parenting Time"; or "Split Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> Also to be considered are any other provincial credits/benefits and the federal refundable medical credits.
>
> The Canada Child Benefit (including the Child Disability Benefit, if applicable), the refundable children's GST/HST credits, the Climate Action Incentive, the Ontario Child Benefit, the Ontario Trillium Benefit, and the Ontario Tax Reduction for low income families, if applicable, respecting the children are paid/available to the taxpayer who has primary parenting time/care of the children. (Note that for 2021 only as a COVID-19 supplemental measure, the Canada Child Benefit will include a Young Children Benefit, if applicable, paid quarterly. Also note that effective July, 2022, the Climate Action Incentive is now a federal benefit, paid quarterly, as opposed to a refundable credit.)
>
> The eligible dependant credit (formerly, equivalent-to-spouse credit) is only available to the recipient of child support under an agreement. It is not available to someone who pays support for that child. The dependent child must be related to the party claiming the credit by blood, marriage, common-law partnership or adoption. The credit cannot be claimed by more than one individual in the year for the same child, nor can the credit be claimed if the party is remarried, has a new common law spouse or is claiming a spousal credit.
>
> While the benefits/credits do not affect the Table amount of support, be aware that they may impact the net cost and sharing of special expenses, as well as spousal support (if applicable).
>
> All clauses relating to tax benefits/credits eligibility should be verified by your family law accounting professional/tax specialist.

Split Parenting Time

5.48 Harold may claim the following income tax benefits/credits/tax reductions for [name(s) of child(ren)] living primarily with Harold, and Wendy may claim the following income tax benefits/credits/tax reductions for [name(s) of other child(ren)] living primarily with Wendy:

(a) Canada Child Benefit (including the Child Disability Benefit, if applicable), paid out

monthly;

(b) refundable children's GST/HST credits, paid out quarterly;

(c) Climate Action Incentive, paid out quarterly;

(d) Ontario Child Benefit, paid out monthly;

(e) Ontario Trillium Benefit, paid out monthly;

(f) Ontario Tax Reduction for low income families, if applicable; and

(g) Eligible Dependant Credit.

These benefits/credits/tax reductions will not affect the Table amount of child support in this Agreement.

> Select only one of the following 3 clauses: "Equal/Shared Parenting Time"; "Primary Parenting Time"; or "Split Parenting Time". If, however, there is a mixed parenting time arrangement, you may need to include more than one of these clauses.
>
> Also to be considered are any other provincial credits/benefits and the federal refundable medical credits.
>
> This clause ensures certainty when the parties prepare their tax returns. It cannot be used if the split parenting time arrangement does not exist. In other words, the parties cannot arbitrarily shift around these benefits and the eligible dependant credit if not warranted by the situation.
>
> The Canada Child Benefit (including the Child Disability Benefit, if applicable), the refundable children's GST/HST credits, the Climate Action Incentive, the Ontario Child Benefit, the Ontario Trillium Benefit, and the Ontario tax reduction for low income families, if applicable, respecting the children are paid/available to the taxpayer who has primary parenting time/care of the children. (Note that for 2021 only as a COVID-19 supplemental measure, the Canada Child Benefit will include a Young Children Benefit, if applicable, paid quarterly. Also note that effective July, 2022, the Climate Action Incentive is now a federal benefit, paid quarterly, as opposed to a refundable credit.)
>
> The eligible dependant credit (formerly, equivalent-to-spouse credit) is only available to the recipient of child support under an agreement. It is not available to someone who pays support for that child. The dependent child must be related to the party claiming the credit by blood, marriage, common-law partnership or adoption. The credit cannot be claimed by more than one individual in the year for the same child, nor can the credit be claimed if the party is remarried, has a new common law spouse or is claiming a spousal credit.
>
> In split parenting time arrangements, the support payor could claim the eligible dependant for the child in his or her custody, as long as the parties claim it for different dependent children.
>
> While the benefits/credits do not affect the Table amount of support, be aware that they may impact the net cost and sharing of special expenses, as well as spousal support (if applicable).
>
> All clauses relating to tax benefits/credits eligibility should be verified by your family law accounting professional/tax specialist.

For Religious School Tuition

5.49 Harold and Wendy will share the charitable donation income tax credit related to the children's religious school tuition, and will direct the school to issue charitable tax receipts in proportion to the amounts paid by each of them.

> A portion of tuition at some religious schools may qualify as a charitable donation and therefore be eligible for a tax credit. The parties must decide who is entitled to claim this charitable donation for the purposes of their personal income tax returns. This clause assumes the charitable donation will be shared proportionately based on each parties' tuition contribution.
>
> All clauses relating to tax benefits/credits eligibility should be verified by your family law accounting professional/tax specialist.

For Post Secondary Educational Institution

5.50 If the tuition income tax credit for a child's post-secondary educational institution are not fully used by the child, [Harold or Wendy, not both] will claim the unused portion of the tuition income tax credit eligible to be transferred to a party.

> Note that this clause may not be necessary if you have already set out who is entitled to claim the tuition income tax credit in the clauses under "Post-Secondary Education" above.
>
> This clause is used to enable a parent who contributes to a child's post-secondary education expenses to claim a credit for the unused tuition amounts. Section 118.9 of the *Income Tax Act* authorizes the transfer of a child's tuition credit to a parent or grandparent. The credit can only be transferred to one person (Information Bulletin IT-516RZZ0). Be aware that the child may keep this credit for himself/herself to offset income earned in later years, and so it is not an automatic transfer. The maximum federal transfer of tuition fees is $5,000 per student (minus the amount the student needs to reduce his/her income taxes to $0).
>
> Note that the education and textbook amounts of the federal tax credit were eliminated, effective January 1, 2017, although unused education and textbook amounts as of the end of 2016 can be carried forward to 2017 and subsequent tax years. The "education amount" was calculated by multiplying the number of months of appropriate schooling by $400, or by $120 if part-time. The "textbook amount" was calculated by multiplying the number of months of appropriate schooling by $65, or by $20 if part-time.
>
> All clauses relating to tax benefits/credits eligibility should be verified by your family law accounting professional/tax specialist.

Payment of Support through FRO

5.51 Harold and Wendy acknowledge that support will be paid through and enforced by the Family Responsibility Office. Wendy [or Harold] will file this Agreement with the court and the Family Responsibility Office for enforcement. To this end, [Harold will pay the child support to

the Family Responsibility Office] [Harold's child support will be an automatic support deduction from Harold's pay in accordance with the *Family Responsibility and Support Arrears Enforcement Act*].

> Select only one of the following 2 clauses: "Payment of Support through FRO"; or "Direct Payment of Support/Non-filing with FRO".
>
> Section 35 of the *Family Law Act* permits a person who is a party to a domestic contract to file the contract or agreement with the court. The agreement may then be enforced as though it were an order of the court where it is filed. The FRO will then take over responsibility for collection of the amounts under the agreement. If the payor is employed, the support will be automatically deducted from his/her pay. If the payor is self-employed, the payor should remit the support directly to the FRO, who will in turn, remit it to the recipient.
>
> Given past problems with the FRO and the potential delays, many parties do not wish the FRO to be involved. To avoid the FRO regime, the parties must jointly withdraw from the FRO. The clauses that follow should be used if self-enforcement is preferred.
>
> Counsel should, therefore, consider at the time of the agreement whether the parties are going to opt into the FRO regime or whether the Agreement will go into the FRO regime only under certain circumstances. For example, the parties may wish to agree that the support will be paid directly by either bank transfer or post-dated cheques and that only if there is a default will the recipient be entitled to register the agreement under s. 35. On the other hand, parties may wish to have their support collected by the FRO in order to limit contact with one another, or have their cost-of-living changes administered automatically, or in cases where there is a history of problems with ongoing payments or projected concern about future payments.
>
> The term "child support" should be defined to include the Table (or other) amount and the section 7 expenses.

Direct Payment Of Support/Non-filing with FRO

5.52 Harold will pay the child support directly to Wendy and not to the Family Responsibility Office. Neither party will file this Agreement with the Family Responsibility Office for enforcement unless Harold defaults in payment [and does not pay within five days of getting a written notification from Wendy] [for more than [number] weeks], at which time Wendy may file the Agreement with the court and the Family Responsibility Office for enforcement.

> Select only one of the following 2 clauses: "Payment of Support through FRO"; or "Direct Payment of Support/Non-filing with FRO".
>
> See the Commentary for the "Payment of Support through FRO" clause above for more information about enforcement.
>
> Given past problems with the FRO and the potential delays, many parties do not wish the FRO to be involved. Even when there is default, the recipient spouse may be better off with self-enforcement, such as Writs of Seizure & Sale or garnishment, rather than waiting for the FRO to enforce, particularly when the

> recipient spouse has in his or her counsel's file a relatively recent record of the payor spouse's assets. Seizing an RRSP to collect the arrears of support will trigger tax consequences and may be more effective than waiting for the FRO to collect the support.

Post-Dated Cheques

5.53

(a) By December 1st each year, Harold will give Wendy twelve post-dated child support cheques for the following year.

(b) If Harold provides Wendy with a cheque that cannot be negotiated at Wendy's bank, Harold will reimburse Wendy for any resulting bank charges.

> Select only one of the following 3 clauses: "Post-Dated Cheques"; "E-Transfers"; or "Inter-Bank Transfers".
>
> This method of payment of cheques directly to the recipient is less common these days, with the availability of e-transfers and inter-bank transfers.

E-Transfers

5.54 Harold will pay child support by e-transfer to Wendy's email address, [specify], on the [first] day of each month.

> Select only one of the following 3 clauses: "Post-Dated Cheques"; "E-Transfers"; or "Inter-Bank Transfers".
>
> This is becoming a more common method of payment. It is efficient and timely and reduces contact.

Inter-Bank Transfers

5.55 Harold will pay child support by direct bank transfer from Harold's bank account at [name of bank, branch and account number] to Wendy's bank account at [name of bank, branch and account number] on the [first] day of each month.

> Select only one of the following 3 clauses: "Post-Dated Cheques"; "E-Transfers"; or "Inter-Bank Transfers".
>
> Like e-transfers, this method of payment is efficient and timely and reduces contact. If payment is to be by bank transfer, specific information should be included so that the support recipient can track the payments.

Interest On Late Payments

5.56 Harold will pay [number]% interest on any late support payment from the date of default to

the date of payment, compounded annually.

> The interest percentage should always be more than the payor's normal borrowing costs in order to provide an incentive for timely payments. However, the parties should carefully consider the interest rate and not use a usurious interest rate or one that would be considered a penalty by the court. Under the *Interest Act*, the interest rate must be specified, either by a number or by terms of reference, such as two points above the prime rate of the Bank of Canada or another named chartered bank. If the latter method is used, the time the rate is to be determined - presumably upon default of payment - should be specified at the time of default, as well as any other factors affecting the method of calculation. Referring to the prime rate of a particular bank, plus a fixed percentage, is easy to calculate, although the FRO may not enforce anything but a fixed percentage.
>
> Any interest will be taxable, but not deductible by the payor.
>
> [ON: Please note that "simple interest" is contemplated in Form 26 "Statement of Money Owed" under the *Family Law Rules*.]

6. Spousal Support

> The Spousal Support Advisory Guidelines, released July of 2008 by the Federal Department of Justice, and the subsequently released Revised User's Guide in April 2015 (collectively referred to as the "SSAG") provide comprehensive guidelines for the determination of spousal support. The SSAG, however, unlike the Child Support Guidelines, are not legislated and operate on an advisory and completely voluntary basis only. Nor do the SSAG deal with entitlement to support, which must be determined prior to the application of the SSAG.
>
> The SSAG provide a range for the amount and a range for the duration of spousal support. These ranges must be considered together, and cannot be isolated.
>
> Most provinces have now accepted the SSAG. In the case of *Yemchuk v. Yemchuk*, 2005 CarswellBC 2540, the British Columbia Court of Appeal held that the SSAG reflect existing law rather than a new approach, and the court therefore had "no hesitation in viewing the [SSAG] as a useful tool to assist judges in assessing the quantum and duration of spousal support." The same court also went so far as to state that if a spousal support award at trial is "substantially lower or higher than the [SSAG] range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention" (*Redpath v. Redpath* (2006), 33 R.F.L. (6th) 91 (B.C.C.A.) at para. 42).
>
> In the Ontario Court of Appeal decision, *Fisher v. Fisher*, 2008 ONCA 11, the court positively endorsed the SSAG and expressed optimism that "with experience, the [SSAG] will become accepted as a reliable tool for resolution of many cases, subject always to the important caveat that due consideration be given to the parties' individual circumstances."
>
> Note that the SSAG do not address situations in which there are prior agreements between the parties dealing with spousal support. Any spousal support made under the SSAG is subject to the normal processes of review and variation.

Lump Sum Support

6.1

(a) In full satisfaction of Harold's spousal support obligation, Harold will pay Wendy $[amount] when this Agreement is signed [and a further $(amount) on (date)] [from Harold's share of the matrimonial home sale proceeds on closing].

(b) Harold will pay interest [monthly] on any outstanding balance after this Agreement is signed at [number] percent a year, compounded [period].

[Include a spousal support release (see Part 7) to be effective once payment is made.]

Select only one of the following 4 clauses: "Lump Sum Support", "Fixed Term Support"; "Periodic Support"; or "Periodic Support with Automatic Review".

The Spousal Support Advisory Guidelines, released July of 2008 by the Federal Department of Justice, and the subsequently released Revised User's Guide in April 2015 (collectively referred to as the "SSAG") provide comprehensive guidelines for the determination of spousal support. The SSAG, however, unlike the Child Support Guidelines, are not legislated and operate on an advisory and completely voluntary basis only. Nor do the SSAG deal with entitlement to support, which must be determined prior to the application of the SSAG.

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In the Ontario Court of Appeal decision, *Fisher v. Fisher*, 2008 ONCA 11, the court positively endorsed the SSAG and expressed optimism that "with experience, the [SSAG] will become accepted as a reliable tool for resolution of many cases, subject always to the important caveat that due consideration be given to the parties' individual circumstances."

Note that the SSAG do not address situations in which there are prior agreements between the parties dealing with spousal support. Any spousal support made under the SSAG is subject to the normal processes of review and variation.

While a lump sum payment of spousal support is not taxable, the interest payable on it is. Since the interest is not deductible by the payor, parties may decide on a different capital sum in order to take into account the notional interest that would otherwise have to be paid, or increase spousal support in lieu of interest. In any event, counsel should remind clients when tax will be triggered so the client is not surprised later by an assessment by CRA.

> While prior caselaw (*Mannarino v. Mannarino* (1992), 43 R.F.L. (3d) (Ont. C.A.)) seemed to limit the court's discretion to award lump sum spousal support to very unusual circumstances, the Ontario Court of Appeal rejected this constraint and held that the court is given broad discretion to award spousal support under the legislation, including the discretion to award lump sum spousal support (see *Davis v. Crawford*, 2011 CarswellOnt 2512 (Ont. C.A.)).
>
> With respect to the release of spousal support following the lump sum payment, be aware that there is some confusion in the case law regarding the appropriate test to be applied in any subsequent variation of a support order where spousal support has been released. See the Commentary under the clause "Release of Spousal Support" below.

Fixed Term Support

6.2 Harold will pay Wendy spousal support of $[amount] a month starting [date] and ending on [date]. Harold will make the payments on the [first] day of each month. On [date], spousal support ends forever. This term cannot be changed. [Include a spousal support release clause to be effective once the fixed term ends.]

> Select only one of the following 4 clauses: "Lump Sum Support", "Fixed Term Support"; "Periodic Support"; or "Periodic Support with Automatic Review".
>
> Periodic spousal support, unlike child support, is taxable income for the recipient and deductible by the payor. The recipient needs to understand the net benefit, so that he or she will put away enough money on a monthly basis to meet both the quarterly and annual tax payments required by CRA.
>
> It appears to the editors that this time-limited support arrangement, if coupled with the language in the "Release of Spousal Support" clause below will be treated in the same fashion as a complete spousal support release given the language in *Miglin v. Miglin*. We have used language identical to a spousal support release to signal to the court and to the parties that they intend this time-limited support agreement to be final and that the parties want the court to respect their private understanding. Note, however, that an application to extend time-limited support that is brought before the time-limited support has expired is covered specifically in the *Divorce Act* by section 17.10. It is an open question, therefore, whether a specific form of release, as is suggested here, will be treated in the same fashion by the court if the application is brought within the provisions of s. 17.10. Presumably, the *Miglin* test should similarly apply. Also, be aware that there is some confusion in the case law regarding the appropriate test to be applied in any subsequent variation of a time limited support order. Refer to the commentary following the "Release of Spousal Support" clause below for more detail.
>
> See the Commentary under the "Lump Sum Support" clause above for general information about the SSAG.
>
> The parties may wish to append a DivorceMate Tools One printout to the Agreement as a schedule to demonstrate how the spousal support amount and duration were determined in this clause.

Periodic Support

6.3 Harold will pay Wendy spousal support of $[amount] a month, starting [date]. Harold will make the payments on the [first] day of each month.

> Select only one of the following 4 clauses: "Lump Sum Support", "Fixed Term Support"; "Periodic Support"; or "Periodic Support with Automatic Review".
>
> See the Commentary under the "Lump Sum Support" and "Fixed Term Support" clauses above for general information about the SSAG and periodic spousal support.
>
> The parties may wish to append a DivorceMate Tools One printout to the Agreement as a schedule to demonstrate how the spousal support amount was determined in this clause. This allows the parties and, subsequently, a court or mediator/arbitrator to understand the basis of the support clauses and more easily determine whether there has been a material change in financial circumstances.

Periodic Support with Automatic Review

6.4 Harold will pay Wendy spousal support of $[amount] a month, starting [date]. Harold will make the payments on the [first] day of each month. Wendy's entitlement to support [or the amount of Wendy's support] will be reviewed [number] years from the date of this Agreement. At that time, the parties will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> Select only one of the following 4 clauses: "Lump Sum Support", "Fixed Term Support"; "Periodic Support"; or "Periodic Support with Automatic Review".
>
> A review clause is substantially different from a variation based on a material change in circumstances. A review is a fresh inquiry into the issue of support and neither party needs to surmount the material change hurdle. See the case of *Andrews v. Andrews* (1999), 45 O.R. (3d) 577 (C.A.).
>
> However, keep in mind the rather troubling comments of the Supreme Court of Canada in the case of *Leskun v. Leskun*, 2006 CarswellBC 1492, wherein the SCC noted in obiter dicta that review orders under s.15.2 of the *Divorce Ac*t have a useful, but "very limited role." This position on review orders was supported by the Ontario Court of Appeal in *Fisher v. Fisher*, 2008 CarswellOnt 43, where the court indicated that review orders should be "the exception, not the norm".
>
> See the Commentary under the "Lump Sum Support" and "Fixed Term Support" clauses above for general information about the SSAG and periodic spousal support.
>
> The parties may wish to append a DivorceMate Tools One printout to the Agreement as a schedule to demonstrate how the spousal support amount was determined in this clause. This allows the parties and, subsequently, a court or mediator/arbitrator to understand the basis of the support clauses and more easily determine whether there has been a material change in financial circumstances at the time of the review.

3rd Party Payments re: Matrimonial Home with Tax Consequences [if No Children]

6.5 Starting [date] and until the closing of the sale of the matrimonial home, Harold will pay these expenses for the matrimonial home:

(a) realty taxes;

(b) utilities, including hydro, water, gas, telephone [basic and long distance] and cable,

(c) home insurance; and

(d) mortgage interest payments.

These payments by Harold are intended solely for the benefit of Wendy. Sections 56.1(2) and 60.1(2) of the *Income Tax Act* will apply to these payments. Harold will deduct these payments from Harold's taxable income and Wendy will include these payments in Wendy's taxable income.

> Not all third party payments are deductible. In order to be deductible, it must satisfy certain requirements: the nature of the third party payment must be specified in a court order or a written agreement, both parties must agree that the third party payment will be deductible by the payor and taxable to the recipient, and the court order or written agreement must specifically refer to the intention of the parties to have sections 56.1(2) and 60.1(2) of the *Income Tax Act* apply to the payments. This specific reference to the Act must be in the court order or written agreement itself. Furthermore, the payments must be solely for the maintenance of the spouse or former spouse and the third party payments must be clearly identified in the order or agreement as being solely for the benefit of the recipient spouse. Finally, the parties must be living separate and apart, not only when the payment is made, but also at the time the expense is incurred.
>
> Note that CRA will disallow a tax deduction for third party payments with respect to accommodation costs (including mortgage payments) if Harold and Wendy have children living in the property. The rationale is that such payments reflect a child benefit, and therefore the whole amount will likely be considered child support. For a detailed discussion of the problem, see *Kouladjian c. R.* 2003 TCC 148, 37 R.F.L. (5th) 373.

3rd Party Payments with Tax Consequences

6.6 Starting [date] and until [date], Harold will pay:

(a) [details];

(b) [details];

(c) [details]; and

(d) [details].

These payments by Harold are intended solely for the benefit of Wendy. Sections 56.1(2) and 60.1(2) of the *Income Tax Act* will apply to these payments. Harold will deduct these payments from Harold's taxable income and Wendy will include these payments in Wendy's taxable income.

> Select only one of the following 2 clauses: "3rd Party Payment with Tax Consequences" or "3rd Party Payments without Tax Consequences".
>
> Not all third party payments are deductible. In order to be deductible, it must satisfy certain requirements: the nature of the third party payment must be specified in a court order or a written agreement, both parties must agree that the third party payment will be deductible by the payor and taxable to the recipient, and the court order or written agreement must specifically refer to the intention of the parties to have sections 56.1(2) and 60.1(2) of the *Income Tax Ac*t apply to the payments. This specific reference to the Act must be in the court order or written agreement itself. Furthermore, the payments must be solely for the maintenance of the spouse or former spouse and the third party payments must be clearly identified in the order or agreement as being solely for the benefit of the recipient spouse. Finally, the parties must be living separate and apart, not only when the payment is made, but also at the time the expense is incurred.
>
> Note that CRA will disallow a tax deduction for third party payments with respect to accommodation costs (including mortgage payments) if Harold and Wendy have children living in the property. The rationale is that such payments reflect a child benefit, and therefore the whole amount will likely be considered child support. For a detailed discussion of the problem, see *Kouladjian c. R.*, 2003 TCC 148, 37 R.F.L. (5th) 373.

3rd Party Payments without Tax Consequences

6.7 Starting [date] and until [date], Harold will pay these expenses:

(a) [specify item, amount, and who is to receive payment];

(b) [specify item, amount, and who is to receive payment]; and

(c) [specify item, amount, and who is to receive payment].

Harold will not deduct these payments from Harold's taxable income and Wendy will not include them in Wendy's taxable income.

> Select only one of the following 2 clauses: "3rd Party Payment with Tax Consequences" or "3rd Party Payments without Tax Consequences".
>
> Specific examples of payments might include car lease payments and insurance. This is an example of third party payments that have no tax consequences. If the parties wish to arrange the third party payments so that the payments are deductible, the specific language and sections of the *Income Tax Act* must be utilized. Bear in mind that if the payor were to specifically provide for the payment of these expenses as a deductible expense, the parties should consider the income tax that the recipient will have to pay on the benefit. Again, although not strictly necessary, we added the last line of the section so that the parties understand their obligations when completing their tax returns.

Prior Payments

6.8 Since [date], Harold has paid spousal support of $[amount] to Wendy on a periodic basis.

These payments are deemed to have been paid and received under this Agreement and subsections 56.1(3) and 60.1(3) of the *Income Tax Act*. Harold will deduct these payments from Harold's taxable income and Wendy will include them in Wendy's taxable income.

> This allows a retroactive adjustment to the parties' tax position. The parties may go back to January 1st of the previous calendar year and adjust for any payments made during that time as long as the payments otherwise qualify as deductible support. If there is retroactive treatment and the recipient is going to pay tax, counsel must consider whether the recipient will be reimbursed by the payor who is receiving the benefit of the tax deduction. The parties may agree to share the benefit of the tax deduction created. If required by CRA, the parties must be able to establish that the amount was paid and received in the appropriate calendar year. Although not strictly necessary, we added the last line to the clause so that the parties understand their obligations when completing their tax returns.

Tax Reimbursement

6.9 Harold will reimburse Wendy for any additional income tax Wendy must pay as a result of including these prior payments in Wendy's income. Harold will also pay any related interest and penalties, unless Wendy fails to file Wendy's return on time. Wendy will give Harold a copy of Wendy's income tax return which includes these additional payments. Harold will provide the certified cheque payable to the Canada Revenue Agency before [April 15th] for Wendy to include with Wendy's income tax return. If Wendy gives Harold the return in a timely way and Harold does not provide the cheque before [April 15th], Wendy will not have to include the prior payments in Wendy's taxable income.

> If the parties are considering a retroactive adjustment to take advantage of the payor's ability to deduct spousal support paid in the previous year, the term must specifically provide how the tax is to be paid. It is better practice not to require the recipient to file his or her return unless he or she receives the reimbursement cheque (certified) from the payor beforehand. Counsel should also consider the loss of benefits which may have otherwise been available to the recipient. Although the recipient may not have been taxed if the additional income had not been included, the recipient may lose a refund as a result of the Canada and provincial Child Benefits and GST/HST credits, even though he or she is not a taxpayer. Accordingly, counsel must consider whether to insist that his or her client be fully compensated. This is a matter for negotiation.
>
> If the recipient has other sources of income, the agreement should provide that the recipient will prepare and give to the payor two separate income tax returns, one without including spousal support and the other including spousal support in order to determine the additional amount of income tax attributable to the spousal support payments.

CRA Acknowledgement and Registration

6.10 The parties will register their child and spousal support arrangement with CRA by filing Form

T1158 "Registration of Family Support Payments" with CRA.

6.11 In any case, when required by Harold and reasonably requested, Wendy will provide a statement of support received from Harold for the prior year.

> CRA has become increasingly difficult about allowing spousal support deductions. These clauses are intended to assist in this regard. A copy of Form T1158 may be found at link https://www.canada.ca/content/dam/cra-arc/formspubs/pbg/t1158/t1158-19e.pdf. You may want to attach a copy of this form as a Schedule to the Agreement.

End of Support

6.12 Spousal support ends when:

(a) Wendy dies;

(b) Harold makes the final payment due on [date];

(c) Harold dies, if the insurance required by this Agreement is in place. If it is not, Harold's estate will continue to pay the support. As Harold's estate will not be able to deduct the support payments for income tax purposes and Wendy may not have to include the support in Wendy's taxable income, the monthly support payment will be reduced to the net after-tax monthly support Wendy was entitled to receive immediately before Harold's death. If they cannot agree on the amount, Harold's estate and Wendy will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue; or

(d) it is determined appropriate by the parties, the court or an arbitrator [in law and/or based on any review, material change and/or variation clauses set out in this Agreement].

> If the Agreement requires the payor's estate to be bound by the support obligation after the death of the payor, then the Agreement must contain a mechanism to "net down" the amount of support being paid. This is due to the fact that the periodic support prior to death was taxable to the recipient, but the support from the estate will not attract tax, thereby giving the recipient a very significant benefit and the estate a significant detriment unless there is an adjustment.
>
> Subsection (d) is added so that spousal support is not interpreted to be for life if that is not the intention of the parties.

Contribution to Own Support

6.13 Wendy must contribute to Wendy's own support [or Wendy will make reasonable efforts to be self supporting]. Wendy will make reasonable efforts to find a job or become self-employed and will provide Harold with written proof every [six] months.

> This clause will not be appropriate if the recipient spouse is unable to contribute to his or her own support or it is unreasonable to expect such a contribution (for example, in the case of a 60-year-old woman out of the workforce for 40 years). Counsel may wish to specify the nature of the written proof that is to be required on a regular basis. A more detailed clause would include the kind of employment the spouse is obliged to seek. Counsel may consider a clause that requires one spouse to advise the other on a timely basis of any further education attempts taken to suit him or her for employment. However, this clause is inappropriate when the marriage is of long duration, a clear dependency has been created, and when the case law, particularly *Moge v. Moge*, [1992] 3 S.C.R. 813, dictates that time-limited support is not appropriate in these circumstances. Self-sufficiency is difficult to determine. *Linton v. Linton* (1990), 1 O.R. (3d) 1 (C.A.) makes it clear that self- sufficiency is relative to the lifestyle the parties enjoyed during the marriage. There is nothing inappropriate about a clause that encourages self-sufficiency, but the parties need to be realistic about such prospects. This is particularly true since the courts are not fond of review orders and sometimes fail to include any encouragement towards self-sufficiency. See *Choquette v. Choquette* (1998), 39 R.F.L. (4th) 384 (Ont. C.A.) and *Andrews v. Andrews* (1999), 45 O.R. (3d) 577 (C.A.). Also keep in mind the rather troubling comments of the Supreme Court of Canada in the case of *Leskun v. Leskun*, 2006 CarswellBC 1492, wherein the SCC noted in obiter dicta that review orders under s.15.2 of the *Divorce Act* have a useful, but "very limited role."
>
> This position on review orders was supported by the Ontario Court of Appeal in *Fisher v. Fisher*, 2008 CarswellOnt 43, where the court indicated that review orders should be "the exception, not the norm".

Obligation to Notify

6.14 When Wendy's income, excluding child and spousal support, is more than $[amount], Wendy will immediately notify Harold in writing. [On Harold's written request,] Wendy will provide Harold with all relevant income information, including Wendy's employment contracts, pay slips, T4 slips, income tax returns and notices of assessment. While receiving support, {{ SsRecipie }} will provide Wendy's income tax return to Harold by April 30th each year and the other information as soon as Wendy receives it.

> Self-sufficiency should be encouraged where appropriate, but not act as a disincentive to the recipient spouse earning an income. If he or she faces a variation application as soon as he or she earns any money, there is a disincentive to returning to the paid workforce. This clause attempts to set a reasonable level of income which will not be considered to be a material change and counsel will have to consider what levels will be reasonable for the particular family.

Reduction Formula

6.15 Starting on the [first] day of the month after Wendy's income exceeds the amount set out above, Harold may reduce Wendy's spousal support payments by 50 cents for every dollar that Wendy's income, excluding child and spousal support, exceeds $[amount]. For example, if Harold pays Wendy spousal support of $750.00 a month and Wendy receives a salary

increase of $500 a month, Harold may reduce Wendy's spousal support payments to $500.00 a month (a reduction of $250 or 50% of Wendy's $500 increase) starting in the month following Wendy's salary increase. NOTE: This is an example only.

Overpayment

6.16 If Harold has overpaid Wendy's support, Harold may deduct the overpayment over [number] months in equal instalments. [If Harold's support obligation has ended, Wendy will immediately repay the amount of the overpayment to Harold.]

> If the payor has overpaid the recipient's support, the payor can either deduct the overpayment from the next month's support or pro-rate it over a specified period. The latter is probably more acceptable since the recipient may suddenly be faced with no support and, since most parties tend to spend available income at the time, sudden adjustments may cause difficulties.

Grounds for Variation

6.17 Spousal support may be changed if there is a material change in circumstances, even if the change was foreseen or foreseeable. The change may be:

(a) in either party's financial position;

(b) in the child support arrangements;

(c) Wendy's remarriage;

(d) Wendy's cohabitation with another person in a relationship resembling marriage for more than [number] months;

(e) in either party's health;

(f) [other circumstances];

(g) [other circumstances];

or any other similar change.

> Other examples might include: (1) the completion of the recipient's training expected to occur on [date], and (2) the payor's retirement [unless the payor's annual income exceeds $(amount) annually] (see also clause that follows re: variation in event of retirement).
>
> It has been generally held that the onus is on the recipient to claim increased support if the recipient surmises that the circumstances of the payor have materially changed. In fact, up until the case of *Marinangeli v. Marinangeli* (2003), 38 R.F.L. (5th) 307 (Ont. C.A.), no court anywhere had suggested that there was an onus on the payor to keep the recipient informed as to changes in the payor's financial position. However, when *Marinangeli* was decided, confusion was cast on the meaning of this kind of "material change" clause, as the Ontario Court of Appeal found that in cases where there is a material

change clause, there is an implied agreement between the parties that a payor has to inform a recipient of changes in his or her financial situation (provided that the implied term is (a) reasonable and equitable; (b) capable of clear expression; and (c) not contradictory of an expressed term in the contract). However, in two subsequent cases, *Murray v. Murray*, 2005 CarswellOnt 3900 and *Baldwin v. Funston*, 2007 CarswellOnt 3168, the Ontario Court of Appeal has limited the applicability of the principles it set out in *Marinangeli* to the particular facts of that case. In the *Murray* case, the appellate court found that the express provisions releasing spousal support after a fixed period were contradictory of any implied duty to disclose increases in a payor's income. In the *Baldwin v. Funston* case, the Ont. C.A. declined to find an implied duty of disclosure of a payor's increased income on the basis that the payor in the present case had not deliberately misled the recipient at the time of the agreement as the *Marinangeli* payor had done.

Keep in mind, however, the recent S.C.C. case of *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, wherein the court appeared to impose a positive duty on the payor to voluntarily increase child support in accordance with the *Child Support Guidelines* as his/her income increased to avoid the risk of a retroactive child support award down the line. The case also suggested a corresponding duty on the recipient to formally request income information and increased child support information from a payor in writing on a regular basis, and to follow up on any such request. While the *D.B.S.* case dealt with retroactive child support where any conduct privileging a parent's interests over a child's is deemed to be blameworthy, the same principles may arguably be applied to a claim for retroactive spousal support.

Note that a claim for support for the period between when support was first requested and trial is not a retroactive claim for support, but rather a prospective claim (see *D.B.S. v. S.R.G.* and *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (Ont. C.A.)).

To be absolutely certain that the principles of *Marinangeli* and *D.B.S. v. S.R.G.* will not apply, the Agreement should contain the following clause below: "No Obligation to Notify of Changes Until Review Requested".

The importance of setting out the parameters of the material change clause is critical. See *Bhupal v. Bhupal* (2009), 69 R.F.L. (6th) 43 (Ont. C.A.), where the parties failed to provide that the wife's remarriage or any foreseen or foreseeable event would constitute a material change. In that case, the wife was involved in a very serious relationship during the negotiation of a separation agreement and so her subsequent remarriage was found not to be a material change.

Procedure

6.18 Whoever seeks a change will give the other, in writing:

(a) notice of the proposed change;

(b) evidence supporting the proposed change; and

(c) any request for information necessary to determine the issue.

What Does NOT Constitute Material Change

6.19 The following will not justify a change in spousal support:

(a) [Wendy's remarriage];

(b) [Harold's remarriage];

(c) [Wendy's cohabitation with another person in a relationship resembling marriage for less than (number) months];

(d) [a drop in Harold's income by less than (number) percent];

(e) [example]; or

(f) [example].

Variation of Support in Event of Retirement

6.20 Spousal support may be changed in the event of Harold's voluntary or involuntary retirement, on the following basis:

(a) If Harold intends to retire voluntarily, Harold will give Wendy six months' written notice of Harold's retirement date, and any variation of support will be prospective only from the end of the six month notice period.

(b) If Harold retires involuntarily, Harold will forthwith give Wendy written notice of Harold's retirement date, and any variation of support will be prospective only from the date of retirement or the date of notice, whichever is later.

(c) At the time of written notice, Harold will provide Wendy with a sworn Financial Statement regarding Harold's circumstances based on retirement, and will further provide all documentation with respect to retirement and retirement benefits.

(d) [Delete the following subparagraph if not applicable:] The parties acknowledge and agree that:

i Harold's pension benefits accrued during the relationship have already been divided, shared and equalized with Wendy under this Agreement, and will not form part of Harold's income for the purposes of any variation of spousal support on retirement;

ii any variation of spousal support will be based on Harold's retirement income in excess of Harold's pension income accrued during the relationship that has already been divided, shared and equalized with Wendy. Specifically, only pension income over and above $[specify amount] [monthly] [annually] received by Harold after retirement will be considered for the purposes of any variation of spousal support.

> 8.20(d): This clause is a starting point only in an attempt to prevent what has come to be known as "double dipping". In other words, it is an attempt to prevent a party from paying support on pension income already equalized with the spouse as property. It will likely be necessary to retain an accountant/actuary to assist in determining the baseline amount for the stream of pension income in this clause.

No Obligation to Notify of Changes Until Review Requested

6.21 Neither Harold nor Wendy has any obligation to inform the other of changes in either party's financial position [with the exception of Harold's retirement] unless and until the review provisions of this Agreement are implemented.

> It has been generally held that the onus is on the recipient to claim increased support if the recipient surmises that the circumstances of the payor have materially changed. In fact, up until the case of *Marinangeli v. Marinangeli* (2003), 38 R.F.L. (5th) 307 (Ont. C.A.), no court anywhere had suggested that there was an onus on the payor to keep the recipient informed as to changes in the payor's financial position. However, when *Marinangeli* was decided, confusion was cast on the meaning of this kind of "material change" clause, as the Ontario Court of Appeal found that in cases where there is a material change clause, there is an implied agreement between the parties that a payor has to inform a recipient of changes in his or her financial situation (provided that the implied term is (a) reasonable and equitable; (b) capable of clear expression; and (c) not contradictory of an expressed term in the contract). However, in two subsequent cases, *Murray v. Murray*, 2005 CarswellOnt 3900 and *Baldwin v. Funston*, 2007 CarswellOnt 3168, the Ontario Court of Appeal has limited the applicability of the principles it set out in *Marinangeli* to the particular facts of that case. In the *Murray* case, the appellate court found that the express provisions releasing spousal support after a fixed period were contradictory of any implied duty to disclose increases in a payor's income. In the *Baldwin v. Funston* case, the Ont. C.A. declined to find an implied duty of disclosure of a payor's increased income on the basis that the payor in the present case had not deliberately misled the recipient at the time of the agreement as the *Marinangeli* payor had done.
>
> Keep in mind, however, the S.C.C. case of *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, wherein the court appeared to impose a positive duty on the payor to voluntarily increase child support in accordance with the *Child Support Guidelines* as his/her income increased to avoid the risk of a retroactive child support award down the line. The case also suggested a corresponding duty on the recipient to formally request income information and increased child support information from a payor in writing on a regular basis, and to follow up on any such request. While the *D.B.S.* case dealt with retroactive child support where any conduct privileging a parent's interests over a child's is deemed to be blameworthy, the same principles may arguably be applied to a claim for retroactive spousal support.
>
> Note that a claim for support for the period between when support was first requested and trial is not a retroactive claim for support, but rather a prospective claim (see *D.B.S. v. S.R.G.* and *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (Ont. C.A.)).
>
> To be absolutely certain that the principles of *Marinangeli* and *D.B.S. v. S.R.G.* will not apply, the agreement should contain this clause.

Review When Child Support Ends

6.22 Wendy's spousal support is less than it would have been because of the amount of child support being paid. When the child support is reduced or ends, [if Wendy requests,] there will be a[n automatic] review of spousal support.

> As contemplated in the *Divorce Act*, the amount of spousal support may be less than it would otherwise have been but for the amount of child support payable. Accordingly, the parties should take into account whether they wish the spousal support to be reviewed when there is a change in child support.
>
> However, keep in mind the rather troubling comments of the Supreme Court of Canada in the case of *Leskun v. Leskun*, 2006 CarswellBC 1492, wherein the SCC noted in obiter dicta that review orders under s.15.2 of the *Divorce Act* have a useful, but "very limited role." This position on review orders was supported by the Ontario Court of Appeal in *Fisher v. Fisher*, 2008 CarswellOnt 43, where the court indicated that review orders should be "the exception, not the norm".

Review When Cohabitation Ends

6.23 Harold will not pay spousal support while Wendy is cohabiting with another person in a relationship resembling marriage. If Wendy stops cohabiting, [if Wendy requests,]Harold's obligation to pay Wendy support will be [automatically]reviewed [or re-instated].

> Select only one of the following 2 clauses: "Review When Cohabitation Ends"; or "Cohabitation Terminates Spousal Support".
>
> Parties may wish to consider a time period for the period of remarriage or cohabitation which will call for a permanent cessation of support. (See clause "Alternate - Cohabitation Terminates Spousal Support" below.)
>
> However, keep in mind the rather troubling comments of the Supreme Court of Canada in the case of *Leskun v. Leskun*, 2006 CarswellBC 1492, wherein the SCC noted in obiter dicta that review orders under s.15.2 of the *Divorce Act* have a useful, but "very limited role." This position on review orders was supported by the Ontario Court of Appeal in *Fisher v. Fisher*, 2008 CarswellOnt 43, where the court indicated that review orders should be "the exception, not the norm".
>
> For those parties who wish to tie spousal support to cohabitation, we have included this clause. However, cohabitation (nor remarriage for that matter) in the absence of other compelling factors justifies an automatic termination or suspension of spousal support. See *L.G. v. G.B.*, [1995] 3 S.C.R. 370. It is clear that remarriage is not usually a terminating event for support and has not been so since the Supreme Court of Canada decided *L.G. v. G.B.* Other cases have reiterated that since support is often compensatory, the remarriage of the recipient is not a basis for terminating support, but it may be a material change in circumstances. Nevertheless, there are those parties who wish support to cease or suspend upon cohabitation and for those, we have included this clause.

Cohabitation Terminates Spousal Support

6.24 Harold will not pay spousal support when Wendy's cohabitation with another person in a relationship resembling marriage entitles Wendy to seek support from that person.

> Select only one of the following 2 clauses: "Review When Cohabitation Ends"; or "Cohabitation Terminates Spousal Support".

Timing Of Spousal Support Review

6.25 Either Harold or Wendy may request a review of spousal support:

(a) on [date];

(b) when Harold is no longer obligated to pay child support or Harold's child support obligation is reduced; or

(c) when Wendy ceases to cohabit with another person in a relationship resembling marriage;

(d) [if the children are of pre-school age at the time the Agreement, the month after the last or youngest child commences full-time school];

(e) [if the children are under the age of twelve at the time of the Agreement, the month after the last or youngest child reaches the age of twelve];

(f) [other circumstances]; or

(g) [other circumstances].

> Other examples might include: (1) three months after the recipient completes his/her current [type of] training which is expected to end on [date], or (2) the payor's retirement, unless the payor's annual income from all sources is more than $[amount].
>
> As indicated above, a review is a fresh look at the situation and is substantially different from a variation proceeding. A review begins afresh and looks at the circumstances as they exist at the time of the review, generally without much consideration of the previous arrangements. We believe that a review clause is very useful for dealing with the uncertainty of the future. It allows the parties to settle most, if not all, of the issues now and reserve for the future potentially narrow areas of possible disagreement. A review clause must set out in detail how the review will be carried out, including how future financial disclosure will be arranged. For a discussion of the concept of review, see the Ontario Court of Appeal decision in *Andrews v. Andrews* (1999), 45 O.R. (3d) 577 (C.A.). However, keep in mind the rather troubling comments of the Supreme Court of Canada in the case of *Leskun v. Leskun*, 2006 CarswellBC 1492, wherein the SCC noted in obiter dicta that review orders under s.15.2 of the *Divorce Act* have a useful, but "very limited role." This position on review orders was supported by the Ontario Court of Appeal in *Fisher v. Fisher*, 2008 CarswellOnt 43, where the court indicated that review orders should be "the exception, not the norm".
>
> Subclauses (d) and (e) relate to the review provisions set out in the *Spousal Support Advisory Guidelines*

> for the "With Child Support" Formula.

Dispute Resolution

6.26 If Harold and Wendy cannot agree, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

Payments Continue

6.27 Until spousal support is adjusted by an amending agreement, court order or arbitration award, Harold will continue to pay spousal support under the parties' most recent written agreement, court order or arbitration award.

Indexing Factor

6.28 On the [first] day of [month] ("indexing date") in each year, starting on [date], spousal support will increase by the indexing factor for the third month immediately before the indexing date in that year. For example, if the indexing date is April 1, the indexing factor applicable on April 1, 2020 will be the indexing factor for January 1, 2020. An example of this calculation is set out as a Schedule ("Indexing Calculation") to this Agreement.

> Select only one of the following 2 clauses: "Indexing Factor"; or "Increase Other Than by Indexing Factor".
>
> Many cost of living adjustment ("COLA") clauses provide for only an upward, not a downward, change in periodic payments. We cannot recall a time in Ontario in the past thirty years when the cost of living has gone down, but there is no reason why the clause should not work both ways. The word "change" as opposed to the word "increase" should be used if this is the parties' intention. Including a COLA clause keeps the support at relatively constant dollars in relation to the cost of living without re-negotiation or an application to the court based on a change of circumstances. The absence of a COLA clause coupled with a significant increase in inflation over the years may by itself amount to a material change in circumstances (see *Winsor v. Winsor* (1992), 8 O.R. (3d) 433 (C.A.)), but there will be years where no adjustment is made and the recipient slowly falls behind until the cumulative effect reaches a critical level. In an era of low inflation, it is more of a slow erosion of purchasing power, without reaching that threshold of material change for a decade or so.
>
> The payor's income may not keep pace with the cost of living and may leave the payor with an increased burden each year, that may well result in unfair circumstances. A COLA clause is often modified by the "lesser of" test set out below. Parties may also consider referencing a particular index that relates most closely to the spouse's income, such as the Ontario Medical Association Fee Schedule or the Dental Association of Ontario Fee Schedule, the Teachers' Federation of Ontario or some other professional body. A COLA clause ought to specify the way in which the calculation is performed and this is usually included as a schedule (see Indexing Calculation Schedules). The FRO will not enforce a "lesser of" clause because the adjustment cannot be determined from the face of the Agreement, given that it is dependent upon

another variable, the payor's income, which does not appear in the Agreement. Accordingly, if the parties wish the Agreement to be enforced by the FRO, the parties should execute an amending agreement at the time that the income is adjusted and forward the amending agreement to the FRO.

See *McMahon v. Hodgson* (2002), 25 R.F.L. (5th) 102 (Ont. S.C.J.), where the court held that the onus was on a payor (not the recipient of support) who agreed to a COLA clause to find out the rate and pay it or risk paying the increase retroactively.

Increase other than by Indexing Factor

6.29

(a) In this section, "Relevant Year" means the calendar year immediately before the calendar year in which the particular indexing date occurs, and "percentage annual increase in Harold's income for the Relevant Year" means the percentage increase, if any, in Harold's income for the Relevant Year compared to the calendar year immediately before the Relevant Year. For example, if the particular indexing date is April 1, 2020, (i) the Relevant Year is calendar year 2019, and (ii) the percentage annual increase in Harold's income for the Relevant Year is the percentage increase, if any, in Harold's annual income for calendar year 2019 compared to that for calendar year 2018.

(b) If the indexing factor applicable on any particular indexing date is greater than the percentage annual increase in Harold's income for the Relevant Year, Harold may choose to increase spousal support for the year beginning on that particular indexing date by the percentage annual increase in Harold's income for the Relevant Year instead of by the applicable indexing factor. If so, Harold must provide Wendy with copies of Harold's income tax returns, schedules and attachments and notices of assessment for the previous two years, and any other documents Wendy reasonably requires to confirm Harold's income. An example of this calculation is set out as a Schedule ("Calculation of Adjustment if Payor's Income Change is Less Than Indexing Factor") to this Agreement. If the increase is other than the indexing factor, the parties will sign and date an amending agreement before witnesses setting out the new amount of spousal support [and Wendy will file the amending agreement with the court and the FRO] .

Select only one of the following 2 clauses: "Indexing Factor"; or "Increase Other Than by Indexing Factor".

See the Commentary in the "Indexing Dates" clause above for general information about indexing.

The FRO/FMEP will not enforce a "lesser of" clause because the increase cannot be determined from the face of the Agreement (as it is expressed as a percentage of the payor's income or is dependent on another variable that does not appear in the Agreement). If the parties are going to use this method of "indexing", the Agreement must provide that the parties sign an amending agreement at the time of any change under

this section in order to make it enforceable.

Interest on Late Payments

6.30 Harold will pay [number] percent interest on any late support payment from the date of default to the date of payment, compounded annually.

The interest percentage should always be more than the payor's normal borrowing costs in order to provide an incentive for timely payments. However, the parties should carefully consider the interest rate and not use a usurious interest rate or one that would be considered a penalty by the court. Under the *Interest Act*, the interest rate must be specified, either by a number or by terms of reference, such as two points above the prime rate of the Bank of Canada or another named chartered bank. If the latter method is used, the time the rate is to be determined - presumably upon default of payment - should be specified at the time of default, as well as any other factors affecting the method of calculation. Referring to the prime rate of a particular bank, plus a fixed percentage, is easy to calculate, although the FRO may not enforce anything but a fixed percentage.

Any interest will be taxable, but not deductible by the payor.

Please note that "simple interest" is contemplated in Form 26 "Statement of Money Owed" under the *Family Law Rules*.

If Support Arrears Paid in Lump Sum

6.31 If Harold does not pay the spousal support as required by this Agreement and later pays the arrears in a lump sum, and this payment results in Wendy paying more income tax than Wendy would have, had Harold complied with Harold's obligations on time, Harold will also pay this extra tax on Wendy's behalf, immediately after Wendy provides Harold with the necessary calculation and tax return. This payment will be treated as liquidated damages, not support. Harold is still liable to pay Wendy interest on the delayed payments.

This clause is required because payment of arrears of taxable support by way of a lump sum leaves the sum taxable in the hands of the recipient, and given the progressive tax rates in this country, could drive the recipient into a higher tax bracket. Note that arrears of both child and spousal support when paid are first applied to child support, which after 1997 has no tax impact. This clause is an added incentive for the payor to pay on time.

Costs Upon Default

6.32 If Harold defaults on timely payment of support, then Harold will pay to Wendy all of the solicitor and client costs Wendy incurs to collect the arrears. [Harold will also pay Wendy $(amount) for Wendy's time and trouble collecting the arrears because of Harold's default.]

> The first part of this penalty, the costs incurred, would be enforceable by a court, as a late payment entitles the recipient to interest. This serves as an incentive to the payor to keep the payments up-to-date. The second part may not be enforceable by a court, but may still serve as an incentive to pay on time.

Payment of Support through FRO

6.33 Harold and Wendy acknowledge that spousal support will be paid through and enforced by the Family Responsibility Office. This Agreement will be filed with the court and the Family Responsibility Office for enforcement. To this end, [Harold will pay the spousal support to the Family Responsibility Office Harold's spousal support will be an automatic support deduction from Harold's pay in accordance with the *Family Responsibility and Support Arrears Enforcement Act*.]

> Select only one of the following 2 clauses: "Payment of Support through FRO"; or "Direct Payment of Support/Non-filing with FRO".
>
> Section 35 of the *Family Law Ac*t permits a person who is a party to a domestic contract to file the contract or agreement with the clerk of the Ontario Court of Justice or the Family Court of the Superior Court of Justice. The agreement may then be enforced as though it were an order of the court where it is filed. The FRO will then take over responsibility for collection of the amounts under the agreement. If the payor is employed, the support will be automatically deducted from his/her pay. If the payor is self-employed, the payor should remit the support directly to the FRO, who will in turn, remit it to the recipient.
>
> Given past problems with the FRO and the potential delays, many parties do not wish the FRO to be involved. To avoid the FRO regime, the parties must jointly withdraw from the FRO. The clauses that follow should be used if self-enforcement is preferred.
>
> Counsel should, therefore, consider at the time of the Agreement whether the parties are going to opt into the FRO regime or whether the agreement will go into the FRO regime only under certain circumstances. For example, the parties may wish to agree that the support will be paid directly by either bank transfer or post-dated cheques and that only if there is a default will the recipient be entitled to register the Agreement under s. 35. On the other hand, parties may wish to have their support collected by the FRO in order to limit contact with one another, or have their cost-of-living changes administered automatically, or in cases where there is a history of problems with ongoing payments or projected concern about future payments.

Direct Payment of Support/Non-filing with FRO

6.34 Harold will pay the spousal support directly to Wendy and not to the Family Responsibility Office. Neither party will file this Agreement with the Family Responsibility Office for enforcement unless Harold defaults in payment for more than [number] weeks, at which time Wendy may file the Agreement with the court and the Family Responsibility Office for enforcement.

> Select only one of the following 2 clauses: "Payment of Support through FRO"; or "Direct Payment of

> Support/Non-filing with FRO".
>
> Section 35 of the *Family Law Act* permits a person who is a party to a domestic contract to file the contract or agreement with the clerk of the Ontario Court of Justice or the Family Court of the Superior Court of Justice. The agreement may then be enforced as though it were an order of the court where it is filed. Note that if the parties take out an order based on a separation agreement and do not jointly withdraw from the FRO, then the FRO will take over responsibility for collection of the amounts under the agreement.
>
> Given past problems with the FRO and the potential delays, many parties do not wish the FRO to be involved. Even when there is default, the recipient spouse may be better off with self-enforcement, such as Writs of Seizure & Sale or garnishment, rather than waiting for the FRO to enforce, particularly when the recipient spouse has in his or her counsel's file a relatively recent record of the payor spouse's assets. Seizing an RRSP to collect the arrears of support will trigger tax consequences and may be more effective than waiting for the FRO to collect the support.
>
> Counsel should, therefore, consider at the time of the Agreement whether the parties are going to opt into the FRO regime or whether the agreement will go into the FRO regime only under certain circumstances. For example, the parties may wish to agree that the support will be paid directly by either bank transfer or post-dated cheques and that only if there is a default will the recipient be entitled to register the Agreement under s. 35. On the other hand, parties may wish to have their support collected by the FRO in order to limit contact with one another, or have their cost-of-living changes administered automatically, or in cases where there is a history of problems with ongoing payments or projected concern about future payments.

Post-Dated Cheques

6.35

(a) By December 1st each year, Harold will give Wendy twelve post-dated spousal support cheques for the following year.

(b) If Harold provides Wendy with a cheque that cannot be negotiated at Wendy's bank, Harold will reimburse Wendy for any resulting bank charges.

> Select only one of the following 3 clauses: "Post-Dated Cheques"; "E-Transfers"; or "Inter-Bank Transfers".
>
> This method of payment of cheques directly to the recipient is less common these days, with the availability of e-transfers and inter-bank transfers.

E-Transfers

6.36 Harold will pay spousal support by e-transfer to Wendy's email address, [specify], on the [first] day of each month.

> Select only one of the following 3 clauses: "Post-Dated Cheques"; "E-Transfers"; or "Inter-Bank Transfers".

This is becoming a more common method of payment. It is efficient and timely and reduces contact.

Inter-Bank Transfers

6.37 Harold will pay spousal support by direct bank transfer from Harold's bank account at [name of bank, branch and account number] to Wendy's bank account at [name of bank, branch and account number] on the [first] day of each month.

Select only one of the following 3 clauses: "Post-Dated Cheques"; "E-Transfers"; or "Inter-Bank Transfers".

Like e-transfers, this method of payment is efficient and timely and reduces contact. If payment is to be by bank transfer, specific information should be included so that the support recipient can track the payments.

No Variation or Indexing under FLA, s. 35(2)(b)

6.38 Harold and Wendy agree that neither will apply to the [Ontario Court of Justice] [Family Court of the Ontario Superior Court of Justice] to vary or index the support provisions of this Agreement, pursuant to s. 35(2)(b) of the *Family Law Act*.

Section 35 of the *Family Law Act* permits the support provisions of any domestic contract and paternity agreement to be enforced and varied as court orders upon their being filed with the Ontario Court of Justice or the Family Court of the Superior Court of Justice. Along with the contract or agreement, one must file an affidavit stating that the contract is in effect and has not been varied or set aside. Parties cannot contract out of the right to enforcement under this section. Case law has held that the parties can contract out of the right to vary (s.35(4)). It is important to note that this provision applies to contracts made and arrears accumulating prior to the coming into force of the *FLA* (s.35(5), (6)).

The purpose of s. 35 was to provide parties to a domestic contract access to the provincial courts where applications to vary support obligations could be heard in a summary and inexpensive manner. This includes an amending agreement. This is an important clause in the Agreement because it gives the Ontario Court of Justice (or the Family Court of the Superior Court of Justice) the right to vary an agreement. Parties may not wish to have their issues determined in this Court and if that is the case, they can contract out of the right of the Court to vary.

7. Spousal Support Release

Release of Spousal Support

7.1

(a) As a result of the terms of this Agreement, [and/or upon payment of the spousal support set out in this Agreement] [and/or upon completion of the property

settlement set out in this Agreement] Harold and Wendy are financially independent of each other and release their respective rights to spousal support from the other, both retroactively and prospectively, now and forever.

(b) Harold and Wendy intend this Agreement to be forever final and non-variable.

(c) For greater certainty, the parties acknowledge that:

i they have negotiated this Agreement in an unimpeachable fashion and that the terms of this Agreement fully represent their intentions and expectations;

ii they have had independent legal advice and all the disclosure they have requested and require to understand the nature and consequences of this Agreement, and to come to the conclusion, as they do, that the terms of this Agreement, including the release of all spousal support rights, reflect an equitable sharing of the economic consequences of their relationship and its breakdown;

iii the terms of this Agreement substantially comply with the overall objectives of the *Divorce Act* now and in the future;

iv they require the courts to respect their autonomy to achieve certainty and finality in their lives;

v the terms of this Agreement and, in particular, this release of spousal support, reflect their own particular objectives and concerns, and are intended to be a final and certain settling of all spousal support issues between them. Among other considerations, they are also relying on this spousal release, in particular, upon which to base their future lives.

(d) Harold and Wendy specifically wish to be able to pursue their separate and independent lives, no matter what changes may occur. Harold and Wendy specifically anticipate that one or both of them may lose their jobs, become ill and be unable to work, have additional child care responsibilities that will interfere with their ability to work, find their financial resources diminished or exhausted whether through their own fault or not, or be affected by general economic and family conditions changing over time. Changes in their circumstances may be catastrophic, unanticipated or beyond their imagination. Nevertheless, no change, no matter how extreme or consequential for either or both of them, will alter this Agreement and their view that the terms of this Agreement reflect their intention to always be separate financially. Harold and Wendy fully accept that no change whatsoever in either or both of their circumstances will entitle either of them to spousal support from the other, now and forever.

(e) In short, the parties expect the courts to enforce fully this spousal support release no matter what occurs in the future.

This clause is intended to be a full and final release of the parties' rights to spousal support outright or after payment of lump sum or time-limited support (see these clauses in the Spousal Support section above), depending on how you structure the clause. Before including this clause, ensure that your client is fully informed about and understands the serious implications of releasing spousal support rights.

It is important to advise your client that while a clause releasing support may be able to be set aside in the future (see the Supreme Court of Canada's decision in *Miglin v. Miglin*, infra), the test to do so is a difficult one, and your client should proceed on the assumption that such a clause will be enforced.

The Supreme Court of Canada's decision in *Miglin v. Miglin* (2003), 1 S.C.R. 303 sets out the test for determining when spousal support can be ordered in the face of an agreement waiving or releasing support. The importance and significance of the case cannot be overestimated. *Miglin* sets out the definitive test for when the court will consider reopening support in the face of a waiver or a release. The test is a significant one and subsequent jurisprudence since *Miglin* has, in fact, verified that overcoming a release or a waiver will be a significant burden. See for example *Murray v. Murray* (2005), 17 R.F.L. (6th) 248 (Ont. C.A.); *McGeachy v. McGeachy* (2003), 42 R.F.L. (5th) 415 (Ont. C.A.); *Marks v. Tokarewicz* (2004), 1 R.F.L. (6th) 282 (Ont. C.A.), leave to appeal to S.C.C. refused (2004), 197 O.A.C. 199 (note) (S.C.C.); *Spencer v. Spencer*, 2005 CarswellSask 148 (Q.B.); *Culen v. Culen* (2003), 37 R.F.L. (5th) 300 (Alta. Q.B.); *Lyster v. Lyster* (2003), 49 R.F.L. (5th) 139 (Ont. S.C.J.); *Palmer v. Palmer* (2003), 240 Sask. R. 25 (Q.B.); *Howarth v. Howarth*, 2003 CarswellOnt 4182 (S.C.J.); *Cherneski v. Cherneski*, 2003 CarswellOnt 4896 (S.C.J.).

There have been cases where support has been ordered in the face of an agreement but the tests set out in *Miglin* have been applied strictly and not always consistently. See for example, *Contino v. Leonelli-Contino*, 2005 SCC 63, *Mirza v. Mirza* (2006), 269 D.L.R. (4th) 259 (B.C.C.A.) (spousal support increased from amount set out in separation agreement based on an unanticipated development - the husband's return to work after retirement); *Freake v. Freake*, 2004 CarswellNfld 185 (C.A.); *D.K.N. v. M.J.O.* (2003), 41 R.F.L. (5th) 142 (B.C.C.A.); *Lang v. Lang* (2003), 46 R.F.L. (5th) 200 (Man. C.A.); *J.E.D. v. E.P.D.* (2003), 42 R.F.L (5th) 334 (B.C.S.C.); *Slipak v. Slipak*, 2004 CarswellOnt 13 (S.C.J.).

Miglin focuses on the third of the factors listed in s.15.2(4) of the *Divorce Act* or the words "any order, agreement or arrangement relating to support". The judgment discusses how courts should exercise their discretion under s.15.2(1) of the *Divorce Act* when a party initially applying for support has already signed an agreement waiving any claim to support. The court prescribes a two-stage analysis. At stage one, there are two components that the court must examine: firstly, the circumstances of the execution of the agreement and secondly, the substance of the agreement. As was noted in the recent court decision of *Kelly v. Kelly* (2004), 7 R.F.L. (6th) 301 (Ont. C.A.), in the words of Laskin, J.A.:

"The court must assess whether there is any reason to discount the agreement because of the circumstances under which it was negotiated and executed. In doing so, the court must consider whether 'there were any circumstances of oppression, pressure or other vulnerabilities' that flawed the negotiations. Professional assistance - the advice of a lawyer - may compensate for or overcome any vulnerability or power imbalance but will not automatically do so. If the power imbalance vitiates the bargaining process, the court should give the agreement little weight.

If the conditions under which the agreement was negotiated cannot be impeached [thus the language in our precedent about the agreement being negotiated in "unimpeachable circumstances"], the court must assess the substance of the agreement. It must decide whether the agreement substantially complies with the objectives of the *Divorce Act*. These objectives include those expressly listed in s.15.2(6) as well as those of certainty, finality and autonomy." (pars. 19 & 20)

Even if the agreement satisfies both components of stage one, that does not end the matter. Satisfying both components of stage one means that the court should give the agreement great weight. Nevertheless, there is still a stage two of the analysis that must be undertaken. Stage two recognizes that because of the vicissitudes of life, the parties may find themselves in circumstances that they did not contemplate at the time they signed the agreement. The court notes that some change is inevitably foreseeable, including changes in occupation or health. The court must assess whether the new circumstances of the parties could not reasonably have been anticipated at the time of the execution of the agreement and, whether in light of these new circumstances, the agreement no longer reflects the parties' intentions or substantially complies with the *Divorce Act*, thus producing a situation that the court cannot condone.

There are hundreds of cases that have commented upon *Miglin* and applied its two step analysis to the facts of the case before the court, all across this country. The courts continue to wrestle with circumstances when they will permit relief, particularly in cases of great hardship. Nevertheless, the test enunciated by the Supreme Court of Canada is a stringent one and has been seized on by many judges to deny relief, and there is every chance that such a release or waiver will be effective to bar support for all time.

However, while *Miglin* sets out a stringent test for overturning agreements, it nevertheless does open the door to the appropriate case. That will be particularly so when the agreement was not negotiated in unimpeachable circumstances. Cases where agreements are hurried, lack complete financial disclosure, or are done without the benefit of counsel are all vulnerable to being attacked on the basis that they were not negotiated in unimpeachable circumstances. (See *D.K.N v. M.J.O.*, cited above. See also *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.) where provisions in a separation agreement were set aside, albeit dealing with a property settlement).

In cases where one party may be psychologically vulnerable and there is concern that the agreement will be attacked subsequently, it may be wise to consider the advantage of having a medical doctor certify that the person signing is doing so freely and voluntarily while fully cognizant of their rights and obligations (see for example *Kelly v. Kelly*, cited above).

On a related matter, a word of caution regarding automatically incorporating spousal support releases/dismissals into court orders without first seriously considering the matter. The necessity for careful consideration stems from some confusion in the case law regarding the appropriate test to be applied to a subsequent variation of spousal support in the face of a release/dismissal contained in a separation agreement versus a court order. In the Ontario Court of Appeal case of *Tierney-Hynes v. Hynes*, 2005 CarswellOnt 2632, earlier case law was overturned and the court found that it had jurisdiction under s.17 (variation provisions governing orders) of the *Divorce Act* to vary an earlier dismissal of spousal support in a court order. This case therefore suggests that a spousal support dismissal is no longer res judicata of entitlement. It also suggests that there is a less stringent test for overturning spousal support dismissals contained in a court order (only need to show a "change in the condition, means, needs and

> other circumstances" of either spouse under section 17, known as the "material change" test) than those found in a separation agreement governed by section 15.2, where the more stringent *Miglin* test must be applied. An application for leave to appeal *Tierney-Hynes* to the Supreme Court of Canada was dismissed, 2005 CarswellOnt 7437.
>
> This confusion has been further compounded by two recent Supreme Court of Canada decisions, *L.M.P. v. L.S.*, [2011] S.C.J. No. 64, 2011 SCC 64, 6 R.F.L. (7th) 1, and *R.P. v. R.C.*, [2011] S.C.J. No. 65, 2011 SCC 65. These cases dealt with variations of ongoing indefinite spousal support orders (as opposed to truly final support orders where support is time limited or waived). In the lead case, *L.M.P. v. L.S.*, there was a majority and minority judgment. While both reached the same conclusion (denying the variation), the minority applied the *Miglin* test to the case at hand, while the majority rejected the application of *Miglin* and instead applied the more traditional "material change" test under section 17 of the *Divorce Act*. The majority appears to have reaffirmed the well established law of variation, applying the "material change" test (enunciated in *Willick v. Willick*, [1994] 3 S.C.R. 670) to ongoing support orders. Unfortunately, however, the majority used some unclear language in its debate with the minority, casting some confusion on what constitutes a "final" agreement, and so in the end, it is at least arguable that the threshold for variation of truly final orders (ie. orders that waive or time limit spousal support) has been lowered from the *Miglin* test to the "material change" test, as was done in the *Tierney-Hynes* case. For an excellent discussion of these cases and their problematic application, see the annotation of these two cases by Professor Rollie Thompson found at 6 R.F.L (7th) 1.

Optional - Repayment of Equalization if Spousal Support Ordered

7.2 The terms of this Agreement are inextricably linked so that if, despite Harold and Wendy's agreement and intent as expressed in this Agreement, a court ever orders any spousal support, the equalization payment must be immediately repaid and its calculation redone as [specify party] says it is an overpayment and paid in exchange for the spousal support release.

Alternate - Disability - Partial Release

7.3 Harold and Wendy are each financially self-sufficient but Wendy has been diagnosed with [potentially disabling disease, etc.]. If Wendy becomes unable to work as a result of the condition worsening, Harold will pay spousal support based on the circumstances at that time.

Alternate - Support Tied to Remarriage or Cohabitation

7.4 Harold will pay spousal support to Wendy until Wendy remarries or cohabits with another person for more than [number] months, at which time Wendy releases the right to spousal support. [Adopt applicable portions of Payment and Release of Spousal Support clause, above.]

For those parties who wish to tie spousal support to remarriage or cohabitation, we have included this clause. However, neither remarriage nor cohabitation in the absence of other compelling factors justifies an automatic termination of spousal support. See *L.G. v. G.B.*, [1995] 3 S.C.R. 370. It is clear that remarriage is not usually a terminating event for support and has not been so since the Supreme Court of Canada decided *L.G. v. G.B.* Other cases have reiterated that since support is often compensatory, the remarriage of the recipient is not a basis for terminating support, but it may be a material change in circumstances. Nevertheless, there are those parties who wish support to cease upon remarriage or cohabitation and for those, we have included this clause as an alternate provision.

8. Dispute Resolution

With careful advice from counsel, the parties must address the issue of how they wish to resolve future disputes, reviews or variation applications. There are various choices and all should be canvassed. They include resolution by:

(1) Negotiation;

(2) Other ADR processes, such as Parenting Dispute Coordinator (for parenting issues only) or Collaborative Family Law;

(3) Mediation;

(4) Arbitration;

(5) Application to the court;

(6) Any combination of the above.

Mediation is often quicker, less costly and successful when the issues are narrow and the pain and bitterness of separation have abated. Mediation, however, raises issues of inequality of bargaining power and the problem of delay if the mediation takes too long.

Arbitration allows the parties to choose their own expert and often leads to an expedited resolution. Be aware of provincial legislation that may limit and define the rules surrounding arbitration in the family law context.

Mediation/Arbitration ("med/arb") is becoming a common dispute resolution method. The chosen person acts as a mediator for a limited period of time and then, failing an agreement, resolves the matter by arbitration.

Depending on the process selection, the parties will, in due course, have to enter into a Mediation Agreement, Arbitration Agreement or a Mediation/Arbitration Agreement, as the case may be.

Counsel (and clients) should be aware of the decision, *Finch v. Finch*, 2003 CarswellOnt 3205 (S.C.J.), where the court directed the parties to undertake the dispute resolution process outlined in their agreement and ordered costs against the applicant who ignored the terms of the agreement and resorted to litigation instead.

Application of Dispute Resolution

8.1 This Dispute Resolution section applies, as specified in the dispute resolution paragraphs below, to disputes about or proposed changes to:

(a) reviewable terms of the Agreement, namely paragraphs [specify reviewable paragraphs];

(b) variable terms of the Agreement, namely paragraphs [specify variable paragraphs];

(c) [the relocation of the parties and/or the children, namely paragraph [specify relocation paragraph];]

(d) [[significant] parenting issues, namely [specify issues/paragraphs];]

(e) [specify any other paragraphs to which this section applies.]

> With careful advice from counsel, the parties must determine the kinds of issues that will be addressed through the various dispute resolution terms in this "Dispute Resolution" section, such as reviews, variations, proposed relocations, significant parenting issues etc., and should specify the particular paragraphs that fall under each of these categories.

Negotiation First

8.2 If Harold and Wendy have a dispute about or propose a change to a term outlined in subparagraph[s] [specify applicable paragraphs in "Application of Dispute Resolution" paragraph above, for example 8.1 (a) and (b)] above, they will first try to resolve the matter through negotiation, either between themselves or with their respective counsel, on the following terms:

(a) The party disputing a term or seeking a change will give the other party, in writing:

i notice of the disputed term/proposed change;

ii evidence supporting their position on the disputed term/proposed change; and

iii any requests for information from the other necessary to determine the issue.

(b) A request under subparagraph (a) above will be answered within [number] days.

(c) After exchanging any information required by this Agreement, Harold and Wendy will meet personally [or through their personal representatives] to resolve the issue. If they come to an agreement, Harold and Wendy will sign and date an amending agreement before witnesses.

> There are many different dispute resolution processes that must be canvassed with the client to resolve future disputes, reviews, variations, relocation, etc. There are many dispute resolution choices, including:

> (1) Negotiation;
>
> (2) Collaborative Family Law;
>
> (3) Mediation;
>
> (4) Mediation/Arbitration;
>
> (5) Arbitration;
>
> (6) Application to the court;
>
> (7) Any combination of the above.
>
> Negotiation is a natural first step in the event of a dispute, variation or review of any term of the Agreement. The parties may negotiate amongst themselves, or they may wish to use counsel to negotiate on their behalf.

Collaborative Family Law

8.3 If Harold and Wendy are unable to resolve a dispute/proposed change to a term outlined in subparagraph[s] [specify applicable paragraphs in "Application of Dispute Resolution" paragraph above, for example 8.1 (a), (b), (c) and (d)] above through negotiation within [number] days of the [notice of the dispute/proposed change] [commencement of negotiation], they will use their best efforts to resolve the dispute through the Collaborative Family Law Process, and will follow the terms of their Collaborative Family Law Participation Agreement.

> Counsel and the parties will have to carefully consider which dispute resolution mechanism to use if the parties cannot resolve issues by negotiation.
>
> If the Agreement was reached using the Collaborative Family Law Process, the matter should be referred back under the terms of the Collaborative Family Law Participation Agreement.

Mediation

8.4 If Harold and Wendy are unable to resolve a dispute/proposed change to a term outlined in subparagraph[s] [specify applicable paragraphs in "Application of Dispute Resolution" paragraph above, for example 8.1 (a), (b), (c) and (d)] above through negotiation within [number] days of the [notice of the dispute/proposed change] [commencement of negotiation], they will engage a mediator to assist them on the following terms:

(a) The parties wish to engage [name of mediator]. If, however, [name of original mediator] is unable or unwilling to act, [name of original mediator] will recommend and refer the matter to an alternate mediator. If this alternate mediator is unable or unwilling to act, the parties will select another mutually agreeable mediator by [specify how this final alternate is to be decided].

(b) The parties will share the cost of the mediation [equally] [on the basis that Harold will pay (number) percent and Wendy will pay (number) percent of the total cost].

(c) The mediation will be [open] [closed].

(d) The parties will enter into a Mediation Agreement consistent with the terms herein[, attached as a Schedule to this Agreement].

> Counsel and the parties will have to carefully consider which dispute resolution mechanism to use if the parties cannot resolve issues by negotiation.
>
> If mediation was used to reach the Agreement initially, it is the logical first choice for the parties to try to resolve disputes arising out of the Agreement. In any event, it is an effective dispute resolution mechanism that is less costly and less disruptive to the family than an application to court. Mediation, however, raises issues of inequality of bargaining power and the problem of delay if the mediation takes too long.
>
> If the parties choose mediation, they must be clear about whether the mediation is "open" or "closed". If mediation is closed, then what is discussed in mediation is essentially privileged and if the parties are unable to reach an agreement, the mediator simply reports the lack of agreement. If mediation does not result in an agreement, the parties need to include a secondary dispute resolution mechanism, either arbitration or court proceedings, which will allow the dispute to be resolved quickly. If the mediation is open, it allows the mediator to report to the court or, potentially, to another third party, such as an arbitrator, as to what took place during the mediation. Most people prefer closed mediation as it allows the parties to be completely honest and open to exploring resolution and making compromises, without fear of their explored settlement positions coming back to haunt them.
>
> A hybrid approach (sort of between open and closed mediation) is known as mediation-arbitration ("med/arb"), where mediation is combined with arbitration (see the next term). In this process, the chosen person acts as a mediator for a limited period of time and then, failing an agreement, resolves the matter by arbitration.

Mediation/Arbitration

8.5 If Harold and Wendy are unable to resolve a dispute/proposed change to a term outlined in subparagraph[s] [specify applicable paragraphs in "Application of Dispute Resolution" paragraph above, for example 8.1 (a) and (b)] above through negotiation within [number] days of the [notice of the dispute/proposed change] [commencement of negotiation], they will engage a mediator/arbitrator to assist them on the following terms:

(a) The parties wish to engage [name of mediator/arbitrator]. If, however, [name of original mediator/arbitrator] is unable or unwilling to act, [name of original mediator/arbitrator] will recommend and refer the matter to an alternate mediator/arbitrator. If this alternate mediator/arbitrator is unable or unwilling to act, the parties will select another mutually agreeable mediator/arbitrator by [specify how this final alternate is to be decided].

(b) The parties will share the [up front]cost of the mediation/arbitration [equally] [on the basis that Harold will pay (number) percent and Wendy will pay (number) percent of the total cost].

(c) If the parties have not reached a resolution of the dispute through mediation after [number] days, the mediator/arbitrator will arbitrate the dispute[, and will have the right to reapportion costs].

(d) Any arbitration will be conducted in accordance with the *Arbitration Act*, and will constitute a secondary arbitration under the *Arbitration Act* and the *Family Law Act*.

(e) The mediator/arbitrator's decision ("award") will be binding. The award may be appealed to the court[in accordance with section 45(1) of the *Arbitration Act*, with leave on questions of law only.] [as of right on questions of (law) (fact) (mixed law and fact).]

(f) Because the mediator and the arbitrator are the same person, the parties waive section 35 of the *Arbitration Act*.

(g) The parties will enter into a Mediation/Arbitration Agreement consistent with the terms herein[, attached as a Schedule to this Agreement].

Mediation/Arbitration ("Med/Arb") is an alternate dispute resolution that may be very effective in resolving variation and review issues in a separation agreement expeditiously. The chosen mediator/arbitrator first attempts to resolve the problem through mediation. Failing agreement, the mediator then has the power to immediately arbitrate the dispute. The parties will need to enter into a Mediation/Arbitration Agreement setting out the terms of the Mediation/Arbitration, keeping in mind all of the requirements of the *Arbitration Act* and the *Family Law Act*. (If, after discussion with the parties, they prefer to instead separate these processes and choose one person to act as mediator and another to act as arbitrator for parenting disputes, you can insert the mediation and arbitration provisions from the "Dispute Resolution" section below, modified as necessary for parenting issues.)

In 2006, the *Arbitration Act, 1991* ("*Arbitration Act*") was amended to recognize "family arbitrations" distinct from other arbitrations. Family arbitrations are defined as arbitrations that deal with matters that can be dealt with in domestic contracts under Part IV of the *Family Law Act* and conducted exclusively in accordance with the law of Ontario or another Canadian jurisdiction.

Therefore, religious based arbitrations in the family law context are no longer legally effective, and parties cannot submit to arbitration in accordance with any law outside of Canada.

Arbitration agreements are now considered domestic contracts under the *Family Law Act* and must be in writing, signed, witnessed, with the parties having received independent legal advice. However, provisions in separation agreements such as this one, are classified as "secondary arbitrations", meaning unlike regular family arbitrations that can only address issues once they have arisen, secondary arbitrations can address future disputes relating to the management or implementation of the agreement, order or award.

While an arbitration award is binding, parties cannot contract out of their right to appeal an arbitration

award on a question of law, with leave pursuant to subsection 45(1) of the *Arbitration Act* (even if the Agreement is silent in this regard), or if the parties expressly provide, as of right on questions of law, questions of fact, or questions of mixed law and fact.

Counsel (and clients) should be aware of the decision in *Finch v. Finch*, 2003 Carswell Ont 3205 (S.C.J.) where the court directed the parties to undertake the dispute resolution process outlined in their agreement and ordered costs against the applicant who ignored the terms of the agreement and resorted to litigation instead.

Arbitration

8.6 If Harold and Wendy are unable to resolve a dispute/proposed change to a term outlined in subparagraph[s] [specify applicable paragraphs in "Application of Dispute Resolution" paragraph above, for example 8.1 (a), (b), (c) and (d)] above through [negotiation] [mediation] [negotiation and mediation] within [number] days of the [notice of the dispute/proposed change] [commencement of negotiation] [commencement of mediation], they will engage an arbitrator to assist them on the following terms:

(a) The parties wish to engage [name of arbitrator]. If, however, [name of original arbitrator] is unable or unwilling to act, [name of original arbitrator] will recommend and refer the matter to an alternate arbitrator. If this alternate arbitrator is unable or unwilling to act, the parties will select another mutually agreeable arbitrator by [specify how this final alternate is to be decided].

(b) The parties will share the [up front]cost of the arbitration [equally] [on the basis that Harold will pay (number) percent and Wendy will pay (number) percent of the total cost]. [The arbitrator will have the right to reapportion costs.]

(c) Any arbitration will be conducted in accordance with the *Arbitration Act*, and will constitute a secondary arbitration under the *Arbitration Act* and the *Family Law Act*.

(d) The arbitrator's decision ("award") will be binding. The award may be appealed to the court[in accordance with section 45(1) of the *Arbitration Act*, with leave on questions of law only.] [as of right on questions of (law) (fact) (mixed law and fact).]

(e) [In the event that the mediator and the arbitrator are the same person, the parties waive section 35 of the *Arbitration Act*.]

(f) The parties will enter into an Arbitration Agreement consistent with the terms herein[, attached as a Schedule to this Agreement].

Arbitration allows the parties to choose their own expert and often leads to an expedited resolution. In 2006, the *Arbitration Act, 1991* ("*Arbitration Act*") was amended to recognize "family arbitrations" distinct from other arbitrations. Family arbitrations are defined as arbitrations that deal with matters that can be dealt with in domestic contracts under Part IV of the *Family Law Act* and conducted exclusively in

> accordance with the law of Ontario or another Canadian jurisdiction.
>
> Therefore, religious based arbitrations in the family law context are no longer legally effective, and parties cannot submit to arbitration in accordance with any law outside of Canada.
>
> Arbitration agreements are now considered domestic contracts under the *Family Law Act* and must be in writing, signed, witnessed, with the parties having received independent legal advice. However, provisions in separation agreements such as this one are classified as "secondary arbitration" provisions, which means that unlike regular family arbitrations which can only address issues once they have arisen, secondary arbitrations can address future disputes relating to the management or implementation of the agreement, order or award. Secondary arbitrations also do not require independent legal advice, and they are less formal in their requirements for delivery of an award.
>
> While an arbitration award is binding, parties cannot contract out of their right to appeal an arbitration award on a question of law, with leave pursuant to subsection 45(1) of the *Arbitration Act* (even if the Agreement is silent in this regard), or if the parties expressly provide, as of right on questions of law, questions of fact, or questions of mixed law and fact.

Notice of Application

8.7 If Harold and Wendy are unable to resolve a dispute/proposed change to a term outlined in subparagraph[s] [specify applicable paragraphs in "Application" paragraph above, for example 8.1 (a), (b) (c) and (d)] above through [negotiation] [mediation] [negotiation and mediation] within [number] days of the [notice of the dispute/proposed change] [commencement of negotiation] [commencement of mediation], either party may bring an application to the court to resolve the dispute. Except in the case of an emergency, the party making an application to the court will give the other party no less than [number] days' notice of the application.

9. Medical and Dental Benefits

Definition

9.1 In this section, "medical" means all mental and physical health needs, including prescriptions, vision care, psychological counselling, dental and orthodontic costs, chiropractic costs, speech therapy, occupational therapy, physiotherapy, homeopathy, acupuncture and massage therapy.

Alternate - Definition

9.2 In this section, "medical" means all health needs for the children.

> Parties may wish to limit the sharing of medical costs to specific items, but bear in mind that s. 7 of the Guidelines requires a contribution to health-related expenses that exceed insurance reimbursement by at

> least $100 annually. These health-related expenses include orthodontic treatment, professional counselling, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses and contact lenses. This is not an exhaustive list, but does seem to include most health needs, except, perhaps, non-prescription drugs.

Payor to Maintain Extended Health Insurance

9.3 While required to pay support for a child under this Agreement, Harold will maintain that child as a beneficiary of medical, extended health and dental coverage through Harold's employment for as long as it is available to Harold.

Where No Extended Health Insurance In Place

9.4 While required to support a child under this Agreement, Harold and Wendy will share the cost of that child's medical expenses in proportion to their respective incomes.

> This clause may be used when there is no insurance available. Alternate versions might include the parties sharing the medical expenses in some proportion, or might put a cap on the amount that the payor is required to contribute to medical and dental expenses. Orthodontic expenses are frequently dealt with separately, given the cost and the lack of insurance generally available. See the clause "Orthodontic Expenses" below.

Processing Claims

9.5 Harold will:

(a) promptly submit receipts given to Harold by Wendy to the insurer; and

(b) immediately endorse the reimbursement cheques from the insurer to Wendy and deliver them to Wendy.

> In high-conflict cases, it may be preferable to have the spouse covered by insurance submit the receipts directly to the insurer and obtain reimbursement, rather than submitting the receipts to the other spouse and then risking a dispute over whether or not the reimbursement ever took place.

Replacement Coverage

9.6 If the coverage is no longer available to Harold through Harold's employment, Harold will immediately obtain and maintain replacement coverage for as long as Harold is obliged to support a child under the terms of this Agreement [provided the coverage is available at reasonable cost.]

> Counsel must carefully consider whether the obligation to provide replacement coverage is to be "open

ended" or restricted.

Alternate - Reimbursement Of Expenses If Coverage No Longer Available

9.7 If, for any reason, Harold's extended health coverage is no longer available to cover Charles or Claire, Harold will immediately notify Wendy, in writing. Harold will immediately reimburse Wendy for any expense incurred by Wendy for Charles or Claire before Wendy received notice that the expense was not covered by the extended health insurance.

Orthodontic Expenses

9.8 Harold will pay for Charles's and Claire's orthodontic expenses, provided that Harold's consent is obtained before the expenses are incurred. Harold will not unreasonably withhold consent. If the parties cannot agree, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

Both To Maintain Extended Health Insurance

9.9 While required to support a child under this Agreement, Harold and Wendy will both maintain the child as a beneficiary of extended health insurance through their employment, and will sign documentation authorizing the other to make claims directly to their insurer. A party who is reimbursed for a medical expense paid by the other will immediately forward the reimbursed amount to the other.

Both parties can maintain the children as beneficiaries of extended health plans and there are benefits if both parties do so, provided the policies are not mirror duplicates. Obviously, if only one party has a health plan, then the other party cannot name the children as beneficiaries under a non-existent health plan. There is, however, little point in requiring a party to assume expenses that would only result in duplicate coverage. The coverages should be examined in order to determine whether there is primary or secondary coverage, or whether there is any advantage to maintaining two policies. Some health policies cover items such as vision care, while others do not. It is important to look at the plans in order to determine just how these expenses will be addressed.

Costs Not Covered By Insurance

9.10 Medical expenses not covered by either party's extended health insurance are section 7 expenses and will be paid according to the applicable section 7 expenses sections above.

If this clause is used, it must be paired with one/some of the clauses from the "Section 7 Expenses" clauses in the Child Support section above, so that the Agreement is clear as to how the special expenses will be shared.

Alternate - Costs Not Covered By Insurance

9.11 Harold will pay [number] percent and Wendy will pay [number] percent of the children's medical expenses not covered by either party's extended health insurance. A party incurring non-emergency child medical expenses will obtain the other's consent in advance, in writing. Neither party will unreasonably withhold their consent. If they cannot agree, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> See the Commentary under the clause "Agreement as to Future Section 7 Expenses" above, in the Parenting Section, discussing the difficulty enforcing through provincial agency if percentage contribution is used in the Agreement.

Consent In Advance Of Contribution

9.12 Harold will not be required to contribute to any medical expenses in this Agreement unless Harold's consent was obtained in advance, in writing, or the issue was resolved under the section of this Agreement entitled "Dispute Resolution" in advance.

Termination Of Coverage When Child Support Ends

9.13 After the obligation to pay child support ends, on 30 days' notice to Wendy, in writing, Harold may remove the child's name from the extended health insurance coverage.

Coverage through Employment

9.14 Harold will maintain his medical, extended health and dental coverage through Harold's employment for Wendy [and the children] [until the parties are divorced] [for as long as it is available to Harold for Wendy's (their) benefit]. Harold will immediately reimburse Wendy for all amounts recovered by Harold for expenses incurred by Wendy for Wendy [and the children].

> Counsel should review with his or her client who will be responsible for insuring health and dental expenses after the separation. Commonly, medical and dental benefits end for a spouse upon divorce, but sometimes a spouse can continue to be covered under a former spouse's policy as long as the former spouse is not insuring a new partner. The Agreement must be clear on this point to avoid the dependent spouse accruing expenses under the mistaken belief that he or she is covered under medical or dental benefits. Counsel should advise the client to get his or her own coverage once the primary coverage ends. Medical and dental coverage may well be expensive, depending on the age and health of the party, and it is an important matter to be negotiated in the Agreement. Even if the coverage ends under the payor's plan, the parties may still negotiate an agreement in which the dependent spouse receives insured health coverage. It may also be a factor to be considered when determining the amount of spousal support.

Replacement Coverage

9.15 If Harold's employer no longer makes medical, extended health or dental coverage available, Harold will immediately tell Wendy. Harold will also immediately purchase private medical, extended health and dental insurance for Wendy [and the children] [if available to Harold at comparable or reasonable cost.]

Required While Spousal Support Payable

9.16 Harold will, either personally or through Harold's employer, maintain medical, extended health and dental insurance coverage for Wendy [and the children]as long as Harold is required to pay Wendy spousal [and child]support under this Agreement. Harold will give a written direction to the medical and extended health insurer permitting the insurer to advise Wendy on a timely basis that the coverage remains in force or is about to change in any material way.

> If the parties have no children and have little contact after separation, it is possible that the payor could leave his/her employment, lose his/her coverage and the recipient would not be aware that he/she was no longer covered. We have, accordingly, added to this clause. a requirement that the payor notify the recipient if the coverage is going to terminate for any reason. This, of course, does not help the recipient if the payor breaches the notice term and the recipient's coverage lapses. It may give the recipient a claim for indemnity, which may or may not have value. The recipient may therefore wish to bargain for the right to be notified on a timely basis that the payor remains covered so that he/she can substitute his/her own coverage if the payor's lapses. See the "Authorization and Direction to Insurer re: Irrevocable Beneficiary and Insurance Information" Schedule below.

Health Coverage Indemnity

9.17 Harold will repay Wendy for any expense or loss Wendy incurs because of Harold's failure to maintain medical, extended health or dental coverage as required by this Agreement.

No Spousal Coverage

9.18 Harold and Wendy are responsible for their own medical, extended health and dental expenses.

10. Life Insurance

> Life insurance is an extremely important term to secure or provide the support payable to a dependent spouse and children. It can also protect against, or at the very least reduce, dependant relief claims against an estate.
>
> Counsel should calculate the appropriate amount of life insurance needed in order to determine the amount

> necessary to create a future stream of payments necessary to meet the obligation to pay support. In making that calculation, remember that the insurance proceeds themselves are not taxable, although income earned on insurance proceeds that are being invested and held in trust is taxable. DivorceMate's Tools One software can assist you in determining the appropriate amount of life insurance necessary to secure/replace periodic support obligations, taking into account both the taxable benefit of the periodic support to the recipient spouse and the time value of money. Ultimately, however, this information should be discussed with an actuary.
>
> In many cases, the calculated amount of insurance may be too expensive. This is an issue for negotiation. If the payor spouse will not agree to provide adequate insurance, the recipient spouse may decide to use some of his or her support to buy insurance on the payor's life. There are two types of insurance to consider - term insurance which has no cash surrender value; and whole life insurance which has a cash surrender value. The cheaper of the two is term insurance, but premiums increase with age - typically jumping to a higher premium level after a number of years at a lower premium level, with the frequency of those jumps (5, 10 or 20 years) depending on the terms of the policy. Most term insurance policies end at age 70 regardless of the premium paid, but there are special term policies, such as life term to 100 that are available at increased cost.
>
> Be aware that the clauses set out herein are provided as assistance to counsel and many of them are as yet untested in law. Ultimately it is the responsibility of the lawyer to review and modify these clauses as he/she sees fit in accordance with the legislation and the caselaw. The editors would like to acknowledge and thank Barry Corbin, of Corbin Estates Law, for his assistance and contribution to this Part of the Agreement.

Existing Policy

10.1 Harold owns or has an interest in a policy of [group] [term] [whole] life insurance [through Harold's employment at (name of employer)], in the amount of $[amount] (the "policy"). [Provide further relevant details of the policy, including insurer, policy number etc.] Harold warrants that Harold has not borrowed against the policy and that the full face value of the policy is available and unencumbered.

Alternate - New Individual Policy

10.2 Harold will apply for a life insurance policy ("the policy"), in the amount of $[amount]. Harold will take any medical examinations or tests required to obtain the policy.

> In high-conflict cases, it may be better to have the recipient spouse own the policy and pay the premiums and simply include the amount in the support being paid by the payor spouse. In these circumstances, if the support is characterized as spousal support, it will have to be increased to reflect the income tax payable by the recipient spouse on the additional support.
>
> Another alternative, sometimes done in the context of a shareholders' agreement (where each shareholder's life is insured for the purpose of allowing his/her estate to be bought out by the corporation or by the

> surviving shareholder(s), as the case may be), might be to appoint a third party as trustee to be the temporary owner of the insurance policy and authorize him/her to take all of the steps that one or the other of the parties is obliged to do under the Separation Agreement. The third party trustee ensures that premiums are paid in a timely fashion, that the policy remains in force and unencumbered and that, upon the death of the life insured, the proceeds are applied for the purposes intended by the parties. The terms of the trust should be set out in a separate agreement with the assistance of a trust specialist.
>
> A further alternative may be to have the parties jointly apply for a policy on Harold's life (see the following clause "Alternate - New Joint Policy").

Alternate - New Joint Policy

10.3 The parties will jointly apply for a life insurance policy ("the policy") on Harold's life, in the amount of $[amount]. Harold will take any medical examinations or tests required to obtain the policy. [Provide further details on the nature of the joint ownership - ie. joint tenancy or tenants-in-common, etc.]

> Counsel may wish to consider a jointly owned life insurance policy, as opposed to a policy owned solely by the insured. If a policy is jointly owned, one spouse cannot change the beneficiary designation without the other's consent, which eliminates the need to make a designation irrevocable. Irrevocable designations can become troublesome when a beneficiary does not co-operate in changing the designation when he or she is no longer entitled to support (although one way around this issue is to have the recipient appoint the payor as his/her attorney for the sole purpose of giving that consent to the insurer once the support obligation ends - see the commentary under the clause "Spouse as Beneficiary Outright" below for further detail).
>
> Joint ownership has the further advantage that all joint owners will receive notices from the insurance company and be entitled to make the usual inquiries of an insurance company about the status of the policy from time to time, although some life insurance companies do not have the administrative system in place to send policy notices to multiple addresses. Accordingly, counsel should ensure that the insurer will comply with this request and, if not, notices should be sent to a single neutral address, such as that of a lawyer or trustee. Alternatively, if the practice is to send out a notice only to the first-listed owner, the recipient could be that person.
>
> If you decide to go with joint ownership, you must consider the nature of the joint ownership, namely joint tenancy or tenants-in-common, which only becomes relevant in the event that the payor outlives the recipient. In other words, while both parties are living, the choice of joint tenants or tenants-in-common is not relevant. Either form of joint ownership gives the recipient the desirable notice and control with respect to the insurance contract. If the payor dies first, the nature of the joint ownership is irrelevant, since the only entitlement at that point is the insurance money payable in accordance with the beneficiary designation or in accordance with the trustee appointment, as the case may be. Therefore, the nature of the joint ownership will only be relevant if the payor outlives the recipient. Whether the payor should become the sole owner or merely a co-owner with the recipient's estate will depend on whether the payor has any continuing obligation with regard to the insurance policy after the recipient's death. If not, then joint

> tenants would be the payor's choice; if so, then tenants in common would make more sense.
>
> While joint-ownership eliminates potential problems that arise when a former spouse does not co-operate in releasing an irrevocable beneficiary designation, it does not guarantee that a spouse who is competent to manage his or her affairs will co-operate in surrendering the policy once the support obligation ends. One option that is commonly seen in commercial agreements for such problems is to have the recipient make an irrevocable appointment of the payor as her attorney for the sole purpose of giving that consent to the insurer on the recipient's behalf after the payor's support obligation ends. If that appointment is expressed to be a "power coupled with an interest" - and it would likely be so characterized even without those words, given the "commercial" nature of the separation agreement - the payor's authority to give consent on the recipient's behalf would survive the recipient's incapacity.

Obligation to Pay Premiums

10.4 Harold will pay all policy premiums when due. If he does not and Wendy pays any premiums, interest or penalties to prevent the lapse of the policy, those amounts will be considered lump sum [child] [spousal] [child and spousal] support and enforceable against Harold. If the policy lapses because Harold failed to pay the premiums, Harold will also pay Wendy all necessary costs incurred by Wendy to reinstate the policy.

> Note that this clause will not be among those that your provincial enforcement agency (eg. FRO; FMEP) can enforce unless a specific amount is included.
>
> In high-conflict cases, it may be better to have the recipient spouse own the policy and pay the premiums and simply include the amount in the support being paid by the payor spouse. In these circumstances, if the support is characterized as spousal support, it will have to be increased to reflect the income tax payable by the recipient spouse on the additional support.
>
> Another alternative might be to appoint a third party as trustee to be the temporary owner of the insurance policy and authorize him/her to take all of the steps that one or the other of the parties is obliged to do under the Separation Agreement, including payment of all premiums (see commentary in clause "Alternate - New Individual Policy" above).

Spouse as Beneficiary Outright

10.5 [As long as Harold is obligated to pay child support to Wendy in accordance with this Agreement,] [For at least one year after Harold's obligation to pay child support ends in accordance with the child support termination provisions in this Agreement,] [and as long as Harold continues to receive coverage under this policy through Harold's employer,] Harold [or the parties (if jointly owned)] will:

(a) keep the policy in force;

(b) not borrow against the policy and will ensure that the policy remains unencumbered; and

(c) irrevocably designate and maintain Wendy as the beneficiary [of $(amount)] of the proceeds of the policy;

as security for Harold's child support obligations outstanding as at the date of Harold's death pursuant to this Agreement.

In this clause, the recipient is made the irrevocable beneficiary of the insurance policy outright, just as he/she is the recipient of child support pursuant to the Agreement, with the expectation that the children will benefit indirectly from this payment (ie. the family will have a higher standard of living or the recipient will use the payments for expenditures specifically for the children). Note that in this arrangement, the custodial parent is not a fiduciary who is accountable to the child as to how the support payments are used. The custodial parent is made the beneficiary, plain and simple.

Because this clause makes the recipient the beneficiary of the full amount specified outright, if the insurance is intended as security for support, it is important to ensure that the amount of the policy for which the recipient is designated as beneficiary reflects the payor's outstanding support obligation. In other words, the amount of the policy (or the amount allocated to the recipient) should decline over time as the payor's support obligations decline (ie. include review and/or automatic reduction clauses below). This is particularly important in light of the Ontario Court of Appeal decision of *Turner v. Di Donato* (2009), 63 R.F.L. (6th) 25. In that case, the separation agreement provided that the husband was to pay spousal support until the wife turned 65. In addition, he was required to irrevocably designate the wife as the beneficiary of $100,000 of his life insurance. The husband died when the wife was 56 years old with only $43,507 of life insurance. The wife argued that she was entitled to the full $100,000 and sought the difference from the husband's estate. The husband's estate argued that the life insurance was intended as security for the husband's support obligation, and that since the $43,507 was in excess of the outstanding support obligation until the wife turned 65, no further amount was owed. The Court of Appeal affirmed the trial judge's finding that the wife was entitled to the full $100,000 based on the wording of the agreement.

Another way to guard against a windfall to the recipient would be to appoint a trustee to receive the proceeds on behalf of the children and to manage them in accordance with terms set out in an insurance trust/declaration. In fact, parties are often reluctant to make their spouse the irrevocable beneficiary outright, despite the fact that this is the manner in which child support is traditionally paid, and so the appointment of a trustee (who could in fact be the recipient) to receive the insurance money and to apply it on trust terms is one way around this problem (see clause "Alternate - Third Party Trustee" that follows). The trust could provide for the proceeds to be used to satisfy the outstanding support obligations pursuant to this Agreement, with any excess proceeds to be returned to the estate or to such other beneficiary as the payor designates.

Ultimately, the characterization and treatment of insurance money is a negotiating point between the parties.

The irrevocable nature of the designation in this clause provides that the designation cannot be changed without the recipient's consent. (Note that while offering some protection to the recipient, this protection will be lost if the payor stops paying the premiums and the policy lapses, although see *Manna v. Manna*, 2008 B.C.S.C. 1365 (CanLII) where the court ordered the insurer to provide the irrevocable beneficiary

with notice of the lapse to allow her to deal with the unpaid premium. A joint policy or a policy held by a third party trustee may be another option to consider.) Irrevocability can also provide protection from creditors. While the naming of a beneficiary (other than the payor's personal representative) protects the insurance proceeds from creditors because the proceeds effectively "bypass" the payor's estate, the naming of an irrevocable beneficiary adds a further protection because it protects the payor's interest in the policy itself (valuable if there is a cash value to the policy) despite the fact that the parties will be divorced.

To get around the potential problem that the recipient will not cooperate in changing the irrevocable designation (or will not surrender his/her interest in a joint policy) when he/she is no longer entitled to support, have the recipient make an irrevocable appointment of the payor as his/her attorney for the sole purpose of giving that consent to the insurer on his/her behalf after the payor's support obligation ends. If that appointment is expressed to be a "power coupled with an interest" - and it would likely be so characterized even without those words, given the "commercial" nature of the separation agreement - the payor's authority to give consent on the recipient's behalf would survive the recipient's incapacity.

For practical reasons, this section assumes that a single policy will be used to cover support for all of the children. Using a single policy generally reduces the policy fee, and there may be a significant premium saving if the combined death benefit takes the amount of coverage to a higher coverage band. Life insurance premiums are "banded" by profile (age, gender, smoking status, health, hobbies and lifestyle) and amount. For example, the cost per $1,000 for people who fit a certain profile for $0-$500,000 of coverage will be one rate, while the cost per $1,000 for $500,001-$750,000 for the same individual will be proportionately less. You can use an insurance trust to manage the distribution proceeds according to each child's age at the time of the payor spouse's death. An insurance trust is a useful way of providing for children, but it is very complicated and a trust specialist should be consulted to assist in this regard.

If you wish, you may instead provide for separate policies to cover support for each child. Be aware, however, that multiple policies increase the potential for an error on someone's part, for instance, if the premium is applied 100% to one policy, so the other lapses, or if the payor parent decides - for whatever reason - to maintain one policy but not the other(s).

You may wish for the policy to be maintained for at least one year after the payor's support obligation ceases because, if the policy is terminated when a child (particularly a minor) temporarily leaves the recipient's care, but that child later moves back with the recipient, it may not be possible for the payor to get new insurance. The payor could be uninsurable, the policy premiums could be much higher, or the payor could simply be too old to get reasonable term insurance. It may be that counsel will want the payor to keep the policy in force until there are no dependent children left.

Note that the potential issue regarding the irrevocable designation of the spouse as a beneficiary raised in the Ontario Divisional Court decision of *Dagg v. Cameron Estate*, 2016 CarswellOnt 4876, was resolved by the Ontario Court of Appeal, 2017 ONCA 366. In overturning the lower court's decision, the Ontario Court of Appeal held that a support recipient designated as an irrevocable beneficiary of a life insurance policy is a "creditor" under s. 72(7) of Ontario's *Succession Law Reform Act*, and so the life insurance funds necessary to secure support obligations in a support order could not be "clawed back" into the deceased support payor's estate for dependant support (although any excess could be). To protect against the clawback of *any* life insurance proceeds into a deceased's estate, consider making the policy jointly

owned so that it is not subject to the *SLRA*.

Alternate - Third Party Trustee

10.6 [As long as Harold is obligated to pay child support to Wendy in accordance with this Agreement,] [For at least one year after Harold's obligation to pay child support ends in accordance with the child support termination provisions in this Agreement,] [and as long as Harold continues to receive coverage under this policy through Harold's employer,] Harold [or the parties (if jointly owned)] will:

(a) keep the policy in force;

(b) not borrow against the policy and will ensure that the policy remains unencumbered;

(c) designate and maintain Charles and Claire as the beneficiar[y] [ies] [of $(amount)] of the proceeds of the policy;

(d) appoint [Wendy or independent third party] as trustee to receive the insurance proceeds in (c) above, as trustee for the children, on the following terms:

i [Provide details of all of the terms of the trust (eg. discretion over income and capital distributions; duration of the trust; treatment of income from the trust; mechanism to replace trustees; trustee compensation; distribution according to each child's age at the time of Harold's death; treatment of balance of proceeds once child support obligations terminate; treatment of proceeds in the event of death of child prior to payment out of all proceeds, etc.), prepared with the assistance of a trust specialist. Alternatively, an insurance trust/declaration, or the form of an insurance trust/declaration to be signed, could be attached as a schedule to the Agreement];

as security for Harold's child support obligations outstanding as at the date of Harold's death pursuant to this Agreement .

Rather than designating the recipient as the irrevocable beneficiary without any "controls" on how the money is used (as in clause "Spouse as Beneficiary Outright" above), the payor may prefer to appoint the recipient to receive the insurance proceeds pursuant to strict parameters, namely as a trustee for the children on detailed terms. This works well if the parties maintain an amicable relationship. Alternatively, particularly if the relationship is acrimonious, the payor may prefer to appoint an independent third party trustee to deal with the insurance proceeds on behalf of the children, again on detailed terms. Several institutions offer these services. Careful thought should be given to the trustee appointed, as the trustee will have significant and potentially time-consuming duties to carry out.

The issue of trustee compensation should be addressed, in addition to the specific trust terms, including but not limited to discretion over income and capital distributions, duration of the trust, treatment of income from the trust, mechanism to replace trustees, distribution according to each child's age at the time of the

> payor's death, treatment of balance of proceeds once child support obligations under Agreement terminate, treatment of proceeds in the event of death of child prior to payment out of all proceeds, etc.
>
> Alternatively, rather than including the terms in the body of the Agreement, the payor could execute an insurance trust or declaration concurrently with the execution of this Agreement, with a copy to be appended as a schedule, or the form of an insurance trust or declaration to be executed could be prepared and attached as a schedule to the Agreement, particularly if the payor has not yet purchased the policy.
>
> Also, if the policy is intended as security for the payor's support obligations, the Agreement should state this purpose and the terms of the trust should specifically address what happens to the balance of the insurance proceeds once the payor's child support obligations terminate. The Ontario Court of Appeal decision of *Turner v. Di Donato* (2009), 63 R.F.L. (6th) 251, discussed in the commentary in clause "Spouse as Beneficiary Outright" above, has highlighted the importance of determining the purpose of life insurance in an agreement and ensuring that the provisions in the agreement reflect this purpose.
>
> It may also be helpful to include a reduction of the policy amount (or the amount allocated to the beneficiaries) as time passes and support obligations decrease (include review and/or automatic reduction sections below). While the terms of any trust will presumably address what happens to proceeds in excess of the support obligations, the reduction of the policy amount as support diminishes might help keep the payor's costs down.
>
> Insurance trusts are extremely complicated instruments and unless you are well versed in trust law, it is likely necessary and advisable to enlist the assistance of a trust specialist in providing the terms of any such trust. It is also important to follow up on this term subsequent to the signing of the Agreement to ensure that the necessary steps have been taken and copies of the trust declaration provided to the trustee and the insurance company.
>
> Note that the children have not been "irrevocably" designated as beneficiaries in this clause. While there is a danger that the payor can change this revocable designation without notice, the practicalities of obtaining the children's consent to an irrevocable designation dictate against it for a number of reasons. Firstly, you may run into the problem of having to obtain a court order to get consent on behalf of minor beneficiaries for whom support may no longer be required under the Separation Agreement. Secondly, even if the child has attained age of majority and support is no longer payable under the Agreement, you cannot assume that the child will give consent willingly. And, since the child is not a party to the Agreement, you cannot force him or her to do so. This can be particularly sticky where the payor has children from a subsequent relationship and wants to use the insurance for their benefit. Furthermore, the protection from creditors in the case of a policy with any cash value is not necessary when the children are named as the beneficiaries.

Life Insurance to Secure Spousal Support

10.7 [As long as Harold is obligated to pay spousal support to Wendy in accordance with this Agreement,] [and as long as Harold continues to receive coverage under this policy through Harold's employer,] Harold [or the parties (if jointly owned)] will:

(a) keep the policy in force;

(b) not borrow against the policy and will ensure that the policy remains unencumbered; and

(c) irrevocably designate and maintain Wendy as the beneficiary [of $(amount)] of the proceeds of the policy;

as security for Harold's spousal support obligations outstanding as at the date of Harold's death pursuant to this Agreement.

In this clause, the recipient is irrevocably designated as the beneficiary of the specified amount of the insurance policy proceeds. The recipient is the beneficiary of the specified proceeds outright, plain and simple, without any limitations.

The Ontario Court of Appeal decision of *Turner v. Di Donato* (2009), 63 R.F.L. (6th) 251, discussed in the commentary in clause "Spouse as Beneficiary Outright" above, has highlighted the importance of determining the purpose of life insurance in an agreement and ensuring that the provisions in the agreement reflect this purpose. If the insurance is intended as security for support, the Agreement must make this clear, otherwise the spouse could obtain a windfall as in the *Turner v. DiDonato* case.

Because this clause makes the recipient the beneficiary of the full amount specified outright, and because it is intended to be security for the payor's support obligations, it is important to ensure that the amount of the policy for which the recipient is designated as beneficiary reflects the payor's outstanding support obligation. In other words, the amount of the policy (or the amount allocated to the recipient) should decline over time as the payor's support obligations decline (ie. include review and/or automatic reduction sections below). This will guard against a windfall to the recipient.

Another way to guard against a windfall to the recipient would be to appoint a trustee to receive the proceeds on his/her behalf and to manage them in accordance with terms set out in an insurance trust/declaration (similar to the trust set up in the clause "Alternate - Third Party Trustee" above in respect of the payor's child support obligations), rather than giving the proceeds to the recipient outright. The trust could provide for the proceeds to be used to satisfy the outstanding support obligations pursuant to this Agreement, with any excess proceeds to be returned to the estate or to such other beneficiary as the payor designates. A trust specialist should be consulted to assist in setting up any such trust.

See the commentary in clause "Spouse as Beneficiary Outright" above for further information regarding the irrevocable nature of the beneficiary designation in this clause.

Note that the potential issue regarding the irrevocable designation of the spouse as a beneficiary raised in the Ontario Divisional Court decision of *Dagg v. Cameron Estate*, 2016 CarswellOnt 4876, was resolved by the Ontario Court of Appeal, 2017 ONCA 366. In overturning the lower court's decision, the Ontario Court of Appeal held that a support recipient designated as an irrevocable beneficiary of a life insurance policy is a "creditor" under s. 72(7) of Ontario's *Succession Law Reform Act*, and so the life insurance funds necessary to secure support obligations in a support order could not be "clawed back" into the deceased support payor's estate for dependant support (although any excess could be). To protect against the clawback of *any* life insurance proceeds into a deceased's estate, consider making the policy jointly owned so that it is not subject to the *SLRA*.

Proof of Policy and [Irrevocable] Beneficiary Designation

10.8 Prior to signing this Agreement:

(a) Harold will provide Wendy with a copy of the policy and the [irrevocable] beneficiary designation; and

(b) Harold signed the direction attached as Schedule ("Authorization and Direction"), permitting Wendy to confirm directly with Harold's [employer and] insurer that the policy is unencumbered and in force.

10.9 Within 14 days of each anniversary date of the policy, Harold will give Wendy proof that Harold has paid the premium.

> This clause is used when the policy is not joint. A joint policy should give the recipient the information immediately (unless there are administrative issues - see above commentary under the clause "Alternate - New Joint Policy" above).
>
> If the payor's life insurance is an employment group policy, the policy may terminate if the payor's employment ends. Many group policies allow a conversion feature and the person losing his or her employment may have the right to obtain an individual policy. In one case, the husband left his job and allowed his group life insurance policy to lapse, notwithstanding the opportunity to convert it into an individual life policy. He then died leaving the wife and children destitute. Counsel need to think about this problem and, in cases where the life insurance is of critical importance, the Agreement may require the payor to give a direction to the employer to notify the recipient spouse of any change in the life insurance conditions and any opportunities to convert the group policy into an individual policy. See the "Authorization and Direction to Insurer re: Irrevocable Beneficiary and Insurance Information" Schedule below. The Agreement may also require the person leaving employment to convert the group policy into an individual policy when the opportunity is available at a reasonable cost. If a dispute arises about the obligation to convert or if there is an issue over costs, this matter can be resolved through the dispute resolution provisions of the Agreement.
>
> We have not covered all of the possibilities or problems that may arise if the insurance is a group policy. The group life insurance contract terminates whenever the employer changes the carrier for its group plan. New group plans may provide fewer benefits or lesser amounts of coverage. This possibility could also be covered in the separation agreement. If the support (child or spousal) is likely to continue after the payor's retirement, counsel must deal with what is to occur with the policy. Some group plans permit the retiree to retain a modest amount of life insurance coverage through the plan. This should be considered when developing the terms of the Agreement.
>
> In many cases, the amount of life insurance available will be inadequate to insure the support. The Agreement could provide that if additional insurance later becomes available to the payor at a reasonable cost (perhaps because of a better job or a promotion in the job), the payor should be obliged to increase the insurance. Life insurance provisions in a separation agreement should always be variable and dealt with by way of the dispute resolution provisions in the agreement.

Release of Irrevocable Beneficiary Designation - Individual Policy

10.10 When Harold's obligation to pay [child] [spousal] [child and spousal] support to Wendy terminates in accordance with the [child support] [spousal support] [child and spousal support] termination provisions in this Agreement, Harold's obligation to maintain the policy and to maintain Wendy as the irrevocable beneficiary of the policy ends. Wendy will [execute any documentation necessary] [provide Harold's insurer with a direction substantially in the form of the attached Schedule "Consent to Release of Irrevocable Beneficiary Status"] to release the irrevocable beneficiary designation. If Wendy refuses to release the irrevocable beneficiary designation, Harold may obtain a court order directing the insurer to do so. Wendy will be responsible for the costs Harold incurs in obtaining the order.

> This clause requires the recipient to execute any necessary documentation to release the irrevocable beneficiary designation. If the insurer has a standard form to be completed, you may wish to attach the form as a schedule.
>
> As noted in some of the other commentaries above, another way to get around the potential problem that the recipient will not cooperate in changing the irrevocable designation when he/she is no longer entitled to support, is to have the recipient make an irrevocable appointment of the payor as his/her attorney for the sole purpose of giving that consent to the insurer on his/her behalf after the payor's support obligation ends. If that appointment is expressed to be a "power coupled with an interest" - and it would likely be so characterized even without those words, given the "commercial" nature of the separation agreement - the payor's authority to give consent on his/her behalf would survive the recipient's incapacity.

Alternate - Release of Interest - Joint Policy

10.11 When Harold's obligation to pay [child] [spousal] [child and spousal] support to Wendy terminates in accordance with the [child support] [spousal support] [child and spousal support] termination provisions in this Agreement, Wendy will transfer Wendy's interest in the policy to Harold. Wendy will [execute any documentation necessary] [provide the insurer with a direction (see attached Schedule "Transfer of Interest in Insurance Policy")] to release Wendy's interest in the policy. If Wendy does not, Harold may obtain a court order directing the insurer to do so. Wendy will be responsible for the costs Harold incurs in obtaining the order.

> This clause requires the recipient to execute any necessary documentation to release his/her interest in a joint policy. If the insurer has a standard form to be completed, you may wish to attach the form as a schedule.
>
> Alternatively, have the recipient make an irrevocable appointment of the payor as his/her attorney for the sole purpose of giving that consent to the insurer on his/her behalf after the payor's support obligation ends, expressed as a "power coupled with an interest". See comments under clause "Release of Irrevocable Beneficiary Designation - Individual Policy" above for more detail.

Replacement Coverage

10.12 If Harold's policy cannot be maintained for any reason, Harold will immediately obtain replacement coverage at a reasonable cost, ensuring no gap in coverage. If Harold learns that there may be a change in insurance coverage, Harold will advise Wendy of the proposed change in coverage and the reason for the change.

> There will be occasions when existing insurance cannot be maintained. This may be because the insured has lost his or her employment which provided group coverage, or the insurance company goes bankrupt, or the insured's premium skyrockets because of a change in health or other relevant condition. Regardless of the cause, the resultant loss of insurance is both parties' problem. If the insurance cannot be replaced at all, there is not much more to be said. But in most cases it can be replaced, although not necessarily by the same coverage at the same rate. One suggestion, set out in this clause, is that the insured be obliged to obtain new coverage at roughly the same cost to him or her as the old coverage. If this cannot be negotiated amicably, then the dispute resolution mechanism should be employed, as this issue is not something that should end up in court for determination. However, one must deal with this issue in a timely fashion if coverage is going to lapse or expire, to ensure no break in the provision of security.
>
> Another possible way to guard against the possibility that Harold may lose his employment at a time when he is uninsurable due to his state of health at the time, would be to oblige Harold from the outset to obtain back-up individual insurance - perhaps jointly owned with Wendy or held by a third party trustee. The Agreement could provide that Harold is free to designate any beneficiary under that individual policy so long as the group coverage continues, but on termination of employment in a case where new coverage is not available, Harold would be obliged to change the beneficiary designation on the individual policy to replace the lost coverage and secure his support obligations. If the policy is jointly owned with Wendy, she could be obliged to sign any beneficiary designation at Harold's request, as long as his group coverage continues in place.

Delay in Insurance Payment

10.13 When Harold dies, Harold's estate will pay Wendy support as if Harold were still alive[, adjusted to reflect that Wendy will not have to pay tax on it and the estate cannot deduct it], until Wendy receives the insurance proceeds.

> This term provides for support to be paid in the interim until life insurance proceeds are paid out, so that there is no hardship to Wendy until such time as she is in receipt of the funds.
>
> Since support payable by an estate is not deductible by it and not taxable in the hands of the recipient, the parties may wish to adjust the amount of support payable upon Harold's death. Out of an abundance of caution, the agreement could include a provision that the estate would pay the recipient's tax on any support payable by it. It is possible to make those payments deductible by the estate and taxable to Wendy, by the creation of a separate trust for that purpose under Harold's will, to the extent that trust income is used to pay the support to Wendy. Of course, that arrangement would have to be negotiated.
>
> Harold's estate could be obliged to pay the support monthly instead of in a lump sum to Wendy. This is less

> desirable for Wendy and an unnecessary burden for Harold's executors, but might be necessary if Harold's estate does not have sufficient assets or liquidity to pay otherwise. From the perspective of the payor, many would prefer a monthly obligation, funded by and maintained through a testamentary insurance trust, if they see that they would retain control over the ultimate distribution of the insurance proceeds once the support obligation ends. This should, in our view, be raised with payor as part of the planning process. Others may prefer to have the estate or the insurance trustee use part or all of the proceeds, at its discretion, to purchase an annuity that would finance the required income stream. Any remaining insurance proceeds could then be distributed to the estate of the payor or among the children, if any.

Failure to Maintain Insurance - Charge on Estate

10.14 If the policy or the full amount of the policy is not in force on Harold's death:

(a) Harold authorizes a lien and first charge against Harold's estate for the full amount of the policy proceeds;

(b) all of Wendy's rights and remedies against Harold's estate are preserved.

> This term is inserted to protect against non-payment of the insurance and will be of significance if Harold lives beyond the age that term policies expire (usually 65 or 70). There may be no efficacy of a first charge against an estate. The estate may be bankrupt or of insufficient value. If insurance is not going to be available and support is critical to the recipient, then other forms of security must be considered.
>
> Support payable by an estate is not deductible by it and is not taxable in the hands of the recipient. Accordingly, the parties may wish to adjust the amount of support payable upon Harold's death. Out of an abundance of caution, the agreement could include a provision that the estate would pay the recipient's tax on any support payable by it. It is possible to make those payments deductible by the estate and taxable to Wendy, by the creation of a separate trust for that purpose under Harold's will, to the extent that trust income is used to pay the support to Wendy. Of course, that arrangement would have to be negotiated.
>
> In the event that sufficient insurance is not in place, Wendy's rights against the estate are preserved, including her right to apply for dependant's relief for herself or the children, pursuant to Part V of the *Succession Law Reform Act*, out of which a party cannot contract in any event.

Review of Policy Amount

10.15

(a) The policy amount [or the amount of the policy allocated to Wendy as the irrevocable beneficiary and/or to the child(ren) as the beneficiar(y)(ies)] that Harold is required to maintain will be reviewed every [number] years, on the anniversary date of the Agreement, for the purpose of determining the [change] [decrease] (if any) warranted by the circumstances at the applicable time.

(b) The following factors may be taken into account in setting the appropriate amount of

the policy:

i the support owed;

ii the estimated remaining period of the obligation;

iii any increase in premium or change in policy; and

iv any other [material] change in circumstance since the policy amount was last set.

(c) Harold and Wendy will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> A review clause is important given changing circumstances and the fact that insurance may become prohibitively expensive over time.
>
> A review clause is also important if the purpose of the life insurance is to secure the support obligations, particularly where the proceeds are paid to the beneficiary outright (versus through a trust), so that there is a mechanism for reducing the life insurance security as the support obligations decrease. See the commentary in the above clause "Spouse as Beneficiary Outright" regarding the decision of the Ontario Court of Appeal, *Turner v. Di Donato* (2009), 63 R.F.L. (6th) 251, where the wife obtained a windfall because the agreement failed to link the life insurance to the support obligation.
>
> In lieu of a reduction in the entire policy amount, the clause gives the option of a reduction in the amount of the policy allocated to the recipient as the irrevocable beneficiary or to the children as the beneficiaries instead (ie. maintaining the full quantum of coverage in place with the balance remaining over and above the payor's support obligation to be allocated as he/she chooses), since the payor may be uninsurable in the future or may have other purposes for that coverage.

Alternate - Automatic Reduction of Policy Amount by Specified Amount or Percentage

10.16 The policy amount [or the amount of the policy allocated to Wendy as the irrevocable beneficiary and/or to the child(ren) as the beneficiar(y)(ies)] that Harold is required to maintain will be automatically reduced every [number] years on the anniversary date of the Agreement by [$(amount)] [(number)%].

> If the purpose of the life insurance is to secure the support obligations, a review or reduction clause should be included, providing a mechanism for reducing the life insurance security as the support obligations decrease (see discussion in the above clause "Spouse as Beneficiary Outright" commentary regarding the Ontario Court of Appeal decision, *Turner v. Di Donato* (2009), 63 R.F.L. (6th) 251).
>
> In lieu of a reduction in the entire policy amount, the clause gives the option of a reduction in the amount of the policy allocated to the recipient as the irrevocable beneficiary or to the children as the beneficiaries instead (ie. maintaining the full quantum of coverage in place with the balance remaining over and above the payor's support obligation to be allocated as he/she chooses), since the payor may be uninsurable in the future or may have other purposes for that coverage.

Alternate - Automatic Reduction of Policy Amount according to Schedule

10.17 The policy amount [or the amount of the policy allocated to Wendy as the irrevocable beneficiary and/or to the child(ren) as the beneficiar(y)(ies)] that Harold is required to maintain will be automatically reduced on the following basis:

(a) effective [date], the amount required will be $[amount];

(b) effective [date], the amount required will be $[amount];

(c) effective [date], the amount required will be $[amount].

> If the purpose of the life insurance is to secure the support obligations, a review or reduction clause should be included, providing a mechanism for reducing the life insurance security as the support obligations decrease (see discussion in the above clause "Spouse as Beneficiary Outright" commentary regarding the Ontario Court of Appeal decision, *Turner v. Di Donato* (2009), 63 R.F.L. (6th) 251).
>
> In lieu of a reduction in the entire policy amount, the clause gives the option of a reduction in the amount of the policy allocated to the recipient as the irrevocable beneficiary instead (ie. maintaining the full quantum of coverage in place with the balance remaining over and above the payor's support obligation to be allocated as he/she chooses), since the payor may be uninsurable in the future or may have other purposes for that coverage.

Review if Material Increase in Premium Payments

10.18

(a) In the event that there is a [material] [(number)%] increase in the premiums, the life insurance clauses herein will be reviewed for the purpose of determining whether a decrease in the policy amount is warranted or whether the premiums should be shared between the parties in a proportion to be determined.

(b) Harold and Wendy will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> A review clause is important given changing circumstances and the fact that insurance may become prohibitively expensive over time.

Variable if Material Change in Circumstances

10.19

(a) The amount of life insurance that Harold is required to maintain is variable in the event of a material change in circumstances, whether that change is foreseen,

unforeseen, foreseeable, or unforeseeable.

(b) Harold and Wendy will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> This clause allows the life insurance requirements to be varied in the event of any material change in circumstances. Alternatively, you may wish to specify what events would be considered material.

11. Property

Equalization Payment

11.1

(a) [When this Agreement is signed] [Within five business days following the signing of this Agreement], Harold will make a payment to Wendy of $[amount] by certified cheque delivered before [time of day and date] to Wendy at [address] [or Wendy's lawyer at (address)].

(b) This payment is an equalization payment[, and upon full payment and completion of the balance of the property transfers and payments in this Agreement is] in full satisfaction of all claims under Part I of the *Family Law Act*[, including all claims with respect to Harold's pension interests] [, except for any claims by Wendy to an equalization/division of Harold's pension interests which are addressed separately in the Pension Section of this Agreement].

> If the amount is large, consider requiring that the equalization be paid by certified cheque and that the funds be delivered before 2:00 p.m. in order to avoid losing a day's interest. There are a number of methods of making payment, and counsel should set out which is being used: direct bank transfer, certified cheque, bank draft, etc.

Alternate - Deferred Payments

11.2

(a) Harold will make a payment by certified cheque to Wendy of $[amount] in [four] instalments:

i $[amount] by [date];

ii $[amount] by [date];

iii $[amount] by [date]; and

iv $[amount] by [date].

(b) These payments constitute an equalization payment[, and upon full payment and completion of the balance of the property transfers and payments in this Agreement are] in full satisfaction of all claims under Part I of the *Family Law Act* [including all claims with respect to Harold's pension interests] [except for any claims by Wendy to an equalization/division of Harold's pension interests which are addressed separately in the Pension Section of this Agreement].

Default Terms - Interest and/or Acceleration

11.3 If Harold does not pay Wendy on time, Harold will pay the amount due plus interest at the rate of [number] percent within 14 days [and/or the balance of the payments will become due immediately and Harold will pay the outstanding amount in full, together with interest at the rate of number percent compounded (period) from (date)] [and/or Wendy's spousal support release will be suspended and unenforceable by Harold until all amounts owing are paid] [and/or the balance owing shall constitute and be deemed to be a lump-sum spousal support payment to Wendy under the *Divorce Act*].

> There should always be an acceleration clause when there is a series of payments so that there is an incentive for the payor to pay on time. Compound interest can also be an effective deterrent to default; the type and term of interest should be specified. The parties may wish to consider whether to allow the payor a grace period before interest and any other potential financial penalties are triggered. As a further incentive, payment of the equalization/compensation payment could be linked to the spousal support release, ie. if the payor does not pay the recipient all of the amounts owing, the spousal support release will be voided. The recipient would then have the right to elect to enforce the Agreement or elect to treat the Agreement as at an end and proceed with all original claims against the payor. An additional incentive may be to treat the full amount of the remaining balance as a lump sum spousal support payment.

Security for Payment

11.4 When Harold signs this Agreement, Harold will also sign [form of security, e.g., General Security Agreement, pledge of shares, a mortgage, etc.], attached as a Schedule to this Agreement.

> This is an important clause when an equalization/compensation payment is paid over time. It protects the recipient if the payor becomes bankrupt. In cases where the equalization/compensation payment is substantial and there are timed payments, a commercial lawyer should be consulted to assist in drafting and registering the appropriate security agreement. Counsel need to keep in mind the nature of the security and the problems that arise with the registration and enforcement of the security. If a mortgage is negotiated as security, proper title and execution searches are required.
>
> There are a number of types of security. One method frequently overlooked is an irrevocable letter of

> credit from a chartered bank. This usually costs the payor spouse 1% of the amount being paid. Sometimes the parties may negotiate a somewhat lower equalization payment over time in return for the security and the resulting peace of mind it brings. However, letters of credit are usually only available for one year at a time and the parties will have to make special terms if the payment period is longer than this.
>
> If the payor is going to provide shares as security, an escrow agreement will likely be necessary. Escrow agreements are complex. There must be an escrow agent with specific directions for timing the release of shares. Shares of a private company are rarely good security since the security terms can often be defeated. It should be "security" of last resort and a corporate lawyer should be consulted.

Alternate - Security for Payment

11.5 To secure this payment, Harold will irrevocably direct Harold's RRSP plan holder to prohibit Harold from collapsing or transferring their RRSP without Wendy's written consent until the equalization payment[, together with all other property transfers or payments in this Agreement, are] [is] paid, substantially in the form of the attached Schedule "Direction to RRSP Planholder".

> An RRSP cannot usually be used for security, as the pledging of an RRSP will cause it to be deregistered (see s. 146(2)(c.3)(ii) of the *Income Tax Act*) and trigger tax consequences, thereby significantly reducing the value of the security. This clause, however, irrevocably directs the payor's RRSP plan holder to prevent the payor from dealing with the RRSP without the recipient's written consent. Not all RRSP trustees will take these instructions, of course.
>
> If the RRSP is not an insurance plan, then the recipient could obtain judgment and execute against the RRSP. This arrangement keeps the RRSP in place until the payor has fulfilled his/her obligations.

Bank and Investment Accounts

11.6

(a) When this Agreement is signed, [name] will transfer to [name]'s account [number] at [name of bank, address, branch number] fifty percent of [his] [her] investment account [number] at [name of bank, address, branch number], calculated as of [date].

(b) Harold and Wendy will divide equally the balance of their joint account [number] at [name of bank, address, branch number].

(c) Except as otherwise provided in this Agreement, Harold and Wendy will each keep their own bank accounts.

RRSP Transfers

11.7

(a) On signing this Agreement, [planholder] will rollover from [his] [her] RRSP to [recipient]'s RRSP $[amount] of [his] [her] [cash or stocks - describe RRSP] RRSPs in [name of institution/mutual fund, etc.] pursuant to s. 146(16) of the *Income Tax Act*. [Planholder] will also complete Form T2220 and deliver it immediately to [recipient] to effect the rollover.

(b) [Planholder] confirms that these RRSPs are not locked in and are available now for [recipient] to transfer to other RRSP assets or collapse. [Planholder] also confirms that [recipient] is not liable for any commissions or other charges on the transfer or collapse of these RRSPs except [his] [her] own income tax.

> Form T2220 is the current CRA form used to rollover one spouse's RRSP to the other spouse. The form can only be completed when the parties have a written separation agreement or there is a court order to deal with the RRSP. The form requires the parties to insert the amount of the rollover. But more detail should be included in the Agreement. An RRSP could consist of term investments, "GICs", bonds, stocks and, in some cases, mortgages. The parties need to be clear about what assets are being rolled over and the RRSP asset statements must be carefully reviewed so that each party understands the assets to be transferred and received. The parties should also agree on the date upon which the RRSP rollover is to be effective since RRSP assets, particularly if they are held in equities, can vary dramatically depending on the vagaries of the markets.
>
> RRSPs may be locked in. The recipient may intend to use part of the RRSP to purchase a new home, only to find that the RRSP is a LIRA and cannot be cashed. The parties must be very clear as to what is being transferred and counsel must verify that the RRSP can be rolled over and dealt with by the recipient in the way in which the parties intended.

Shares

11.8 On signing this Agreement, [transferor] will transfer all [his] [her] shares in [name of company] to [transferee] and resign as officer and director. [Transferee] will pay for the preparation of the necessary documents. [Transferee] indemnifies [transferor] from all debts, obligations and liabilities of the company, whether incurred before or after the date of this Agreement, and from any liability arising from [transferor]'s role as officer and director of the company. [Transferor] will not perform services similar in nature to those [s]he performed for [name of company] within [distance] kilometres of the company [for a certain period of time]. [Transferor] releases [his] [her] rights against the company, its officers, directors and employees.

> If the parties are in business together and one party is to retain the company following the settlement, the parties should consider whether a non-competition term is necessary or advisable. If so, counsel should consult an employment or corporate lawyer to review the nature and scope of non-competition terms. Non-

> competition terms that are unreasonable are not enforceable and the nature of the business and the employment of the parties need to be taken into account in drafting such a term.

Transfer of Capital Property as a Rollover

11.9 On signing this Agreement, [transferor] will transfer to [transferee] the [capital asset] as a tax-free rollover.

11.10 Harold and Wendy will execute and file with their personal income tax returns for the year this Agreement is signed, the joint election attached to this Agreement as a Schedule ("Joint Election Under Section 74.5(3)(b) of the *Income Tax Act*") not to have the taxable capital gain attribution provisions of the *Income Tax Act* apply to dispositions of property by either party after the date of this Agreement. The transferee indemnifies the transferor from all tax liability relating to the transferred property.

> Counsel must be very careful about the transfer of capital property. If capital property is transferred between spouses pursuant to a properly drafted separation agreement, it is transferred at its Adjusted Cost Base (ACB) and the tax consequences are deferred until the transferee sells the property. If this happens before they are divorced, the parties must have executed a joint election to avoid attribution of capital gains to the spouse who transferred the property. An example of the joint election is appended to this agreement as a Schedule. See clause "Indemnity for Tax Liabilities" below for the term counsel must include to avoid attributing the capital gain back to the transferor if a subsequent transfer takes place before a divorce.

Alternate - Transfer of Capital Property at Fair Market Value

11.11

(a) On signing this Agreement, [transferor] will transfer to [transferee] the [capital asset] at its fair market value of $[amount].

(b) [transferor], as transferor, will elect in [his] [her] income tax return in the year the transfer is made not to have the terms of s. 73(1) of the *Income Tax Act* apply.

> (a): Although a transfer between spouses will automatically be a rollover, with the transferee taking the capital property at the ACB of the transferor, in some cases, the parties may elect to have the transfer take place at fair market value (FMV). In that case, one of the parties has to make the election pursuant to s. 73(1) of the *Income Tax Act* and file the election with his or her tax return. This will not be the usual way property is transferred between spouses pursuant to a separation agreement, but there are significant advantages for the recipient to receive the property with a much higher cost base so that when the property is sold he or she will pay less tax. The recipient spouse may be willing to offer something in return to achieve this so-called "bump-up" to a higher cost base. The problem that arises on transferring property at fair market value is that it triggers tax immediately for the transferor.

> This area of law is a potential minefield for lawyers who do not fully understand and appreciate the tax consequences. Whenever capital property of significant value is being transferred, a tax lawyer and/or accountant should be consulted to ensure that there are no unintended tax consequences for either party. If the parties are transferring at fair market value, they need careful tax advice. They also need to include a tax adjustment term in the agreement because of the potential risk that CRA may not accept the FMV chosen by the parties and may consider that the transferor owes more tax or that the property was overvalued and, therefore, the recipient spouse will have more tax to pay when he or she disposes of the property.
>
> (b): This clause only applies where the parties have elected not to have the rollover terms apply and the transfer will take place at fair market value. This means the transferor will pay the capital gains tax at the time of the transfer and the transferee will get the "bump up" referred to in (a) above.

Vehicles

11.12 [Driver] has possession of the [vehicle]. [Owner] will immediately transfer its ownership to [driver]. [Owner] will sign any documents necessary to ensure that [driver] will not pay any sales tax on the transfer. [Owner] will maintain the vehicle insurance until the transfer. [Owner] will indemnify [driver] from any loss [driver] incurs if [owner] fails to do so. From the date of the ownership transfer, [driver] will insure the vehicle.

> Counsel and the parties must specifically consider who should bear the costs of the transfer, as well as income tax and insurance issues. For example, car insurance is often prepaid. If vehicles are being transferred out of a company, there are tax consequences such as recapture of depreciation, which must be taken into account.

Air Rewards

11.13 Harold and Wendy will share equally their respective, accumulated air rewards [as of the date of separation/this Agreement]as follows:

(a) If the air rewards plan (eg. Air Miles) permits a direct transfer between accounts, then the party with the higher number of air rewards will transfer one-half of the difference between the parties' air rewards to the other party's account. The parties will cooperate in effecting the transfers and will sign any direction required to authorize the transfer.

(b) If the air rewards plan (eg. Aeroplan) does not permit a direct transfer between accounts, then the party with the higher number of air rewards will pay the cash equivalent of one-half of the difference between the parties' air rewards to the other party, or at the other party's option, will arrange to book airline ticket(s) on behalf of the other party equal in value to the other party's entitlement by no later than [specify date for booking].

(c) If the air rewards plan does not permit a direct transfer between accounts, or if the air rewards cannot be valued in cash, then the party with the higher number of air rewards will arrange to book airline ticket(s) on behalf of the other party equal in value to one-half of the difference between the parties' air rewards by no later than [specify date for booking].

> You should check with the particular air rewards plan to see if they allow transfers of air rewards or if they allow purchase of air rewards in cash. As the air rewards plans appear to change fairly often this should be done on each and every occasion.
>
> You may wish to be more specific in this clause and outline the precise number/value of air rewards to be transferred between the parties.

Indemnity for Tax Liabilities

11.14

(a) To the best of [transferor's] knowledge, [transferor] is not liable for any income tax for a period of time before the date of this agreement;

(b) [Transferor] has paid or will pay when due, any income taxes owing or installment payments due;

(c) If [transferee] becomes liable for income tax under s. 160 of the *Income Tax Act* or if any property transferred to [transferee] is charged for payment of income taxes for which [transferor] is liable, [transferor] agrees to indemnify [transferee]; and

(d) [Transferor's] indemnification of [transferee] will be enforceable as a consent to judgment in favour of [transferee] and against [transferor] in the amount of the liability, plus the costs incurred to obtain the judgment and enforce it.

> Although an indemnity is not, strictly speaking, necessary where property is transferred pursuant to an agreement and the parties are living separate and apart at the time of transfer, we have included this indemnity clause out of an abundance of caution.
>
> Indemnification agreements can be problematic. For instance, bankruptcy will render the indemnity meaningless. In addition, if the person giving the indemnity defaults on the primary debt, CRA may well chase the other party. Accordingly, when releases cannot be obtained and an indemnity is the only reasonable solution, security of some form should be considered for the term of the indemnity. See the "Security for Payment" clauses above.

Property and Support Interdependent

11.15 The spousal support and property sections of this Agreement are interdependent and inextricably intertwined. Together, they fully satisfy the support objectives set out in the

Divorce Act and the *Family Law Act*.

> This clause is designed to discourage a re-opening of support issues. It allows the payor spouse to argue that, because the support and property sections were interdependent and intertwined, the re-opening of support must then also re-open the property settlement. We have no reason to believe that this clause will be any more successful than other releases that the courts have overridden. If the equalization payment was accurately calculated in the first place, then there is no additional benefit or risk. On the other hand, this term may have some efficacy if it can be argued that the recipient spouse was paid a premium in order to release support.

Alternate - Interdependent Clause

11.16 The spousal support and property sections of this Agreement are interdependent and inextricably intertwined in that they:

(a) fully satisfy the support objectives set out in the *Divorce Act* and the *Family Law Act*;

(b) recognize any economic advantages or disadvantages to the parties arising from the marriage or its breakdown;

(c) apportion between the parties any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(d) relieve any economic hardship to the parties arising from the breakdown of the marriage;

(e) insofar as is practicable, promote the economic self-sufficiency of each party within a reasonable period of time;

(f) recognize each party's contribution to the relationship and the economic consequences of the relationship for the party;

(g) share the economic burden of child support equitably;

(h) fairly assist the parties to become able to contribute to their own support; and

(i) relieve all financial hardship.

> This is an attempt to replicate the language of the applicable statutes.

12. Matrimonial Home

Ownership - Joint / Tenants-in-Common

12.1 The parties own the matrimonial home jointly [or as tenants-in-common].

> Spouses may wish to sever existing joint tenancies. Counsel should canvass early on whether a client wishes the right of survivorship to continue. If a tenancy-in-common is to be substituted, a party can transfer his or her interest as joint tenant to him or herself as tenant-in-common. This can be done at any time without the consent of the other party.

Alternate - Ownership - Sole

12.2 Wendy is the sole registered owner of the matrimonial home.

Severance of Joint Tenancy

12.3 The parties hereby sever the joint tenancy in the matrimonial home and now hold the matrimonial home as tenants-in-common.

Transfer of Home in Settlement

12.4 On signing this Agreement, Harold will transfer all rights, title and interest in the matrimonial home to Wendy, free of all encumbrances [except for the existing mortgage in the amount of $(amount), in favour of (name of mortgagee) (the "existing mortgage")]. Wendy will pay the cost of the preparation and registration of the transfer.

> This simple clause will work only when the home is unencumbered. If the transferee assumes a mortgage or there are executions against the parties, they must be specified. Title should be searched prior to the parties finalizing the agreement and a subsearch should be conducted immediately before execution to ensure nothing unknown is registered on title. Alternatively, the transferor could warrant that there are no encumbrances and can be responsible for the costs of removing any encumbrances. The transferor may be met with an unusual cost for removing encumbrances that perhaps neither party knew existed, such as old mortgages or old liens. Accordingly, it is important to examine title before the parties finalize the Agreement.

Alternate - Transfer of Home for Value

12.5 On signing this Agreement, Harold will transfer all rights, title and interest in the matrimonial home to Wendy for [$amount] [value calculated below]. Wendy will pay the cost of the preparation and registration of the transfer.

Mutual Transfer of Home and Cottage

12.6 On signing this Agreement:

(a) Harold will transfer all rights, title and interest in the matrimonial home to Wendy, free of all encumbrances [except for the existing mortgage in the amount of

$(amount), in favour of (name of mortgagee) (the "existing mortgage"),] and

(b) Wendy will transfer all rights, title and interest in the cottage to Harold, free of all encumbrances [except for the existing mortgage in the amount of $(amount), in favour of (name of mortgagee) (the "existing cottage mortgage")].

(c) Wendy will pay the cost of the preparation and registration of the matrimonial home transfer and Harold will pay the cost of the preparation and registration of the cottage transfer.

> This is a tax-free rollover from one spouse to another, but counsel should remember to take into account the fact that the parties can only have one principal residence and that the subsequent sale of one of these properties may well attract capital gains tax to one of the parties. See commentary in clause "Transfer of Home in Settlement" above regarding the potential problem with encumbrances.

Encumbrance Registered before Transfer

12.7 If any encumbrance is registered on title after the date of this Agreement but before the transfer, the responsible party will immediately remove it and fully indemnify the other from all liability relating to it.

> Counsel need to be concerned with encumbrances that could be registered on title after separation or the signing of the Agreement, but before transfer, that relate to only one of the spouses. An example would be a legal aid lien.

Value of Matrimonial Home

12.8 The parties agree that the value of the matrimonial home is $[amount] [, as determined by (specify name of real estate appraiser)].

Alternate - Value of Matrimonial Home by Jointly Retained Appraiser

12.9 If Harold and Wendy cannot agree on the value of the matrimonial home, it will be determined by a jointly retained, qualified real estate appraiser.

Alternate - Value of Matrimonial Home by Average Appraisals

12.10 If Harold and Wendy cannot agree on the value of the matrimonial home, it will be determined as follows. Harold and Wendy will each select a qualified real estate appraiser who will appraise the home. They will then exchange these appraisals and if they are within ten percent of each other, the value will be the average of the two. If the appraisals are not within ten percent of each other, the two appraisers will select a third appraiser to prepare a third appraisal. The two closest appraisals of the three will be averaged, and the value will be

the average of the two appraisals. If either Harold or Wendy is purchasing the other's interest in the property, the purchaser may deduct [number] percent of notional real estate commission and legal expenses of [number] percent from the value.

> The parties should consider what, if any, notional real estate commission should be deducted in determining the value of the home and how they wish to have it valued. This clause raises the possibility of three appraisals, which can be expensive. The parties can name in advance the person they wish to do the appraisal. It is important in this type of clause to be very specific as to how the value is to be determined and what deductions are to be made in determining the value. In determining value for purchase by one party, the parties need to consider whether notional real estate commission must be taken into account. Real estate commission can range anywhere from 3% to 6%, or higher, if the matrimonial home is a rural property. If the home will not be sold for a long time, the deduction should be "present valued" or discounted. If the sale of the house is imminent, real estate commission should be taken into account

Existing Mortgage - Release or Indemnity

12.11 Wendy will use best efforts to immediately obtain a release of Harold's mortgage obligations on the existing mortgage. If Wendy cannot obtain Harold's release from the existing mortgage, Wendy indemnifies Harold for all claims the lending institution may make against Harold on the existing mortgage. Wendy will be responsible for all penalties, interest and costs resulting from this existing mortgage.

> The parties must decide how the transferor will be released from the mortgage since leaving him/her as a mortgagor may make it difficult for him/her to get a new mortgage on another property. Mortgage companies will usually refuse to release a co-mortgagor or guarantor unless they are satisfied of the transferee's ability to pay the mortgage or that the home is more than sufficient security for the mortgage. It is also possible that if the transferor remains on the mortgage and the transferee later sells the property and there is a shortfall, the transferor would still be responsible on his/her personal covenant. This is another good reason for attempting to ensure that the transferor is released from the mortgage at the time of the transaction. Sometimes, however, a release is not possible to get.
>
> The alternate clause that follows is more draconian than this clause which provides only an indemnity. An indemnity is worthless to the transferor if the transferee were to go bankrupt and, accordingly, it is not the best protection. The best protection is contained in clause but that may be a very expensive route to go down and the parties may not wish to put the transferee to that expense. The answer probably lies in striking a reasonable balance. That is, if there is very significant equity in the home, the refinancing is probably unnecessary. If, however, the home is heavily mortgaged, the transferor should strive for the best protection available, which is a refinancing and a release to him/her.

Alternate - Existing Mortgage - Release or Refinance

12.12 Wendy will use best efforts to immediately obtain a release of Harold's mortgage obligations

on the existing mortgage. If Wendy cannot obtain Harold's release from the existing mortgage, Wendy will refinance the home and discharge the existing mortgage. Wendy will pay any penalties resulting from this refinancing.

> See commentary under the immediately preceding clause "Existing Mortgage - Release or Indemnity".

Principal Residence

12.13 On signing this Agreement, Harold and Wendy will each designate the matrimonial home as their principal residence from the year of purchase until the year of Harold's transfer to Wendy [or the year the Agreement is signed], and neither will designate another home as a principal residence during this time period. If either becomes liable for income tax resulting from the other's breach of this term, the breaching party will be liable for the other's tax.

> If the parties own various properties, they must address which one will receive the principal residence exemption for each of the relevant years prior to the signing of the agreement. The parties can only designate one property as his or her principal residence for each year until the year after the agreement is signed. However, the "one plus" rule permits parties a free year which can be applied to the year in which the separation agreement is signed. Counsel should give specific consideration to this issue.

Date for Completion of Transfer and Sanctions for Delay

12.14 The transfer of the matrimonial home [and cottage] is to be completed no later than [60] days from the date this Agreement is signed. In the event that the transfer has not been completed by that date, [set out sanctions to be imposed].

> A timeframe for completion of the transfer should be included in the Agreement, failing which, sanctions should be imposed. The sanctions could be anything from monetary fines to be paid by the transferring party, increasing as time elapses, to a reduced purchase price if the home is to be purchased for value. Counsel can be as creative as they wish and should give specific consideration to this issue.

Release of FLA Part II Rights in the Matrimonial Home

12.15 [Once the transfer of the matrimonial home has been completed,]Harold releases all rights in the matrimonial home under Part II of the *Family Law Act*.

> This release of rights under Part II of the FLA (ie. right of possession; right to dispose of or encumber the matrimonial home without spouse's consent) is necessary under s. 21(b) of the FLA to allow the transferee to deal with the property as he/she wishes in the future.

Agreement to List and Sell

12.16 Harold and Wendy will list the matrimonial home for sale by [date] with a realtor. They will accept the first reasonable offer to purchase the property. If they cannot agree on sale terms, Harold and Wendy will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> This clause assumes that the parties will cooperate on the sale of the home. In high-conflict cases, this clause may need to be more detailed, including the listing price and minimum acceptable sale price, the date of the listing, the name of the agent, the length of the listing and how the property is to be maintained and shown during the listing agreement. Even with detailed terms, a dispute resolution mechanism is advisable since parties who do not wish to sell a home may find ways to interfere with the sale process. Alternatively, the parties can include a clause providing for consent to a judicial sale if they cannot reach accord.

If Agreement Cannot be Reached

12.17 If they cannot agree on any sale terms, Harold and Wendy consent to a judicial sale under section 23 of the *Family Law Act*. Either may apply to court on short notice for approval of the acceptance of an offer to purchase.

> Again, in high-conflict cases, the Agreement might provide for one party to have carriage of the sale since joint carriage may result in no sale at all. If the parties are not joint owners or tenants-in-common, in the absence of agreement that either may apply to the court for directions on the sale, only the owner of a property may apply to the court for assistance.

Exclusive Possession Until Sale

12.18 Wendy will have exclusive possession of the matrimonial home until the sale closes, and will pay [utilities, mortgage, insurance, common expense charges, cable T.V., gardening, snow removal, alarm monitoring and maintenance]. Harold and Wendy will equally pay [realty taxes, repairs over $ (amount)].

> If there is any prospect that the home may not sell quickly, this clause may have to be extended. That is, the parties may wish to consider whether the transferee's exclusive possession should terminate upon his/her cohabitation with another person or remarriage. The transferee may not be able to pay the expenses if the sale does not occur reasonably quickly and, accordingly, the parties may wish to review this clause in the event that the home has not sold, say, within six months.

Household Expenses

12.19 For the purposes of this Agreement:

(a) "daily household expenses" in connection with the matrimonial home means:

i utilities;

ii water and sewer fee;

iii electricity;

iv telephone; and

v repairs that are not major repairs.

(b) "major repairs" means repairs required to preserve the matrimonial home or maintain it in a marketable condition, such as:

i roof repairs;

ii exterior repairs;

iii exterior painting;

iv major plumbing or electrical repairs; and

v replacement of:

1. chimney;

2. hot water tank;

3. furnace;[air conditioning; air cleaner; humidifier;]

4. major appliances; [and]

5. [swimming pool]

but does not include remodelling or redecorating.

(c) "major expenses" of the matrimonial home means:

i major repairs;

ii premiums on [type of] insurance;

iii mortgage payments; and

iv property taxes.

12.20 Wendy will pay the daily household expenses.

12.21 Harold and Wendy will pay equally the major expenses [or percentage split or one pays and is to be reimbursed from sale proceeds].

12.22 Neither party will arrange for major expenses without the other's prior consent, in writing.

> The above clauses are detailed maintenance and sale terms for high-conflict cases.

Sale Proceeds

12.23 The parties will direct the lawyer on the sale to pay these expenses from the matrimonial home sale proceeds:

(a) real estate commission;

(b) adjustments for taxes, utilities, municipal fees or levies;

(c) amounts required to discharge registered encumbrances;

(d) legal fees and disbursements relating to the sale; and

(e) all other sale adjustments.

12.24 From the net proceeds, before distribution between the parties, they will:

(a) pay to [name] as agreed $[amount];

(b) reimburse Harold $[amount], as agreed; and

(c) pay the [institution] to retire the parties' [joint credit card debt or personal credit line] of $[amount].

12.25 After paying these amounts, the remaining proceeds will be divided [equally] between the parties.

> Great care should be taken in detailing the division of sale proceeds. Occasionally, the encumbrances will exceed the net proceeds of sale. In these cases, counsel must deal with the shortfall.

Mortgage Renewal

12.26 While Wendy has exclusive possession of the matrimonial home in accordance with this Agreement, Harold will execute or guarantee:

(a) any mortgage renewal, [and] [or]

(b) any mortgage replacement, provided the principal amount secured does not exceed $[amount].

12.27 Wendy will indemnify Harold from any expense or loss incurred by Harold as a result of co-signing or guaranteeing the mortgage.

> See clause "Mortgage/Continuing Obligation" in the "Debts" section below for an alternative.

Ownership Until Sale

12.28 Harold and Wendy hold title to the matrimonial home as joint tenants [or tenants-in-common]. They will continue to hold title jointly until the matrimonial home is sold. [Neither

party will sever the joint tenancy.]

> See the commentary regarding joint tenancy and tenancy-in-common following the clause "Ownership - Joint / Tenants-in-Common" above. If the parties do not intend to sever the joint tenancy, the agreement should specify this intention. Otherwise, the case law suggests that a separation agreement dealing with the property may automatically sever a joint tenancy. If a tenancy-in-common regime is utilized, the parties should be reminded to make new wills as soon as possible.

When Home to be Sold

12.29 Harold and Wendy will sell the matrimonial home when:

(a) [the youngest child] leaves or completes high school;

(b) Wendy remarries or cohabits in a relationship resembling marriage for more than [number] months; or

(c) [date].

> This is intended to protect the children by letting them stay in the matrimonial home unless the transferee remarries or cohabits. It may be that the children should remain in the matrimonial home regardless of whether the transferee remarries or cohabits, but this is a matter of negotiation. We intend "cohabits" to mean a conjugal relationship, including same-sex relationships. It does not include the transferee bringing her sister or a platonic friend to live with her. If that is also to trigger a sale, then the parties have to specifically provide for it.

Household Contents Already Divided

12.30 Harold and Wendy have divided their household contents.

Household Contents Divided per Schedule

12.31 Harold and Wendy have divided their household contents as set out in a Schedule attached to this Agreement.

Household Contents to be Divided with Assistance if Necessary

12.32 Harold and Wendy will equally divide their household contents. Once all household contents have been divided, the parties will execute the Acknowledgement Regarding Division of Household Contents, attached as a Schedule to this Agreement. If the parties cannot agree on a division, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the issue.

> We have used the word "equally" to give direction to the mediator/arbitrator if the parties cannot agree.

> This term does not require that sets are to be kept intact, which is a very common term, so that the arbitrator has the right to divide silverware or crystal. If the parties do not want the arbitrator to have this right, they should specify. Moreover, if the property is to be divided in value rather than in specie or if ownership is to be relevant, the term should be clear.
>
> Most parties do not understand how contents are dealt with under the *Family Law Act*. They believe that all contents are divided equally, regardless of how they were acquired. In fact, ownership remains relevant. In longer marriages, it is harder to prove who bought what contents, and most were bought using a joint credit card or through a joint account. But this is not always the case.
>
> In high-conflict cases, it is always more useful to have a schedule when considering contents. Counsel and parties must not forget that the contents of all homes, including recreational properties, should be included. Some of the property being transferred might attract capital gains tax. Although lawyers rarely deal with this issue, consider, for example, that a piece of art purchased by one party in 1984 for $10,000.00 and now worth $100,000.00 has a capital gains component on which the parties may have to pay tax if the art is sold. Also bear in mind that if contents are in fact owned by a company, there may be additional corporate tax consequences that need to be taken into account.

Alternate - Household Contents to be Divided on an Alternating Basis

12.33 Harold and Wendy will equally divide their household contents. Once all household contents have been divided, the parties will execute the Acknowledgement Regarding Division of Household Contents, attached as a Schedule to this Agreement. If the parties cannot agree on a division, they will divide the household contents on an "I pick, you pick" basis with a coin toss to determine which of the parties is to have first pick.

> See the commentary in the immediately preceding clause.

13. Debts

Joint Debts

13.1

(a) Harold and Wendy have the following debts in their joint names:

i [debt];

ii [debt]; and

iii [debt].

(b) Harold will be responsible for [name debt and proportion, if appropriate].

(c) Wendy will be responsible for [name debt and proportion, if appropriate].

(d) If Harold or Wendy becomes liable for a debt the other has assumed, the party who has assumed the debt will fully indemnify the other.

> This clause and the following one establish which party is responsible for various debts. In addition to setting out the party responsible where the debts were joint debts, it is advisable for the party assuming the debt to obtain a release of the other party from the creditor so that there is no risk that, in a subsequent bankruptcy, the other party is left responsible for it, notwithstanding the agreement. In all cases where one party can remove the other's name from the liability, he or she should be obliged to do so.

Separate Debts

13.2 Harold and Wendy will each be solely responsible for payment of each one's own personal debts and liabilities, which include:

(a) [debt];

(b) [debt]; and

(c) [debt];

and will indemnify the other from any expense or liability with respect to each one's own personal debts and liabilities.

Credit Cards

13.3

(a) When this Agreement is signed, Harold and Wendy will terminate the following credit cards:

i [credit card and account #];

ii [credit card and account #];

iii [credit card and account #]; and

(b) Harold will be responsible for any balance owing on [credit card(s) and account #(s)].

(c) Wendy will be responsible for any balance owing on [credit card(s) and account #(s)].

> This clause has both parties agreeing to terminate all joint credit cards or credit cards where one party is the primary card holder and the other party is a secondary card holder, or vice versa so that there is no risk that one party can use the credit card unilaterally and require the other party to be responsible for his or her charges.
>
> This clause also enables the drafter to specify that one party in particular may be responsible for the balance owing on a particular credit card if the parties know at the time the separation agreement is drafted that other party has incurred charges on a credit card post valuation date without the other party's consent.

> In this manner, the party who did not incur the charges on the credit card will not be responsible for paying such charges subsequent to the agreement being signed.
>
> It is important to remember that many parties continue to use his or her spouse's credit card after valuation date without the consent or approval of that spouse. To safeguard against your client being left with the sole responsibility for paying the bills in connection with such credit cards subsequent to a separation agreement being signed, it is important to turn your mind to this clause to ensure that this does not occur.

Joint Credit Line/Mortgage

13.4 Harold and Wendy are both liable to [institution] for [line of credit/mortgage/collateral mortgage]. [Specify party] will assume full responsibility for this debt and will use best efforts to arrange [specify other party]'s release from it. Whether or not [specify party] is able to arrange [specify other party]'s release, [specify party] will fully indemnify [specify other party] from the debt.

> This clause outlines that one party (usually transferee of property) is to be responsible for the parties' joint line of credit which is secured against the matrimonial home/residence. It acknowledges that even though the line of credit is in joint names and both parties are liable to the bank for the credit line, that one party is to assume sole responsibility for this debt and use his/her best efforts to obtain a discharge of this debt for the other party. It also outlines that if the party is unable to secure a release from the bank to the other party, that party will indemnify the other party in relation to this line of credit.
>
> The import of this clause is to ensure that even if the bank will not release the other party from the responsibility in connection with the line of credit, which is often the case in a jointly held property that has a jointly held debt associated with it, that the party specified is to assume full responsibility for the debt if the bank looks to the other party for repayment after the Agreement is signed. It is advisable to ensure that this clause forms part of the Agreement if your client is responsible for a debt secured against a joint asset so that if the bank attempts to enforce the debt against your client, your client has recourse against the other party. This clause can then be used by your client in any litigation that may arise between the bank and the parties as a statement of the other party's intention and evidence that the other party is to indemnify your client in connection with any responsibility toward this line of credit.
>
> In both this clause and the clause "Credit Cards" above, you are attempting to safeguard a party being left responsible for a joint credit card bill or a joint line of credit if the other party defaults in paying either. These clauses, therefore, do not protect the party if the other party goes bankrupt, because the indemnification provision then becomes useless. The best protection for the party is for the other party to immediately retire the debt and obtain a release from the creditor in favour of the party. If, however, there are not sufficient funds for the other party to retire the debt, then the party has to be aware that he/she may be called upon to pay these debts.

Family Loans

13.5 [specify party]'s family loaned Harold and Wendy $[amount], which is evidenced by a

promissory note. [specify party] will assume full responsibility for this debt and indemnify [specify other party] from it. [specify party] will also obtain [specify other party]'s release from the debt, and provide proof at the time this Agreement is signed.

> This clause serves as a reminder that, upon the Agreement being signed, the parties should be as free of each other as possible. Therefore, it is necessary to canvass all potential obligations and liabilities, including family loans.

Mortgage/Continuing Obligation

13.6 Wendy has exclusive possession of the matrimonial home, which is mortgaged to [institution]. Harold will continue to guarantee the mortgage until Wendy's period of exclusive possession ends when Wendy will use best efforts to remove Harold from the guarantee. Harold will sign all renewals within one week of Wendy providing Harold with a copy for signing.

> See the clause "Mortgage Renewal" under the "Matrimonial Home" section above for an alternative.

Loans between Parties

13.7 [Name] loaned [Name] $[amount] in [year]. [Name] forgives that loan completely and does not expect any form of repayment.

Pledge of Credit

13.8 Neither Harold nor Wendy will pledge the credit of the other or bind the other for any debts either may incur after the signing of this Agreement. Harold and Wendy acknowledge that they have not pledged the credit of the other since separation.

Indemnities

13.9 A party who is under an obligation in this Agreement to reimburse or indemnify the other will:

(a) pay the other's expenses, damages or loss, including costs arising from the party's obligation to reimburse or indemnify; and

(b) indemnify the other from:

i any amounts paid by the other with respect to the liability, plus interest on the amount at [number] percent a year compounded annually; and

ii actual legal fees and disbursements incurred by the other.

Enforcement of Indemnification

13.10 In this Agreement, one party's indemnification of the other with respect to a debt will be enforceable as a consent to judgment in favour of the party owed the indemnity and against the party owing it [can be more specific if the debts are specifically listed] in the amount of the liability, plus the costs incurred to obtain the judgment and enforce it.

> Indemnification agreements can be problematic. For instance, bankruptcy will render the indemnity meaningless. In addition, if the person giving the indemnity defaults on the primary debt, the lender may well chase the other party. Accordingly, when releases cannot be obtained and an indemnity is the only reasonable solution, security of some form should be considered for the term of the indemnity. See the "Security for Payment" clause and its associated commentary in the "Property" section above for more detail.

14. Pensions

> This Part deals with Canada Pension Plan ("CPP") credits, Ontario provincial pensions under the *Pension Benefits Act* ("PBA"), and federal government/public service pensions under the *Pension Benefits Division Act* ("PBDA"), which are divisible at source. We do not currently deal with federal pensions governed by the *Pension Benefits Standards Act* ("PBSA").
>
> Given that the division of a pension pursuant to the applicable pension legislation requires the cooperation of the pension plan administrator, It is strongly recommended that before any agreement respecting pensions is finalized, the pension section of the draft agreement be reviewed in advance by the pension plan administrator so that any potential issues with the enforceability and applicability of the clauses can be addressed in advance.

PART A: Canada Pension Plan

14.1 Either party may apply for a division of Canada Pension Plan credits.

> Parties cannot contract out of a division of Canada Pension Plan credits. Any agreement prohibiting a party from seeking a division of credits is unenforceable. Parties may not wish to include this term because they see it as an invitation to the other spouse to apply for the division. On the other hand, counsel have an obligation to explain to their clients that the Government of Canada has decreed that, upon separation or divorce, the Canada Pension Plan credits may be divided upon application. When a divorce petition is issued, the Government of Canada sends the Canada Pension Plan application to the address of the respondent. The parties need to be reminded of the Canada Pension Plan terms so that they are not surprised when their pensions are affected. Some cases have held that if the parties agree not to apply for a division of pension plan credits and one party does in contravention of the agreement, that party holds the Canada Pension Plan benefits in trust for the other spouse. We do not believe these cases can be relied on.

PART B: Pension under the Pension Benefits Act - Intention to Equalize and Divide Pension per PBA

14.2 Harold is a[n active] [retired] [former] plan member of [specify name of Plan], a pension plan subject to the *Pension Benefits Act*. The Family Law Value of Harold's pension interests (defined below):

(a) is property to be equalized within the meaning of the *Family Law Act*;

(b) will not be included in Harold's net family property in the Property Part above; and

(c) will instead be divided and shared with Wendy according to the PBA and the terms of this Part of the Agreement.

> Rather than including the value of any PBA pension in the equalization payment provided in the "Property" Part above, this clause carves out the equalization and division of the pension for determination in accordance with the PBA and this Part of the Agreement.
>
> Note, however, that the Family Law Value of Harold's pension interests is in pre-tax dollars, and so the contingent tax consequences will have to be considered separately (see the clause "Tax Consequences" and its associated commentary below).
>
> As well, if the pension is already in pay at the time of separation, the Family Law Value of a spouse's survivor benefits will be calculated by the Plan Administrator, but there is no mechanism for dividing it in the PBA legislation/regulations/Pension Forms. Therefore, the Family Law Value of a spouse's survivor benefits should be included in the spouse's net family property and equalized in a separate section in this Part of the Agreement or as part of the equalization payment in the "Property" Part above.
>
> General:
>
> By way of background, this Part deals with Ontario provincial pensions governed by the *Pension Benefits Act* ("PBA"), the division of which was reformed effective January 1, 2012, pursuant to the *Family Statute Law Amendment Act*, 2009, S.O. 2009, c. 11 (first introduced as Bill 133). Pursuant to this legislation, as further fleshed out in the regulations, a code was put into place for the valuation and division of PBA pensions, with a similar methodology to be applied to non-PBA pensions. Under the pension legislation and regulations, the Plan Administrator of PBA pensions is responsible for providing a valuation of the pension for family law purposes. The clauses relating to Ontario pensions in this precedent have been drafted in accordance with the legislation, but it is strongly recommended that before any agreement respecting PBA pensions is finalized, the pension section of the draft agreement be reviewed in advance by the Plan Administrator so that any potential issues with the enforceability and applicability of the clauses with respect to the Pension Plan in question can be addressed in advance. The editors would like to thank Wendela Napier and Bryan Smith for their time and assistance to the editors in interpreting and understanding the pension regime in Ontario. As well, we are indebted to Bryan Smith and Sarah Conlin for their paper entitled "Pension Clauses", presented at the LSUC's October 25, 2011 CPD Program on Domestic Contracts in Family Law, which was a valuable resource for our PBA pension precedent clauses.
>
> This Part deals with the division of pensions under sections 67.2 to 67.6 of the PBA, and Part II of the applicable regulation, O.Reg. 287/11, as amended. It does NOT address the division of retired members'

> variable benefit accounts under sections 67.7 to 67.9 of the PBA and Part III of O.Reg. 287/11.

Alternate - Intention to Equalize/Divide Pension as Part of Property Equalization

14.3 Harold is a[n active] [retired] [former] plan member of [specify name of Plan], a pension plan subject to the *Pension Benefits Act*. The Family Law Value of Harold's pension interests [and the Family Law Value of Wendy's survivor benefits] (defined below):

(a) [is] [are] property to be equalized within the meaning of the *Family Law Act*;

(b) will be valued but will not be divided according to the PBA;

(c) will instead be included in Harold's [or Wendy's] net family property [respectively] and equalized in the Property Section above.

> Rather than dividing the value of any PBA pension in accordance with the PBA, this clause provides that the value of any PBA pension (as well as the value of a spouse's survivor benefits if the pension is in pay at the date of separation) will be equalized in the "Property" Part above.
>
> Keep in mind that this value is in pre-tax dollars, and so the contingent tax consequences will have to be considered separately (see the clause "Tax Consequences" and its associated commentary below).

Definitions

14.4 In this Part of the Agreement regarding Harold's pension: [Delete definitions that do not apply:]

(a) "AVCs" means the total Additional Voluntary Contributions Harold has made to the Plan, including interest/investment earnings, as set out in the Pension Form FL-4[letter];

(b) "bridging/supplemental benefits" means the aggregate monthly, annual or other periodic amount payable to Harold for a temporary period until his pension comes into payment;

(c) "EMCs" means the total Excess Member Contributions Harold has made to the Plan, including interest/investment earnings, remaining in the Plan, as set out in the Pension Form FL-4[letter];

(d) "Family Law Valuation Date" means the date the parties separated with no reasonable prospect of resuming cohabitation;

(e) "Family Law Value of Harold's pension interests" means the imputed value, for family law purposes, of Harold's pension benefits, deferred pension or pension/lifetime pension under the Plan, accrued from the starting date to the Family Law Valuation

Date, as determined pursuant to the *Family Law Act*, the PBA and the PBA Regulation, and valued in the Pension Form FL-4[letter];

(f) "PBA" means the *Pension Benefits Act*;

(g) "PBA Regulation" means Ontario Regulation O.Reg. 287/11, relating to Family Law Matters, pursuant to the PBA;

(h) "pension benefits" means the aggregate monthly, annual or other periodic amounts payable to Harold during his lifetime, to which Harold is/will become entitled under the Plan, but which are not yet in payment;

(i) "Pension Form(s)" means the Financial Services Regulatory Authority of Ontario ("FSRA") Pension Family Law Form(s) prescribed by the PBA and the PBA Regulation, more particularly delineated by a number;

(j) "Pension Form FL-[4A] [4B] [4C] [4D]" means the Pension Form FL-[4A (Statement of Family Law Value - Defined Contribution Benefit)] [4B (Statement of Family Law Value - Active Plan Member with a Defined Benefit)] [4C (Statement of Family Law Value - Active Plan Member with a Defined Benefit and Defined Contribution Provisions)] [4D (Statement of Family Law Value - Former Plan Member)], dated [specify date], provided by the Plan Administrator, and attached as a Schedule to this Agreement;

(k) "Plan" means [specify name of Plan], which is a pension plan subject to the PBA;

(l) "Plan Administrator" means [specify name];

(m) "starting date" means the starting date for determining the Family Law Value, pursuant to the PBA Regulation;

(n) "surplus" means the excess of the value of the Plan's assets over its liabilities, as more particularly defined in the PBA;

(o) "transfer ratio" means the transfer ratio as defined in the PBA which reflects the funded status of the Plan as of a certain date.

> Only relevant definitions should be included in the Agreement. All irrelevant subparagraphs should therefore be deleted.

Background/Details re: Pension

14.5 The parties confirm that:

(a) Harold is a member of the Plan;

(b) Harold was born on [date of birth];

(c) Wendy was born on [date of birth];

(d) The starting date is [specify date] which is [the parties' date of marriage] [the date the parties started cohabiting] [the jointly-chosen date agreed upon by the parties] [the date ordered by the court];

(e) The Family Law Valuation Date is [specify date] which is [the parties' date of separation] [the jointly chosen date agreed upon by the parties] [the date ordered by the court];

(f) No payment of an instalment of Harold's pension benefits was due on or before the Family Law Valuation Date;

(g) [Harold] [Wendy] submitted Pension Form FL-1 (Application for Family Law Value) to the Plan Administrator. The Plan Administrator provided the parties with Pension Form FL-[4A (Statement of Family Law Value -Defined Contribution Benefit)] [4B (Statement of Family Law Value - Active Plan Member with a Defined Benefit)] [4C (Statement of Family Law Value - Active Member of a Plan with Defined Benefit and Defined Contributions Provinsions)] [4D (Statement of Family Law Value - Former Plan Member)], which forms an integral part of this Agreement;

(h) The Family Law Value of Harold's pension interests as of the Family Law Valuation Date is $[specify amount] [or for Plans with Combination Benefits (Forms FL-4C and FL-4D), add:] [(total), comprised of $(specify amount) (defined benefit) and $(specify amount) (defined contribution)];

(i) The maximum amount of the Family Law Value of Harold's pension interests that may be assigned and transferred to Wendy from the Plan is $[specify amount] [or for Plans with Combination Benefits (Forms FL-4C and FL-4D), add:] [(total), comprised of $(specify amount) (defined benefit) and $(specify amount) (defined contribution)], plus interest/investment earnings to the beginning of the month in which the transfer is made;

(j) The following transfer options are available to Wendy pursuant to the Pension Form FL-4[letter]: [Delete the options not available:]

i Transfer lump sum to a locked-in retirement account ("LIRA");

ii Transfer lump sum to a life income fund ("LIF") (if Wendy is eligible to buy a LIF, which can be purchased in the calendar year before the year Wendy turns 55 years of age, at the earliest);

iii Transfer lump sum to another pension plan in any Canadian jurisdiction (if the plan administrator of the receiving pension agrees to accept the transfer and administer it in accordance with the PBA);

iv No transfer options are available because [specify];

(k) [Use this clause in special circumstances only:]While not expressly available as an

option on Pension Form FL-4[letter], because of special circumstances, namely [detail the special circumstances - ie. plan member's shortened life expectancy; small amount; plan member not vested; surplus; etc.] and with the approval of the Plan Administrator, the transfer of the lump sum to Wendy may be made to a Registered Retirement Savings Plan ("RRSP"), a Registered Retirement Income Fund ("RRIF") or by way of cash payment;

[Delete any or all of the remaining subparagraphs in this section that do not apply:]

(l) The transfer ratio of the Plan is [specify number], as of the date of the Pension Form FL-4[letter];

(m) The AVCs as of the Family Law Valuation Date, including interest/investment earnings, are $[specify amount]. The AVCs from the starting date to the Family Law Valuation Date, including interest/investment earnings, are $[specify amount]. The AVCs are not included in the Family Law Value, and will instead be addressed separately in section [specify] below;

(n) The EMCs, including interest/investment earnings, are $[specify amount]. The EMCs are not included in the Family Law Value, and will instead be addressed separately in section [specify] below;

(o) [Specify the details of any other relevant issues in the applicable Pension Form FL-4, including full or partial wind up of the Plan, surplus, amendments to the Plan, etc.]

> While some of this information is already included elsewhere in the Agreement, it is reiterated in this clause for ease of administration by the parties and the plan administrator. The clauses mimic the language used in the Pension Forms as much as possible. Note that this clause has been drafted based on the assumption that the parties have already applied for and received a valuation of the pension from the Plan Administrator (Pension Form FL-4). If that is not the case, you will have to modify this clause and those that follow accordingly.
>
> (d) and (e): The starting date for the purposes of the division of the pension will likely be the date of marriage or cohabitation, and the Family Law Valuation Date will likely be the date of separation.
>
> (j)(ii): In order to exercise this transfer to a LIF, the spouse must be eligible to buy a LIF, which can be purchased in the calendar year before the year the spouse turns 55 years old, at the earliest. Up to 50% of the money transferred into the LIF may be withdrawn, or transferred from the LIF to an RRSP or RRIF, within 60 days of transfer using FSRA Form 5.2 (Application to Withdraw or Transfer up to 50% of the Money Transferred into a Schedule 1.1 LIF).
>
> (j)(iv): There will be no transfer options if the plan member terminates employment or plan membership and his/her pension entitlement is paid out in full from the pension plan between the time the Statement of Family Value Pension Form is issued and the time the former spouse of the plan member gives the completed Spouse's Application for Transfer of a Lump Sum (Pension Form FL-5) to the plan administrator.

> (k): Although this option has been removed as an express option from the new FSRA Pension Family Law Forms, presumably this option to transfer to an RRSP, RRIF or cash payment, may still be available in special circumstances, such as payment of a small amount, payment resulting from shortened life expectancy of the plan member, if the plan member is not vested and/or payment of surplus. The parties will have to make an application to the Plan Administrator for this option, and this option (and clause) will need to be approved by the Plan Administrator prior to its use.
>
> (m): Because AVCs are not included in the Family Law Value, the parties will have to address their treatment/equalization separately in another section of the Agreement. See "Additional Voluntary Contributions (AVCs)" clause below. Note that AVCs are not subject to the 50% maximum division rule. The payment of AVCs is subject to the terms of the pension plan.
>
> (n): Note that EMCs do not apply to active members, only former members. Because EMCs are not included in the Family Law Value, the parties will have to address their treatment/equalization separately in another section of the Agreement. See "Excess Member Contributions (EMCs)" clause below. Note that EMCs are not subject to the 50% maximum division rule.
>
> (o): Pension Form FL-4 may raise other issues relevant to the specific circumstances of the parties that should be reflected/addressed in the Agreement.

Lump Sum Transfer to Spouse

14.6 The parties agree, and irrevocably authorize and direct, that:

(a) [$ specify amount] [or specify percentage %] of the Family Law Value of Harold's pension interests, plus interest/investment earnings from the Family Law Valuation Date to the beginning of the month in which the transfer is made, will be transferred to Wendy in a lump sum (the "Lump Sum Transfer") as set out in this section;

(b) The Plan Administrator will make the Lump Sum Transfer to Wendy's [LIRA] [LIF] [pension plan] [RRSP] [RRIF] [bank account], the details of which are specified as follows: [provide details of qualified retirement savings vehicle, pension plan or bank account for transfer];

(c) To effect the Lump Sum Transfer, Wendy [has completed and filed on (date)] [will complete and file by (date)] with the Plan Administrator, a Pension Form FL-5 (Spouse's Application for Transfer of a Lump Sum), a copy of which is attached as a Schedule to this Agreement;

(d) Harold and Wendy will cooperate and complete all documents necessary to facilitate the Lump Sum Transfer, including the completion and delivery of all necessary Pension Forms, together with any supporting documentation and additional information required or requested by the Plan Administrator;

(e) Harold will not do anything to cause Harold's pension to cease to be available for division in accordance with this Agreement. In the event that Harold does jeopardize

the availability of Harold's pension for division in accordance with this Agreement, [Wendy's spousal support amount in this Agreement will be recalculated to determine an appropriate adjustment (ie. increase if Wendy is the support recipient or decrease if Harold is the support recipient)] [(if Wendy is the spousal support recipient:) Wendy's spousal support release in this Agreement will be set aside and an appropriate amount of spousal support determined] [the equalization payment in the Property Section above will be recalculated to take into account the Family Law Value of Harold's pension interests] [or specify some other sanction/remedy];

(f) If Wendy dies before Harold and before the Lump Sum Transfer under the PBA is completed, the Lump Sum Transfer will be paid to Wendy's estate;

(g) Harold and Wendy acknowledge that the Lump Sum Transfer will be in before-tax dollars. Consequently, the tax consequences, if any, of the Lump Sum Transfer have been addressed [separately in section (specify) below] [in the equalization payment under the Property Section above];

(h) [In the event that the Plan is underfunded (ie. the transfer ratio of the Plan is less than 1.0), the Lump Sum Transfer will be paid out as follows: (specify details);]

(i) [Specify how any other relevant issues in the applicable Pension Form FL-4, including full or partial wind up of the Plan, surplus, amendments to the Plan, etc., are to be handled.]

> (a): Be aware that the maximum transferable amount under the PBA is 50% of the Family Law Value.
>
> (b): The option to transfer to an RRSP, RRIF or cash payment (ie. bank account), is only available in special circumstances, such as for payment of a small amount, payment resulting from shortened life expectancy of the plan member, if the plan member is not vested and/or payment of surplus, and only with the approval of the plan administrator.
>
> (f): This clause is in accordance with s. 67.3(5) of the PBA.
>
> (g): Because the tax consequences of any transfer (and the corresponding effect on net family property) is not required to be calculated by the plan administrator, the tax consequences should be addressed elsewhere in the Agreement, and an adjustment of the equalization payment may be necessary. See "Tax Consequences" clause below. It may well be advisable to engage an accountant/actuary to assist in this regard.
>
> (h): The transfer ratio is defined in s. 1(1) of O.Reg. 909 and reflects the funded status of a pension plan. If the ratio is less than 1.0, there may be limits on the Plan Administrator's ability to transfer the whole amount to the spouse. The Plan Administrator would likely pay a first payment equal to the Family Law Value (with interest, if any) multiplied by the transfer ratio, with the balance paid out within five years of the date of the first payment. Note that it is the transfer ratio of the plan on the date when the payment is made that determines any limits on the payment (which may be different than the transfer ratio set out in the Pension Form).

> (i): Pension Form FL-4 may raise other issues relevant to the specific circumstances of the parties that should be reflected/addressed in the Agreement.

Definitions

14.7 In this Part of the Agreement regarding Harold's pension: [Delete definitions that do not apply:]

(a) "AVCs" means the total Additional Voluntary Contributions Harold has made to the Plan, including interest/investment earnings, as set out in the Pension Form FL-4E;

(b) "bridging/supplemental benefits" means the aggregate monthly, annual or other periodic amount payable to Harold for a temporary period until his pension comes into payment;

(c) "EMCs" means the total Excess Member Contributions Harold has made to the Plan, including interest/investment earnings, remaining in the Plan, as set out in the Pension Form FL-4E;

(d) "Family Law Valuation Date" means the date the parties separated with no reasonable prospect of resuming cohabitation;

(e) "Family Law Value of Harold's pension interests" means the imputed value, for family law purposes, of Harold's pension under the Plan, accrued from the starting date to the Family Law Valuation Date, as determined pursuant to the *Family Law Act*, the PBA and the PBA Regulation, and valued in the Pension Form FL-4E;

(f) "Family Law Value of Wendy's survivor benefits" means the imputed value, for family law purposes, of Wendy's survivor benefits under the Plan, accrued from the starting date to the Family Law Valuation Date, as determined pursuant to the *Family Law Act*, the PBA and the PBA Regulation, and valued in the Pension Form FL-4E;

(g) "PBA" means the *Pension Benefits Act*;

(h) "PBA Regulation" means Ontario Regulation O.Reg. 287/11, relating to Family Law Matters, pursuant to the PBA;

(i) "pension" or "lifetime pension" (as it is sometimes referred to in the Pension Forms) means Harold's pension under the Plan that is in payment;

(j) "Pension Form(s)" means the Financial Services Regulatory Authority of Ontario ("FSRA") Pension Family Law Form(s) prescribed by the PBA and the PBA Regulation, more particularly delineated by a number;

(k) "Pension Form FL-4E" means the Pension Form FL-4E (Statement of Family Law Value - Retired Member with a Defined Benefit Pension), dated [specify date], provided by the Plan Administrator, and attached as a Schedule to this Agreement;

(l) "Plan" means [specify name of Plan], which is a pension plan subject to the PBA;

(m) "Plan Administrator" means [specify name];

(n) "starting date" means the starting date for determining the Family Law Value, pursuant to the PBA Regulation;

(o) "surplus" means the excess of the value of the Plan's assets over its liabilities, as more particularly defined in the PBA;

(p) "survivor benefits" means the aggregate monthly, annual or other periodic amounts payable to Wendy in the event of Harold's death for Wendy's lifetime pursuant to the Plan".

> Only relevant definitions should be included in the Agreement. All irrelevant subparagraphs should therefore be deleted.
>
> (f): Note that the Family Law Value of a spouse's survivor benefits will be calculated by the Plan Administrator for a pension already in payment at the date of separation, but there is no mechanism for dividing it in the PBA legislation/regulations/Pension Forms. Therefore, the Family Law Value of a spouse's survivor benefits should be included in the spouse's net family property and equalized in a separate section in this Part of the Agreement or as part of the equalization payment in the "Property" Part above.

Background/Details re: Pension

14.8 The parties confirm that:

(a) Harold is a member of the Plan;

(b) Harold was born on [date of birth];

(c) Wendy was born on [date of birth];

(d) The starting date is [specify date] which is [the parties' date of marriage] [the date the parties started cohabiting] [the jointly-chosen date agreed upon by the parties] [the date ordered by the court];

(e) The Family Law Valuation Date is [specify date] which is [the parties' date of separation] [the jointly chosen date agreed upon by the parties] [the date ordered by the court];

(f) Payment of the first instalment of Harold's pension was due on or before the Family Law Valuation Date;

(g) [Harold] [Wendy] submitted Pension Form FL-1 (Application for Family Law Value) to the Plan Administrator. The Plan Administrator provided the parties with Pension Form FL-4E (Statement of Family Law Value - Retired Member with a Defined Benefit

Pension), which forms an integral part of this Agreement;

(h) The Family Law Value of Harold's pension interests, including bridging/supplemental benefits and surplus, if any, but excluding Wendy's survivor benefits, as of the Family Law Valuation Date is $[specify amount];

(i) The Family Law Value of Wendy's survivor benefits as of the Family Law Valuation Date is $[specify amount];

(j) Harold's lifetime pension is [monthly] [annual] instalments of $[specify amount] from the Family Law Valuation Date until age 65, and $[specify amount] from age 65 to Harold's death. The maximum lifetime pension that may be paid to Wendy from the Plan is:

i [monthly] [annual] instalments of $[specify amount] from the Family Law Valuation Date until Harold turns 65 years of age, and $[specify amount] from the date Harold turns 65 years of age until Harold's death; or

ii [specify percentage]% of each of Harold's pension instalments;

which cannot exceed 50% of Harold's lifetime pension earned during the period between the starting date and the Family Law Valuation Date;

(k) Harold's bridging/supplemental benefits are [monthly] [annual] instalments of $[specify amount] until [specify date]. The maximum bridging/supplemental benefits that may be paid to Wendy from the Plan are:

i [monthly] [annual] instalments of $[specify amount] until [specify date]; or

ii a maximum of [specify percentage]% of each of Harold's instalments of the bridging/supplemental benefits;

which cannot exceed 50% of Harold's bridging/supplemental benefits earned during the period between the starting date and the Family Law Valuation Date;

(l) The Plan [does not provide] [provides] post retirement indexation;

(m) [Include the following subparagraph if the Plan provides survivor or other death benefits:]The Plan provides survivor benefits [and other post retirement death benefits] to Wendy. Following Harold's death:

i Wendy's survivor benefit is [specify percentage]% of Harold's lifetime pension, which is payable for Wendy's lifetime;

ii [Wendy is guaranteed (specify number) payments of Harold's lifetime pension from the Family Law Valuation Date (before Wendy's survivor benefit in subparagraph (i) above applies);]

iii [Wendy's share of Harold's bridging/supplemental benefits is paid for a

minimum of (specify number) payments;]

(n) [Include the following subparagraph if the Plan does not provide survivor benefits:]The Plan does not provide survivor benefits to Wendy, but does provide other post retirement death benefits. Following Harold's death:

i Wendy's share of Harold's lifetime pension is paid for a minimum of [specify number] payments;

ii Wendy's share of Harold's bridging/supplemental benefits is paid for a minimum of [specify number] payments;

(o) The following options to divide Harold's pension are available to Wendy pursuant to the Pension Form FL-4E: [Delete the options not available:]

i Division of each instalment of Harold's pension [including a division of each instalment of the bridging/supplemental benefits];

ii Wendy may waive all survivor benefits, by completing Pension Form FL-6S (Spouse's Application to Divide a Retired Member's Pension - Special (Combined Option)), and instead have Wendy's share of the Family Law Value of Harold's pension interests plus the Family Law Value of Wendy's survivor benefits, combined and paid to Wendy independently by the Plan for Wendy's lifetime. This combined payment is referred to as "Wendy's combined pension". The maximum amount of the Family Law Value of Harold's pension interests (including bridging/supplemental benefits and surplus, if any) that may be used to calculate Wendy's combined pension as of the Family Law Valuation Date is $[specify amount]. The estimated (ie. not guaranteed) amount of Wendy's combined pension is $[specify amount] [monthly] [annually] for Wendy's lifetime;

iii Harold's pension cannot be divided because [specify];

(p) [Use this clause in special circumstances only:]While not expressly available as an option on Pension Form FL-4E, because of [detail the special circumstances - ie. plan member's shortened life expectancy; small amount; plan member not vested; surplus; etc.] and with the approval of the Plan Administrator, the transfer of the lump sum to Wendy may be made to a Registered Retirement Savings Plan ("RRSP"), a Registered Retirement Income Fund ("RRIF") or by way of cash payment;

[Delete any or all of the remaining subparagraphs in this section that do not apply:]

(q) The AVCs as of the Family Law Valuation Date, including interest/investment earnings, remaining in the Plan, are $[specify amount]. The AVCs are not included in the Family Law Value, and will instead be addressed separately in section [specify] below;

(r) The EMCs, including interest/investment earnings, remaining in the Plan, are $[specify

amount]. The EMCs are not included in the Family Law Value, and will instead be addressed separately in section [specify] below;

(s) [Specify the details of any other relevant issues in Pension Form FL-4E, including full or partial wind up of the Plan, surplus, amendments to the Plan, etc.]

While some of this information is already included elsewhere in the Agreement, it is reiterated in this clause for ease of administration by the parties and the Plan Administrator. The clauses mimic the language used in the Pension Forms as much as possible. Note that this clause has been drafted based on the assumption that the parties have already applied for and received a valuation of the pension from the Plan Administrator (Pension Form FL-4E). If that is not the case, you will have to modify this clause and those that follow accordingly.

(d) and (e): The starting date for the purposes of the division of the pension will likely be the date of marriage or cohabitation, and the Family Law Valuation Date will likely be the date of separation. The PBA, however, also allows the parties to jointly determine the starting date and separation date, by completing Pension Form 2 (Joint Declaration of Period of Spousal Relationship).

(i): With respect to a pension in payment, note that while the PBA requires the Plan Administrator to provide a valuation of a spouse's survivor benefits, there is no mechanism in the PBA for dividing the Family Law Value of a spouse's survivor pension, and so presumably it will need to be equalized in a separate section or as part of the equalization payment in the "Property" Part above. See clause "Waiver/Release of Survivor Benefits" below.

(j): The maximum amount/percentage of the member's lifetime pension instalments (and bridging/supplemental benefits instalments, if any) that can be paid to the spouse is 50% of the member's lifetime pension (and benefits) earned during the period of the spousal relationship.

(o)(ii): This combination option is only available if the Plan provides for this option and the former spouse waives the survivor benefit in Part E of Pension Form FL-6S (Spouse's Application to Divide a Retired Member's Pension - Special (Combined Option)). Note that despite any combination pension paid to the spouse, the spouse's survivor benefits have still not been equalized between the parties, and so presumably the Family Law Value of the spouse's survivor benefits will still need to be included in his/her net family property (considering any tax consequences) and equalized in a separate section or as part of the equalization payment in the "Property" Part above. See "Equalization of Family Law Value of Spouse's Survivor Benefits" clause below.

(p): Although this option has been removed as an express option from the new FSRA Pension Family Law Forms, presumably this option to transfer to an RRSP, RRIF or cash payment, may still be available in special circumstances, such as payment of a small amount, payment resulting from shortened life expectancy of the plan member, if the plan member is not vested and/or payment of surplus. The parties will have to make an application to the Plan Administrator for this option, and this option (and clause) will need to be approved by the Plan Administrator prior to its use.

(q) and (r): Because AVCs and EMCs are not included in the Family Law Value, the parties will have to address their treatment/equalization separately in another section of the Agreement. See clauses relating to

> AVCs and EMCs under "Other Issues/Considerations" below.
>
> (s): Pension Form FL-4E may raise other issues relevant to the specific circumstances of the parties that should be reflected/addressed in the Agreement.

Division Option 1 - Division of Pension Instalments

14.9 The parties agree, and irrevocably authorize and direct, that:

(a) Pursuant to the options for the division of Harold's pension available to Wendy in Pension Form FL-4E, Wendy opts for the division of each instalment of Harold's pension [including a division of each instalment of the bridging/supplemental benefits], on the following basis:

i [$ specify amount] [specify percentage %] of each of Harold's lifetime pension instalments;

ii [Delete this subparagraph (ii) if no bridging/supplemental benefits:] [$ specify amount] [specify percentage %] of each of Harold's bridging/supplemental benefits instalments;

(b) On Harold's death, Wendy's share of Harold's lifetime pension [and bridging/supplemental benefits] instalments in subparagraph (a) above will end. Thereafter, Wendy will receive [nothing further] [Wendy's survivor benefits (subject to any guaranteed payments of Harold's lifetime pension permitted by the Plan before payment of Wendy's survivor benefits commence)];

(c) Indexation applied to Harold's pension will [not] be applied to the pension payable to Wendy;

(d) The amount owing to Wendy is retroactive to the Family Law Valuation Date and so will include any arrears and interest/investment earnings on the arrears from the Family Law Valuation Date to the date when the pension is divided (collectively "the arrears"). The parties acknowledge that the Plan Administrator will adjust the amount owing to Wendy under subparagraph (a) above to include the arrears owing to Wendy, by increasing Wendy's prospective instalments [to the maximum amount allowable] [by $(amount) each] until the arrears are paid in full. There will be a corresponding, but not necessarily identical, reduction in Harold's prospective instalments until the arrears are paid in full;

(e) To effect the division of Harold's pension in accordance with this section, Wendy [has completed and filed on (date)] [will complete and file by (date)] with the Plan Administrator, a Pension Form FL-6 (Spouse's Application to Divide a Retired Member's Pension), a copy of which is attached as a Schedule to this Agreement;

(f) Harold and Wendy will cooperate and complete all documents necessary to facilitate

the division of Harold's pension, including the completion and delivery of all necessary Pension Forms, together with any supporting documentation and additional information required or requested by the Plan Administrator;

(g) Harold will not do anything to cause Harold's pension to cease to be available for division in accordance with this Agreement. In the event that Harold does jeopardize the availability of Harold's pension for division in accordance with this Agreement, [Wendy's spousal support amount in this Agreement will be recalculated to determine an appropriate adjustment (ie. increase if Wendy is the support recipient or decrease if Harold is the support recipient)] [(if Wendy is the spousal support recipient:) Wendy's spousal support release in this Agreement will be set aside and an appropriate amount of spousal support determined] [the equalization payment in the Property Section above will be recalculated to take into account the Family Law Value of Harold's pension interests] [or specify some other sanction/remedy];

(h) If Wendy dies before Harold, the amount otherwise payable to Wendy will [be paid to Harold] [be paid to Wendy's estate] [terminate]. [Provide details];

(i) [Specify how any other relevant issues in Pension Form FL-4E, including full or partial wind up of the Plan, surplus, amendments to the Plan, etc., are to be handled.]

> (a): The spouse's share of the member's pension (and bridging/supplemental benefits, if any) cannot exceed 50% of the Family Law Value of member's pension (including bridging/supplemental benefits, if any).
>
> (b): The spouse may be entitled to receive survivor benefits in accordance with the election made by the member at the time of retirement and the terms of the Plan.
>
> (c): You must specify whether the spouse's share of the member's pension is to be indexed according to the Plan.
>
> (d): In the event that payments have been made by the member to the spouse voluntarily since the date of separation, the Plan Administrator will not take this into account in calculating the amount owed retroactively, and so the parties will have to negotiate an adjustment separately.
>
> (h): While the legislation is not clear as to what will happen in the event that the spouse dies before the member, the Ontario Court of Appeal in the case of *Meloche v. Meloche*, 2021 ONCA 640, provides the necessary clarification - the parties can agree in a domestic contract that the payments can continue to be paid to the spouse's estate (as can the court in a court order, and an arbitrator in an arbitration award).
>
> (i): Pension Form FL-4E may raise other issues relevant to the specific circumstances of the parties that should be reflected/addressed in the Agreement.

Division Option 2 - Combined Pension

14.10 The parties agree, and irrevocably authorize and direct, that:

(a) Pursuant to the options for the division of Harold's pension available to Wendy in

Pension Form FL-4E, Wendy opts to waive all survivor benefits and instead receive a combined pension of Wendy's share of the Family Law Value of Harold's pension interests plus the Family Law Value of Wendy's survivor benefits, in the estimated amount of $[specify amount] [monthly] [annually], paid to Wendy independently by the Plan for Wendy's lifetime;

(b) The parties understand that the amount in subparagraph (a) above is an estimate only and is not guaranteed;

(c) The amount owing to Wendy is retroactive to the Family Law Valuation Date and so will include any arrears and interest/investment earnings on the arrears from the Family Law Valuation Date to the date when the pension is divided. The parties acknowledge that the Plan Administrator will adjust the estimated amount owing to Wendy under subparagraph (a) above to account for any arrears and interest/investment earnings owing to Wendy, by increasing Wendy's prospective instalments. There will be a corresponding, but not necessarily identical, reduction in Harold's prospective instalments;

(d) To effect the division of Harold's pension in accordance with this section, Wendy [has completed and filed on (date)] [will complete and file by (date)] with the Plan Administrator, a Pension Form FL-6S (Spouse's Application to Divide a Retired Member's Pension - Special (Combined Option)), including the completed waiver of Wendy's right to survivor benefits in Part E, a copy of which is attached as a Schedule to this Agreement;

(e) Harold and Wendy will cooperate and complete all documents necessary to facilitate the division of Harold's pension, including the completion and delivery of all necessary Pension Forms, together with any supporting documentation and additional information required or requested by the Plan Administrator;

(f) Harold will not do anything to cause Harold's pension to cease to be available for division in accordance with this Agreement. In the event that Harold does jeopardize the availability of Harold's pension for division in accordance with this Agreement, [Wendy's spousal support amount in this Agreement will be recalculated to determine an appropriate adjustment (ie. increase if Wendy is the support recipient or decrease if Harold is the support recipient)] [(if Wendy is the spousal support recipient:) Wendy's spousal support release in this Agreement will be set aside and an appropriate amount of spousal support determined] [the equalization payment in the Property Section above will be recalculated to take into account the Family Law Value of Harold's pension interests] [or specify some other sanction/remedy];

(g) If Wendy dies before Harold prior to the waiver of Wendy's survivor benefits and/or the implementation of Wendy's combined pension, [the application for division will be cancelled and Harold will retain the full value of Harold's pension] [the application

for division will proceed as a division of each instalment of Harold's pension on the terms that follow and will be paid to Wendy's estate (specify necessary terms as if division taking place under Division Option 1 and verify with pension administrator in advance)] [the application for division will proceed as a lump sum transfer of the Family Law Value of Harold's pension interests on the terms that follow and will be paid to Wendy's estate (specify necessary terms as if division taking place under Division Option 2 and verify with pension administrator in advance)] [or specify some other result];

(h) [Specify how any other relevant issues in Pension Form FL-4E, including full or partial wind up of the Plan, surplus, amendments to the Plan, etc., are to be handled.]

This combination option is only available if the Plan provides for this option and the former spouse waives the survivor benefit in Part E of Pension Form FL-6S (Spouse's Application to Divide a Retired Member's Pension - Special (Combined Option)). Note that despite any combination pension paid to the spouse, the spouse's survivor benefits have still not been equalized between the parties, and so presumably the Family Law Value of the spouse's survivor benefits will still need to be included in his/her net family property (considering any tax consequences) and equalized in a separate section or as part of the equalization payment in the "Property" Part above. See "Equalization of Family Law Value of Spouse's Survivor Benefits" clause below.

(a) and (b): The spouse's share of the member's pension (and bridging/supplemental benefits, if any) cannot exceed 50% of the Family Law Value of the member's pension (including bridging/supplemental benefits, if any). Once the maximum amount is determined, the Plan Administrator will convert it to an estimated pension amount.

(c): In the event that payments have been made by the member to the spouse voluntarily since the date of separation, the Plan Administrator will not take this into account in calculating the amount owed retroactively, and so the parties will have to negotiate an adjustment separately.

(d): The spouse must complete the waiver of their survivor benefits in Part E of Pension Form FL-6S before the combination pension will be effected.

(g): The legislation is not clear as to what will happen in the event that the spouse dies before the member, prior to the waiver of the spouse's survivor benefits and the implementation of the spouse's combined pension. Because a combined pension of the member's pension and the spouse's survivor pension is not feasible in the event of the spouse's death, this clause purports to allow for the pension to revert back to the member, or for the pension division to proceed (as either a division of the instalment or as a lump sum transfer) and be paid to the spouse's estate, or such other result as you determine. If the option to pay the amount to the spouse's estate is selected, you will need to provide the details for the division (ie. include many of the terms from Division Option 1 or 2 as applicable). Because of the lack of clarity in the legislation, this clause should be verified with the Plan Administrator prior to its use.

While the issue of a combined pension was not specifically addressed, the Ontario Court of Appeal in the case of *Meloche v. Meloche*, 2021 ONCA 640, held that the parties can agree in a domestic contract that pension payments can continue to be paid to the spouse's estate (as can the court in a court order, and an

> arbitrator in an arbitration award).
>
> (h): Pension Form FL-4E may raise other issues relevant to the specific circumstances of the parties that should be reflected/addressed in the Agreement.

Alternate - Payment of Lump Sum (Special Circumstances)

14.11 The parties agree, and irrevocably authorize and direct, that:

(a) While not expressly available as an option on Pensions Form FL-4E, because of special circumstances, namely [detail the special circumstances - ie. plan member's shortened life expectancy; small amount; plan member not vested; payment of surplus; etc.], and with the approval of the Plan Administrator, Mary opts for the transfer of $[specify amount] of the Family Law Value of George's pension interests, plus interest/investment earnings from the Family Law Valuation Date to the beginning of the month in which the transfer is made, to Mary in a lump sum (the "Lump Sum Transfer") as set out in this section.

(b) The Plan Administrator will make the Lump Sum Transfer to Wendy's [RRSP] [RRIF] [bank account], the details of which are specified as follows: [provide details of qualified retirement savings vehicle or bank account for transfer];

(c) To effect the Lump Sum Transfer, Wendy has made an application to the Plan Administrator, which has been approved. Harold and Wendy will cooperate and complete all documents necessary to facilitate the Lump Sum Transfer, including the completion and delivery of all necessary Pension Forms, together with any supporting documentation and additional information required or requested by the Plan Administrator;

(d) Harold will not do anything to cause Harold's pension to cease to be available for division in accordance with this Agreement. In the event that Harold does jeopardize the availability of Harold's pension for division in accordance with this Agreement, [Wendy's spousal support amount in this Agreement will be recalculated to determine an appropriate adjustment (ie. increase if Wendy is the support recipient or decrease if Harold is the support recipient)] [(if Wendy is the spousal support recipient:) Wendy's spousal support release in this Agreement will be set aside and an appropriate amount of spousal support determined] [the equalization payment in the Property Section above will be recalculated to take into account the Family Law Value of Harold's pension interests] [or specify some other sanction/remedy];

(e) If Wendy dies before Harold and before the Lump Sum Transfer under the PBA is completed, [the application for the Lump Sum Transfer will be cancelled and Harold will retain the full value of Harold's pension] [the Lump Sum Transfer will be paid to Wendy's estate (*verify with pension administrator in advance)] [or specify some other result];

(f) Harold and Wendy acknowledge that the Lump Sum Transfer will be in before-tax dollars. Consequently, the tax consequences, if any, of the Lump Sum Transfer have been addressed [separately in section (specify) below] [in the equalization payment under the Property Section above].

> General: Although this option has been removed as an express option from the new FSRA Pension Family Law Form FL-4E, presumably this option to transfer to an RRSP, RRIF or cash payment, may still be available in special circumstances, such as payment of a small amount, payment resulting from shortened life expectancy of the plan member, if the plan member is not vested and/or payment of surplus. The parties will have to make an application to the Plan Administrator for this option, and this option (and clause) will need to be approved by the Plan Administrator prior to its use.
>
> (a): Be aware that the maximum transferable amount under the PBA is 50% of the Family Law Value. This option is only available in special circumstances, such as for payment of a small amount, payment resulting from shortened life expectancy of the plan member, if the plan member is not vested and/or payment of surplus, and only with the approval of the plan administrator.
>
> (f): Unlike a pension not yet in payment, when a pension is in payment, the legislation is not clear as to what will happen to a proposed transfer if the spouse dies before the member. This clause gives the parties the option to have the payment made to the spouse's estate, or to have the payment returned to the member. Because of the lack of clarity in the legislation, this clause should be verified with the Plan Administrator prior to its use. However, it should be noted that the Ontario Court of Appeal in the case of *Meloche v. Meloche*, 2021 ONCA 640, held that the parties can agree in a domestic contract that pension payments can continue to be paid to the spouse's estate (as can the court in a court order, and an arbitrator in an arbitration award). Applying this same principle to lump sum payments, it would seem that a lump sum payment could be made to the spouse's estate.
>
> (g): Because the tax consequences of any transfer (and the corresponding effect on net family property) is not required to be calculated by the Plan Administrator, the tax consequences should be addressed elsewhere in the Agreement, and an adjustment of the equalization payment may be necessary. It may well be advisable to engage an accountant/actuary to assist in this regard. See the clause "Tax Consequences" in the "Other Issues/Considerations" section below.

No Division of Pension Benefits/Pension by Plan Administrator

14.12 The parties agree, and irrevocably authorize and direct, that:

(a) Notwithstanding having received a Pension Form FL-4[letter], there will be no division of the Family Law Value of Harold's pension interests by the Plan Administrator pursuant to the PBA[, and Harold will so advise the Plan Administrator];

(b) The parties understand that this clause will not affect nor release them from any support obligations enforceable under s. 66(4) of the PBA;

(c) Notwithstanding subparagraphs (a) above, the parties still intend to equalize Harold's

pension interests, but not through the Plan Administrator and the PBA. The parties have therefore included the Family Law Value of Harold's pension interests in Harold's net family property, and equalized this asset, as reflected in the equalization payment in the Property Section above.

> General: Note that the new FSRA Pension Forms do not include an equivalent to the FSCO Pension Form 7 (No Division of Family Law Value), which was an optional form, with no other purpose but to put the Plan Administrator on notice that no further action was required on their part. While there is no formal notice required, it is good practice to advise the Plan Administrator.
>
> (c): Notwithstanding the fact that the parties do not wish to divide the pension interests directly through the Plan Administrator under the PBA, the parties may still wish to equalize the pension interests in the normal course (ie. by way of an equalization payment) based on the values obtained from the Plan Administrator. Ensure that this section is consistent with the stated intention clause "Alternate - Intention to Equalize/Divide Pension as Part of Property Equalization" above.

Additional Voluntary Contributions (AVCs)

14.13 The AVCs, including interest/investment earnings, that have accumulated from the starting date to the Family Law Valuation Date, are valued at $[specify the portion of the total AVCs that were earned during the relationship] and:

(a) are property to be equalized within the meaning of the *Family Law Act*;

(b) have been included in Harold's net family property and equalized, as reflected in the equalization payment in the Property Part above.

> Because AVCs are not included in the Family Law Value, the parties will have to address their treatment/equalization separately in this clause of the Agreement. You may need to retain an accountant/actuary to assist in determining the appropriate amount of the total AVCs to be included in the member's Net Family Property for equalization.

Excess Member Contributions (EMCs);

14.14 The EMCs, including interest/investment earnings, that have accumulated from the starting date to the Family Law Valuation Date, are valued at $[specify the portion of the total EMCs that were earned during the relationship] and:

(a) are property to be equalized within the meaning of the *Family Law Act*;

(b) have been included in Harold's net family property and equalized, as reflected in the equalization payment in the Property Part above.

> Because EMCs are not included in the Family Law Value, the parties will have to address their treatment/equalization separately in this clause of the Agreement. You may need to retain an

> accountant/actuary to assist in determining the appropriate amount of the total EMCs to be included in the member's Net Family Property for equalization.

Equalization of Family Law Value of Spouse's Survivor Benefits

14.15 The Family Law Value of Wendy's survivor benefits:

(a) is property to be equalized within the meaning of the *Family Law Act*;

(b) has been included in Wendy's net family property and equalized, as reflected in the equalization payment in the Property Part above.

> With respect to a pension in payment, while the PBA requires the Plan Administrator to provide a valuation of a spouse's survivor benefits, there is no mechanism in the PBA for dividing the Family Law Value of a spouse's survivor benefits, and so presumably it will need to be equalized as set out in this section. Keep in mind that the valuation is in pre-tax dollars, and so the contingent tax consequences, if any, will have to be considered separately (see the clause "Tax Consequences" below).

Tax Consequences

14.16 Harold and Wendy acknowledge that the Family Law Value of Harold's pension interests [and the Family Law Value of Wendy's survivor benefits] and any corresponding Lump Sum Transfer under the PBA are in before-tax dollars. Consequently, taxes in the amount of $[specify amount] [for Harold and $(specify amount) for Wendy] have been deducted from Harold's net family property [and Wendy's net family property respectively] in calculating the equalization payment owing under the Property Part above.

> Because all Family Law Values and transfer payments under the PBA are in pre-tax dollars, the income tax consequences must be taken into account. This clause factors the contingent taxes into the equalization payment in the "Property" section above, although this is only one option available to you. It is recommended that you obtain the assistance of an accountant/actuary in this regard.

Miscellaneous Other Issues

14.17 [Include clauses respecting any other relevant issue not addressed above. Refer to commentary for list of issues to consider.]

> General: Include clauses respecting any other relevant issues, including but not limited to:
>
> (a) full or partial wind up of the Plan;
>
> (b) ad hoc indexing (Plan amendments before the Family Law Valuation Date);
>
> (c) non-vested benefits (preliminary value reduced by 50% under PBA);
>
> (d) surplus (if not already included in the Family Law Value of Harold's pension interests);

> (e) shortened life expectancy considerations;
>
> (f) other benefits, such as sick leave retirement gratuity;
>
> (g) disability pensions;
>
> (h) buy-backs;
>
> (i) double dipping.
>
> Many of these issues are either not included in the pension valuation provided by the Plan Administrator (although they may be referenced), or not considered at all in the Pension Forms and clauses above, and so will likely require separate treatment in this area of the Agreement. If any of these issues apply in your situation, it may well be advisable to engage an accountant/actuary to assist in this regard.
>
> (i): You may wish to guard against "double dipping" by a recipient spouse. (Double dipping is a term applied to a situation where the recipient spouse receives spousal support on pension income already equalized as property.) See subclause (d) in "Variation of Support in Event of Retirement" clause under the "Spousal Support" section above (a clause addressing this double dipping issue in the case of a variation of spousal support on retirement), as a starting point.

Waiver/Release of Survivor Benefits

14.18

(a) Wendy waives, and releases Harold and the Plan from all claims to, any survivor benefits which Wendy has or to which Wendy may otherwise have been entitled under Harold's Plan and under the PBA.

(b) [Include this subsection if the pension is not yet in pay:] The parties acknowledge that payment of Harold's pension has not yet commenced, and given that the parties separated before it came into pay, Wendy will not be entitled to any joint and survivor benefits under Harold's Plan, in accordance with s. 44(4)(b) of the PBA. Notwithstanding that Wendy is not entitled to any survivor benefits under Harold's Plan, Wendy will execute any further documentation necessary or required by the Plan Administrator to evidence this lack of entitlement or to give effect to any waiver/release of Wendy's survivor benefits, if necessary.

(c) [Include this subsection if the pension is in pay and the pension is to be divided:] The parties acknowledge that payment of Harold's pension has commenced but that the pension has not yet been divided. As evidence of and to give effect to the waiver/release of Wendy's survivor benefits, the parties will execute Pension Form FL-8 (Post-retirement Waiver of Survivor Pension After Separation (Optional)), and Wendy will forward it, together with Pension Form FL-6 (Spouse's Application to Divide a Retired Member's Pension), to the Plan Administrator immediately and before the pension is divided.

(d) [Include this subsection if the pension is in pay and the pension is NOT to be divided:] The parties acknowledge that payment of Harold's pension has commenced and that they have agreed that the pension will not be divided. As evidence of and to give effect to the waiver/release of Wendy's survivor benefits, the parties will execute Pension Form FL-8 (Post-retirement Waiver of Survivor Pension After Separation (Optional)), and Harold will forward it to the Plan Administrator immediately.

> If a spouse agrees to waive their joint and survivor benefits that automatically arise under the PBA if a member has a spouse on retirement, it is imperative that this clause be included in an agreement. (Note that this waiver of survivor benefits is distinct from the waiver provided in "Division Option 2 - Combined Pension" clause above for pensions in pay, relating to a combined pension and survivor pension.)
>
> (b): If the parties are already separated at the time that a pension comes into pay, the spouse will not be entitled to any joint and survivor benefits (see s. 44(4)(b) of the PBA). A waiver/release is therefore technically unnecessary. However, to confirm that the parties have specifically turned their mind to this legal reality, and as a precaution and evidence of the parties' intentions in the event that there is dispute about the joint and survivor rights down the road, you may wish to include this subclause.
>
> (c) & (d): If the parties were not yet separated at the time the pension came into pay, despite the timelines set out in s. 46(2) of the PBA, a spouse's joint and survivor benefits can still be waived post-retirement, as long as the pension has not yet been divided (see s. 67.4(8) of the PBA). Hence the creation of Pension Form FL-8. It is worth noting that while the legislation permits a post-retirement waiver in these circumstances, there is no related revaluation provision, and so a waiver may not provide the retired member with any increased pension entitlement, or in other words, may ultimately have no effect. (An exception would be a Plan that provides a death date survivor pension, in which case the waiver would have an effect). You should discuss this issue with the Plan Administrator in advance of any settlement to determine whether a waiver of the spouse's joint and survivor benefits will have the desired effect and makes sense in the circumstances.

Release

14.19 Except as otherwise set out in this Part, upon completion of the parties' obligations in this Part of the Agreement, as well as [payment of the Lump Sum Transfer in section (specify) above] [the division of Harold's pension instalments in section (specify) above], [and payment of the equalization payment in the Property Part above,] Wendy releases all claims[, including all claims to joint and survivor benefits,] Wendy may have against Harold's pension interests, including the Family Law Value of Harold's pension interests, [list any other specific items such as AVCs, EMCs etc.,] in common law, equity or by statute, including all claims under the PBA, the *Divorce Act*, the *Family Law Act*, and the *Succession Law Reform Act*.

> This release of the party's pension is not effective until the parties have complied with the terms of this

> "Pension" Part of the Agreement, the transfer of a lump sum or division of the income stream has occurred, and the equalization payment has been paid, if applicable.

PART C: Pensions under The Pension Benefits Division Act

14.20 In this section of the Agreement regarding Harold's pension plan subject to the *Pension Benefits Division Act*:

(a) "PBDA" means the *Pension Benefits Division Act*;

(b) "pension benefit" means any pension or other benefit or amount payable under a pension plan as defined in section 2 of the PBDA; and

(c) "Plan" means a superannuation or pension plan provided by the *Public Service Superannuation Act* and the *Supplementary Retirement Benefits Act*.

> Some pensions are divisible at source, such as pensions under the *Pension Benefits Division Act* (PBDA), which deals with federal government pensions. These sections are intended to deal only with the PBDA and not provincial pensions, which are treated differently.
>
> If the parties cohabited before their marriage, the non-titled spouse may argue that he or she has a constructive trust claim for pension benefits earned by the pension holder during the period of pre-marital cohabitation. That would change the date of calculation and the value of the benefits under the pension.
>
> Note that if the parties intend for all rights to a spouse's federal pension to be released, the governing statute may provide a comprehensive code, requiring specific forms to be completed and filed. It is likely not enough to simply release all rights in a separation agreement. See the N.B.C.A. decision of *Tower Estate v. Tower Estate*, 2012 CarswellNB 126, where a former wife was entitled to receive Supplementary Death Benefits under her former husband's federal pension on his death, because the appropriate forms changing the designation had not been filed as required by the regulations of the *Act* governing the husband's federal pension, despite a release in the parties' separation agreement.

Background/Details re: Pension

14.21 The parties confirm that:

(a) Harold is a member of the Plan;

(b) Harold's interest in the Plan which has accumulated from [date of marriage unless parties agree otherwise] to [valuation date] is property within the meaning of the *Family Law Act*;

(c) a report containing a valuation of Harold's entitlements under the Plan was obtained from [name of actuary];

(d) each has reviewed the report and the basis for the valuation thoroughly with their

lawyer;

(e) the value of Harold's pension for the purposes of this paragraph is [the value] and Wendy is entitled to one-half of that amount; and

(f) Harold is not now in receipt of pension income pursuant to the Plan.

[or]

(g) Harold is currently receiving $[amount] annually of pension income under the Plan.

> It is helpful to provide any relevant background facts, such as the date the pension holder joined the Plan, whether the pension is in pay, and, if so, what the current payments are, whether indexing has started, as well as any other relevant facts.

Intention to Equalize and Divide Pension under PBDA

14.22 The value of Harold's interest in the Plan will not be included in Harold's net family property. Wendy's entitlement will be paid according to the PBDA and the terms of this Agreement.

> Rather than including the value of any PBDA pension in the equalization payment provided in the property section (Part 11) above, this clause carves out the equalization and division of the pension for determination in accordance with the PBDA and this part of the Agreement.

Application for Division of the Pension

14.23 Either party may apply for a division of the value of Harold's pension benefit ("the benefits") under the Plan pursuant to subsection 4(1) of the PBDA and the terms of this Agreement. For the purposes of the application, Harold and Wendy confirm that:

(a) they have been living separate and apart since [date];

(b) both Harold and Wendy will co-operate fully in order to have the application processed as quickly as possible;

(c) Harold's address is [address] and Wendy's address is [address];

(d) Harold's birthdate is [date of birth];

(e) Harold's most recent place of employment in the Public Service is [place of employment]. Harold ceased to be employed in the Public Service on [date];

(f) Harold's employee identification number, regimental number or pension number is [number];

(g) neither Harold nor Wendy will file a Notice of Objection with the Minister under section 6 of the PBDA and each party waives the right to file a Notice of Objection;

(h) neither Harold nor Wendy will submit evidence to the Minister suggesting that it would not be just to approve the application and the parties waive the right to submit such evidence;

(i) for the purpose of section 8 of the PBDA, the "period subject to division" is the period from [time period to time period]; and

(j) during the period subject to division, Harold and Wendy were spouses of one another within the meaning of the PBDA and there was no other person who could be considered a spouse under the PBDA during that time.

> 14.22(i): Consider whether there have been any prior separations as this will impact on the period subject to the pension division.

Option One - Transfer Amount More than Maximum Allowed

14.24 The Minister will transfer an amount representing fifty percent of the value of the pension benefits that have accrued to Harold under the Plan during the period subject to division into a [details of qualified retirement savings vehicle] chosen by Wendy. The amount to be transferred will be determined in accordance with the regulations under the PBDA ("the maximum transferable amount").

14.25 Harold and Wendy agree that the value of Wendy's interest in Harold's plan on valuation date was $[amount]. Harold agrees that if the maximum transferable amount payable is less than this amount, then Harold will pay the difference in value to Wendy. The amount owed to Wendy will be calculated as follows:

[provide details]

14.26 Harold and Wendy acknowledge that the amount transferred under the PBDA will be in before-tax dollars. Consequently, in calculating the balance, if any, of the equalization payment owing from Harold to Wendy under the Property Section above, the amount actually transferred by the Minister under section 8 of the PBDA will be deducted from the equalization payment using the before-tax value of Harold's pension [or the net (after tax) value, if appropriate].

> First Clause: When using the first clause, be aware that the maximum transferable amount under the PBDA will be calculated on the date of the rollout and will be dependent on such factors as interest rates on that date. Other factors, such as pre-marriage pensionable service and the assumed age of retirement, will affect the maximum transferable amount. The use of this clause should be discussed with an actuary before any agreement is signed. However, if the clause is used, consider including the immediately following (ie. Second) clause as well.
>
> Third Clause: Consider this clause if the pension value is being integrated into the equalization payment.
>
> In calculating the amount to be paid, consider the income tax consequences of the payment. A payment by

> way of a Registered Retirement Savings Plan rollover will have a different value than a payment from the proceeds of the matrimonial home because of the income tax consequences. If the maximum transferable amount is equal to or greater than the amount, for example, consider adjusting the equalization payment, if any.

Option Two - Transfer Amount Less than Maximum Allowed

14.27 The Minister will transfer $[amount] into a qualified retirement savings vehicle chosen by Wendy in accordance with the regulations under the PBDA.

> This clause should be used only if one is certain that the maximum transferable amount calculated according to the PBDA is greater than the amount to be transferred.

Treatment on Death - Payable to Spouse's Estate

14.28 In the event of the death of Wendy before the transfer under the PBDA, the amount otherwise payable to Wendy will be paid to Wendy's estate.

> If the intention is that the estate of the non-plan member is to receive the benefits if the plan member dies before the transfer has occurred under the PBDA, then this term should be used.

Pension Holder to be Trustee of Recipient's Interest In Pension Pending Transfer

14.29 Until the transfer of the value of the pension benefits under subsection 8(1) of the PBDA, Harold:

(a) will be a trustee for Wendy's interest in the Plan;

(b) will ensure that Wendy's interest in the Plan is not prejudiced;

(c) must immediately [or within (number of days)] deliver to Wendy copies of all written communications between Harold and the administrator of the Plan ("the administrator");

(d) must immediately forward to the administrator a copy of this Agreement with a letter drawing to the administrator's attention the terms of this Agreement that deal with the Plan; and

(e) will immediately deliver an irrevocable direction to the administrator authorizing the administrator to:

i provide Wendy with any information {{ PensionGet}} requests about the Plan; and

ii promptly send to Wendy copies of all communications between Harold and

the administrator prior to the division of the value of the pension benefits. If the administrator requires a specific form of direction, Harold must comply with the administrator's requirement.

14.30 Until the completion of the transfer of the value of the pension benefits under the Plan, Wendy is entitled to communicate directly with the administrator of the Plan.

14.31 If Harold does not comply with these trust terms, Harold consents to Wendy obtaining an order without notice to Harold directing the administrator to refrain from any action that might impact negatively on Wendy's ability to apply for the division of benefits.

14.32 Harold directs the administrator to:

(a) comply with all applicable terms of this Agreement; and

(b) take all steps required to protect Wendy's interest in and claims to Harold's pension benefits as provided in this Agreement.

14.33 Harold will designate Wendy irrevocably as beneficiary of $[amount] of life insurance to ensure that if Harold dies prior to satisfying the requirements under the pension sections of this Agreement, Wendy may enforce all rights to the balance of the equalization payment owing to Wendy.

14.34 Recognizing the mutual intention of the parties that Wendy receive a one-half interest in the pension benefits accumulated during [the marriage or period of cohabitation], if, for any reason, the above requirements cannot be accomplished in a reasonable period of time:

(a) Wendy will remain entitled to a one-half interest in Harold's pension benefits accumulated during the years of [marriage/cohabitation];

(b) the court may make further orders as to the pension, including security, as may be necessary to give effect to the intention of the parties contained in this Agreement;

(c) Wendy's entitlement will be satisfied:

i in any other manner the parties may agree upon; or

ii if they cannot agree, then as may be:

1. resolved by using the section of this Agreement entitled "Dispute Resolution"; or

2. by a court of competent jurisdiction; and

iii for these purposes, Harold and Wendy waive the application of any limitation period which might otherwise apply. If, for any reason, any term in this Agreement concerning the transfer of the value of the pension benefits becomes difficult or impossible to complete, the parties will execute any amendments to this Agreement that may be necessary to give effect to this

Agreement.

14.35 Harold and Wendy will sign any documents required to carry out these pension terms.

> Sixth Clause: Consider using some form of security to protect against the eventuality of the pension holder's death before the rollover occurs under the PBDA. The clause used above is an example.

15. Releases

General Release - Short Form

15.1

(a) This Agreement is a full and final settlement of all issues between Harold and Wendy and all rights and obligations arising out of their relationship.

(b) Except as otherwise provided in this Agreement, Harold and Wendy release each other from all claims at common law, in equity or by statute against each other, including claims under the *Divorce Act*, the *Family Law Act*, and the *Succession Law Reform Act*.

> This is a dramatically shorter release than most of those existing in prior precedents. We believe that these release clauses set out the nature of the arrangement between the parties and accurately capture their intention. We have previously dealt with the "Spousal Support Release" and its problems above. This release should be effective in releasing all claims other than support claims and possibly pension claims (which should be specifically addressed - see commentary following "Alternate Release - Long Form" clause below), assuming that the normal formalities with respect to these kinds of agreements have been fulfilled, including complete financial disclosure, independent legal advice and the lack of any vitiating factors, such as duress or undue influence.

Property

15.2 In consideration of and on completion of the parties' mutual obligations in this Agreement, and except as otherwise provided in this Agreement, Harold and Wendy:

(a) release each other from all claims either may have against the other now or in the future under the terms of any statute, in equity or the common law, including all claims under the *Divorce Act*, the *Family Law Act*, and the *Succession Law Reform Act*, for:

i possession of property;

ii ownership of property;

iii division of property;

iv compensation for contributions to property;

v monetary or proprietary remedies for unjust enrichment including claims where there is a joint family venture;

vi claims in trust, including any claims to a constructive or resulting trust; and

vii an equalization payment.

(b) will be entitled to retain their respective property free from any claim by the other party, and will be free to deal with or dispose of their respective property as they deem fit;

(c) will not claim any share or interest in the other party's property;

(d) in the case of RRSPs, RRIFs, registered or unregistered private or employment pensions, life insurance and any such similar property, disclaim any and all rights arising from and benefits payable to them from the other party's plans, including any survivor benefits and other rights or benefits which may arise on the death of the other, or any designations to the contrary that predate this Agreement.

> This clause provides a general release regarding all property claims, including any claim for unjust enrichment (based on the language used in the recent Supreme Court of Canada decision, *Kerr v. Baranow* 2011 SCC 10).
>
> Note, however, that such a general release may well not be sufficient with respect to pension rights. If the parties intend for all rights to a spouse's pension to be released, the governing statute may provide a comprehensive code, requiring specific forms to be completed and filed. It is likely not enough to simply release all rights in a separation agreement. See the N.B.C.A. decision of *Tower Estate v. Tower Estate*, 2012 CarswellNB 126, where a former wife was entitled to receive Supplementary Death Benefits under her former husband's federal pension on his death, because the appropriate forms changing the designation had not been filed as required by the regulations of the Act governing the husband's federal pension, despite a general release in the parties' separation agreement.

Estate

15.3 Except as otherwise provided in this Agreement, Harold and Wendy each renounce any entitlement either may have in the other's will made before the date of this Agreement or to share in the estate of the other upon the other dying intestate.

15.4 Except as otherwise provided in this Agreement, Harold and Wendy release each other from all claims either may have against the other now or in the future under the terms of any statute or the common law, including claims for:

(a) a share in the other's estate;

(b) a payment as a dependant from the other's estate under the *Succession Law Reform*

Act;

(c) any entitlement under the *Family Law Act*;

(d) an appointment as an attorney or guardian of the other's personal care or property under the *Substitute Decisions Act*; and

(e) participation in decisions about the other's medical care or treatment under the *Health Care Consent Act*.

15.5 Except as otherwise provided in this Agreement, on the death of either party:

(a) the surviving party will not share in any testate or intestate benefit from the estate;

(b) the surviving party will not act as personal representative of the deceased; and

(c) the estate of the deceased party will be distributed as if the surviving party had died first.

> Clients need to be reminded that a separation agreement is not a will, nor does a divorce terminate or revoke an existing will (although a remarriage will do so). Accordingly, clients must be reminded upon completing a separation agreement to review all of their beneficiary designations for their life insurance, RRSPs and other pension plans (see also "Waiver/Release of Survivor Benefits" clause re: PBA pensions above), in order to ensure that the benefits will go where he or she intends on his or her death and to avoid an inadvertent double recovery for the party with whom they have just entered into a separation agreement. (See *Gaudio Estate v. Gaudio*, 2005 CanLII 14574 (Ont. S.C.J.) where the court held that a separation agreement with boilerplate release clauses against the estate were insufficient to revoke beneficiary designations in a life insurance policy and RRSPs.) It might be good practice to have your client write and sign a holograph will at the time the separation agreement is completed so that the disposition of the property on death will be taken care of until the client can prepare a formal will.
>
> The parties must remove any entitlement they may have under the other's will in case either of their existing wills have not yet been revoked. This protects your client's estate from a claim by a separated or ex-spouse if your client did not make a new will after the agreement was signed. Also, it better protects your client from a claim by a separated or ex-spouse under the *Succession Law Reform Act* as a dependant for support, or any entitlement if your client died intestate. Having said that, it is important to note that in the event of death, Part V of the *Succession Law Reform Act* provides that an order can be made requiring the estate of the deceased to pay support to a dependant "despite any agreement or waiver to the contrary" (s. 63(4)).

Full and Final Satisfaction of All Claims in Outstanding Court Application

15.6 Harold and Wendy acknowledge that this agreement is in full and final satisfaction of all claims made by either of them in Court File No. [court file number] in the [specify court] at [City, Province].

16. General Terms

Domestic Contract

16.1 Harold and Wendy each acknowledges and agrees that this Agreement is a separation agreement entered into under section 54 of the *Family Law Act*, and is a domestic contract that prevails over all matters dealt with in the *Family Law Act*.

> Section 54 of the *Family Law Act* provides as follows:
>
> Separation agreements
>
> 54(1) 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 decision-making responsibility or parenting time with respect to their children; and
>
> (e) any other matter in the settlement of their affairs.

No Representations

16.2 There are no representations, collateral agreements, warranties or conditions affecting this Agreement. There are no implied agreements arising from this Agreement and this Agreement between the parties constitutes the complete agreement between them.

> There may be times when the parties are signing the Agreement on the understanding that one or the other will do something in addition to what is set out in the Agreement. Without telling counsel, the parties make a "side deal", the Agreement is signed, then one party comes back to his/her lawyer to complain that the other party did not live up to the side deal. Remind the parties that this clause is included as protection for both of them. There are to be no representations, other agreements, warranties or conditions affecting this Agreement. This Agreement is the entire agreement and no other promises will be enforceable.
>
> If there are representations or collateral agreements, this clause must be amended to include reference to other representations or collateral agreements. For example, the parties may intend to rely on representations about the financial position of the parties as disclosed prior to the execution of the Agreement. Some counsel append or annex the financial statements of the parties as proof and an ongoing reminder of the representations made. Financial disclosure must always be accurate and timely. A financial statement that is out-of-date at the time the separation agreement is executed is problematic for both counsel and the party who submitted it and failed to update material differences. Using a financial statement that is inaccurate cannot be overcome by this general term. Parties cannot hide behind inaccurate financial disclosure and say that there was no misrepresentation or warranty in connection with the Agreement. However, this term should protect parties against other kinds of representations or warranties

> that were not written, or were not included in the Agreement.

Reconciliation

16.3 If Harold and Wendy attempt to reconcile their relationship, but cohabit for no longer than 90 days, this Agreement will not be affected. If they cohabit for more than 90 days, this Agreement will become void, except that any transfers or payments made to that time will not be affected or invalidated.

> In most cases, it may seem unlikely that the parties will try and reconcile, but it does happen. The effect of reconciliation is to void the Agreement but to leave in place any property transfers. For clarity, however, the value of all property owned on the new valuation date, including that which may have been transferred by one party to the other under this Agreement, will form part of the net family property of the transferee. In drafting the Agreement, it would be wise to consider the consequences of reconciliation and exactly what the parties wish to occur in the event the parties reconcile. If the parties attempt a reconciliation and cohabit for a cumulative period of up to 90 days, the Agreement will not be affected. If the parties reconcile within the same calendar year as the Agreement and support is being paid during that period, the support will lose its deductibility for the entire year because the parties need to be separated at the end of the calendar year under the *Income Tax Act*. Accordingly, when consulted by clients who are considering reconciliation, counsel may recommend that they reconcile after New Year's Eve or face a severe tax consequence. There may also be attribution and other capital gains tax consequences that should be reviewed carefully.

Severability

16.4 Except as otherwise provided in this Agreement, the invalidity or unenforceability of any term of this Agreement does not affect the validity or enforceability of any other term. Any invalid term will be treated as severed from the remaining terms.

> Although a severability clause is common in separation agreements, it is rarely carefully considered. The parties usually wish the Agreement to be a comprehensive settlement, particularly if the support and property terms are intertwined. Severability can be useful if the parties have drafted a term that is potentially unlawful. The risk is slight, since the parties are negotiating a separation agreement as opposed to a marriage contract, which has certain prohibitions such as contracting about decision-making responsibility or parenting time with respect to their children, or possessory rights to a matrimonial home. It would arise only if the parties create a term that is void as against public policy. The severability term may weaken the effectiveness of the spousal support release from the payor's perspective. The person seeking support in the face of such a release may argue that the parties contemplated the Agreement being severable and the granting of spousal support in the face of a release should not affect the validity of the rest of the terms of the Agreement. Whether the Agreement should contain a severability clause is a matter of careful reflection and negotiation.

Headings

16.5 The section headings contained in this Agreement are for convenience only and do not affect the meaning or interpretation of any term of this Agreement.

> This clause could be inserted at the beginning of the Agreement.

Application Already Commenced

16.6 On execution of this Agreement, [Harold or Wendy] will forthwith proceed to obtain a divorce judgment or order for a [divorce only] [divorce and the incorporation of the terms of this Agreement as set out below] with no costs payable. [Harold or Wendy] will forthwith withdraw the Answer filed in the proceeding and the divorce will proceed on an uncontested basis.

> Select only one of the following 3 clauses: "Application Already Commenced"; "Application to be Commenced by One Party"; or "Application to be Commenced by Either Party".

Application to be Commenced by One Party

16.7 On execution of this Agreement, [Harold or Wendy] will forthwith commence an application to obtain a [divorce only] [divorce and the incorporation of the terms of this Agreement as set out below] with no costs payable. [The other party will cooperate in the service of documents.] [The application will be served with an Acknowledgement of Service form (see attached Schedule "Form 6: Acknowledgement of Service"), which the other party will sign and return.] [The other party will instruct their counsel to accept service of the application on their behalf, if served within 60 days of the date of this Agreement.] The divorce will then proceed on an uncontested basis.

> Select only one of the following 3 clauses: "Application Already Commenced"; "Application to be Commenced by One Party"; or "Application to be Commenced by Either Party".

Application to be Commenced by Either Party

16.8 On execution of this Agreement, either party may commence an application to obtain a [divorce only] [divorce and the incorporation of the terms of this Agreement as set out below] with no costs payable. The other party will cooperate in the service of documents. The divorce will proceed on an uncontested basis.

> Select only one of the following 3 clauses: "Application Already Commenced"; "Application to be Commenced by One Party"; or "Application to be Commenced by Either Party".

Costs to be Borne by One Party

16.9 The costs of any application for a divorce judgment or order will be borne by [Harold or Wendy] [the party commencing the application].

> Select only one of the following 2 clauses: "Costs to be Shared"; or "Costs to be Borne by One Party".

Costs to be Shared

16.10 The costs of any application for a divorce judgment or order will be shared equally between the parties. To this end, [Harold will pay $[amount] to Wendy] representing Harold's share of the costs.] [[Wendy will pay $[amount] to Harold representing Wendy's share of the costs.] [The party proceeding to obtain the divorce judgment or order will provide the other with the invoice for the total cost, that will then be divided equally between them.]

> Select only one of the following 2 clauses: "Costs to be Shared"; or "Costs to be Borne by One Party".

Clauses to be Incorporated in Judgment/Order

16.11 If a divorce judgment or order issues, paragraphs [specify paragraphs to be incorporated] of this Agreement will be incorporated in the judgment or order, [in the draft form attached as a schedule,]and this paragraph constitutes the parties' consent thereto. [Because the incorporated sections include parenting terms, the parties will each complete a Form 35.1 "Affidavit (decision-making responsibility, parenting time, contact)".]

> Select only one of the following 2 clauses: "Clauses to be Incorporated in Judgment/Order"; or "No Clauses to be Incorporated in Judgment/Order".
>
> Care should be taken to consider what clauses of the Agreement, if any, should be incorporated in the divorce judgment. The Agreement can always be registered under the *Family Law Act*, but that will only be for enforcement purposes. Since, in many cases, the parties may wish to use traditional methods of enforcement rather than the FRO, an inclusion of various terms will give rise to an enforceable judgment with the ability to execute on a judgment that is in default. The best practice is to draft a form of judgment/order and attach it as a schedule so that there is no confusion as to the wording that will appear in the judgment/order.
>
> If the clauses to be incorporated include parenting terms regarding decision-making responsibility, parenting time or contact, the parties will necessarily need to include the Form 35.1: "Affidavit (decision-making responsibility, parenting time, contact)" in any application for a divorce judgment or order.

No Clauses to be Incorporated in Judgment/Order

16.12 If a divorce judgment or order issues, none of the clauses of this Agreement will be incorporated in the judgment or order.

> Select only one of the following 2 clauses: "Clauses to be Incorporated in Judgment/Order"; or "No Clauses to be Incorporated in Judgment/Order".

Separation Agreement To Survive Divorce

16.13 If a divorce judgment or order issues, all of the terms of this Agreement will continue.

> This clause eliminates the now highly suspect argument that the agreement merged with a divorce judgment. It is included only out of an abundance of caution.

Religious Barriers to Remarriage

16.14 Harold and Wendy wish to remove any religious barriers to either party's remarriage and they will co-operate in immediately obtaining a [Catholic annulment, Jewish Ghet or Muslim divorce]. They will share the cost equally.

> This clause may need to be more specific in high-conflict cases or where there is a serious concern that the other party will not cooperate. An Agreement cannot be dependent upon the other party removing the religious barrier since that would contravene the provisions of the *Family Law Act*. On the other hand, if the parties complete the divorce and the financial settlement, and the religious divorce has not been completed, there will be little incentive for the other side to cooperate. Accordingly, it must be discussed with a client whether there is any risk that the other side will not cooperate and remove the religious barriers. If there is a risk, then the religious barriers should be removed before the divorce is completed or before the financial settlement is made, particularly where there is a lump-sum payment. Another way of accomplishing the same purpose is to have any lump-sum paid into the lawyer's trust account and released upon the delivery of the religious divorce.

Applicable Law And Interpretation

16.15 Unless the parties agree otherwise:

(a) the laws of Ontario apply to this Agreement and its interpretation;

(b) [subject to the provisions in this Agreement relating to [Collaborative Family Law, mediation, arbitration etc.],]the [Ontario Superior Court of Justice, Family Court] [Ontario Superior Court of Justice] [Ontario Court of Justice] has exclusive jurisdiction over this Agreement.

> Depending on the issues covered in this Agreement and the applicable legislation, select the appropriate court to have jurisdiction over this Agreement.

Agreement To Bind Estate

16.16 This Agreement survives the death of Harold and Wendy and enures to the benefit of and binds Harold and Wendy's heirs, executors, administrators, estate trustees, personal representatives and assigns.

> This clause provides that the parties' estate trustees, personal representatives or administrators are bound by this Agreement, and that the Agreement therefore prevails over other matters provided by statute in the event of a party's death (unless of course the Agreement is found to be invalid for some reason (ie. no financial disclosure, duress etc.)). Having said that, it is important to note that in the event of death, Part V of the *Succession Law Reform Act* provides that an order can be made requiring the estate of the deceased to pay support to a dependant "despite any agreement or waiver to the contrary" (s. 63(4)).
>
> If the Agreement is intended to apply in the event of death, any will should obviously be consistent with the Agreement, and a copy of the Agreement should be provided to the estate solicitor preparing the will. It would be good practice for any will to include a clause expressly referencing this Agreement (eg. "I draw the attention of my estate trustees to a separation agreement dated x, made between me and my former spouse, y, under which I may have obligations that survive my death.")
>
> Counsel should be sure to remind clients that a separation agreement is not a will, nor does a divorce terminate or revoke an existing will (although a remarriage will do so). Accordingly, clients must be reminded upon completing a separation agreement to review all of their beneficiary designations for their life insurance, RRSPs and other pension plans, in order to ensure that the benefits will go where he or she intends on his or her death.

Inform Personal Representatives

16.17 Harold and Wendy will each inform the executors, estate trustees, personal representatives named in each one's will that this Agreement exists, and where a copy is located.

> This is not an enforceable clause but is included in the Agreement to remind each party that obligations may survive his or her death and, accordingly, estate trustees need to be informed of the contents of this Agreement. It may also serve as a reminder to the parties to consider making new wills.

Amendments

16.18 Any amendments to this Agreement must be in writing, signed by the parties, dated and witnessed.

> This is an important clause which counsel should bring to the attention of their clients. If any amendments to the Agreement are to be made, the parties must be cautioned that they need to be in writing, dated and witnessed. Any other amendment, particularly an oral one made between the parties, is not binding or enforceable.

Execution Of Other Documents

16.19 Harold and Wendy will sign any documents necessary to give effect to this Agreement.

> This general clause is for low-conflict cases or unanticipated requirements. In high-conflict cases, documents to be signed should be specified and signed contemporaneously, if at all possible.

Financial Disclosure

16.20 Harold and Wendy have disclosed their income, assets and debts/liabilities existing at the date of [marriage or start of cohabitation,]separation and the date of this Agreement.

> Select only one of the following 2 clauses: "Financial Disclosure"; or "Financial Investigation".
>
> The importance of full financial disclosure in the negotiation of a separation agreement cannot be stressed enough. Although not an express statutory requirement in the *Family Law Act*, for all practical purposes financial disclosure should be treated as if it is one. Section 56(4) of the *Family Law Act* cites failure to disclose to the other "significant assets, or significant debts or other liabilities, existing when the contract was made" as one of the grounds for setting aside a domestic contract or any provision in it - an obligation that cannot be waived (s. 56(7)).
>
> Furthermore, the Supreme Court of Canada, in *Rick v. Brandsema*, [2009] 1 S.C.R. 295, affirmed that the parties are under a duty to make full and honest disclosure of all relevant financial information when negotiating separation agreements. A failure to do so could result in the agreement being set aside.

Financial Investigation

16.21

(a) Each party has investigated the other's financial circumstances and is satisfied with the disclosure and investigation.

(b) The parties acknowledge that their respective solicitors have drawn their attention to section 56(4)(a) of the *Family Law Act*, that provides as follows:

"56(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."

> Select only one of the following 3 clauses: "Financial Disclosure"; "Financial Investigation" or "Disclosure Waiver".
>
> See the Commentary under the "Financial Disclosure" clause above about the importance of full financial disclosure.

> Rarely should counsel accept a party's direction not to investigate the other spouse's financial position, as it is impossible to accurately ascertain the rights of the parties or advise them properly without knowing their financial positions. Counsel must explore fully the risks of such an approach and make sure the client understands all the risks.
>
> There are rare cases where a party feels confident that he or she knows all the important facts about the other's finances and so understands the nature and consequences of the Agreement. In these circumstances, counsel must determine whether he/she feels comfortable continuing to act for the client. If the lawyer continues to act on behalf of the client, the client must understand the very real risk this creates regarding the validity of the Agreement.
>
> If there is to be an Agreement without such full disclosure, counsel would be well advised to spell out the risks in writing and receive written instructions and an acknowledgement from the client to proceed in the face of these risks, in an effort to protect counsel from a future negligence action.

Disclosure Waiver

16.22

(a) Although neither Harold nor Wendy has requested financial disclosure from the other, each is satisfied with the financial information each has about the other and each waives further financial disclosure.

(b) Harold and Wendy agree that lack of financial disclosure shall not constitute a ground for avoiding the provisions of this Agreement. Harold and Wendy deem financial disclosure irrelevant to the negotiation of the terms of this Agreement.

(c) The parties acknowledge that their respective solicitors have drawn their attention to section 56(4)(a) of the *Family Law Act*, that provides as follows:

"56(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."

> Select only one of the following 3 clauses: "Financial Disclosure"; "Financial Investigation" or "Disclosure Waiver".
>
> The importance of full financial disclosure in the negotiation of a separation agreement cannot be stressed enough. Although not an express statutory requirement in the *Family Law Act*, for all practical purposes financial disclosure should be treated as if it is one. Section 56(4) of the *Family Law Act* allows a court to set aside a domestic contract or a term in it if a party failed to disclose to the other significant assets or significant debts or other liabilities existing when the domestic contract was made, if a party did not understand the nature or consequences of a domestic contract, or otherwise in accordance with the law of

contract. Subsection 56(7) specifically states that s. 56(4) applies despite any agreement to the contrary. Accordingly, the parties cannot oust the jurisdiction of the court to review and set aside the Agreement by attempting to waive financial disclosure, despite the wording of this clause, and counsel should ensure that a client understands this point.

Furthermore, the Supreme Court of Canada, in *Rick v. Brandsema*, [2009] 1 S.C.R. 295, recently affirmed that the parties are under a duty to make full and honest disclosure of all relevant financial information when negotiating separation agreements. A failure to do so could result in the agreement being set aside.

Rarely should counsel accept a party's direction not to investigate the other spouse's financial position, as it is impossible to accurately ascertain the rights of the parties or advise them properly without knowing their financial positions. Counsel must explore fully the risks of such an approach and make sure the client understands all the risks.

There are rare cases where a party feels confident that he or she knows all the important facts about the other's finances and so understands the nature and consequences of the Agreement. In these circumstances, counsel must determine whether he/she feels comfortable continuing to act for the client. If the lawyer continues to act on behalf of the client, the client must understand the very real risk this creates regarding the validity of the Agreement.

If there is to be an Agreement without such full disclosure, counsel would be well advised to spell out the risks in writing and receive written instructions and an acknowledgement from the client to proceed in the face of these risks, in an effort to protect counsel from a future negligence action.

Financial Statements Attached

16.23 Harold and Wendy attach their [sworn]financial statements [ie. Form 13/13.1]as Schedules to this Agreement.

Select only one of the following 2 clauses: "Financial Statements Attached"; or "Statements of Income, Assets, Debts and Excluded Property Attached". See the Commentary under the "Statements of Income, Assets, Debts and Excluded Property Attached" clause below for discussion of the benefits of filing those kinds of Statements.

Some counsel like to attach the financial statements that were prepared and sworn by the parties as schedules to the Agreement. Sworn financial statements are sometimes preferred over simple statements of income, assets, debts and excluded property given that they are often readily available, having already been prepared either in preparation for court or for settlement reasons. As well, the detailed sources of income and budget information in a sworn financial statement can assist in determining the reality of the situation at the time that the Agreement was entered into (especially with respect to children's expenses). Finally, some argue that the requirement that a financial statement be sworn impresses upon the parties the importance of providing the most accurate and up-to-date disclosure.

See the Commentary under the "Financial Disclosure" clause above about the importance of full financial disclosure.

Statements of Income, Assets, Debts and Excluded Property Attached

16.24 Harold and Wendy attach their [sworn]Statements of Income, Assets, Debts and Excluded Property as Schedules to this Agreement.

> Select only one of the following 2 clauses: "Financial Statements Attached"; or "Statements of Income, Assets, Debts and Excluded Property Attached". See the Commentary under the "Financial Statements Attached" clause above for discussion of the benefits of filing sworn Financial Statements.
>
> Rather than sworn financial statements as in the clause above, some counsel prefer to attach statements listing the party's income, assets, debts and excluded property. This is particularly so if the parties have not been involved in a court procedure and sworn financial statements have not previously been prepared. Regardless of the format, this disclosure allows the parties and, subsequently, a court or mediator/arbitrator to understand the basis of the Agreement and more easily determine whether there has been a material change in financial circumstances.
>
> On occasion, the Agreement may be given to third parties, such as schools, medical practitioners and CRA and, accordingly, the parties may not wish to have the financial statements as a schedule. This is a matter of negotiation and the advantages and disadvantages of such an approach will have to be carefully considered.
>
> If the parties prefer, these Statements can also be sworn.
>
> See the Commentary under the "Financial Disclosure" clause above about the importance of full financial disclosure.

Non-compliance

16.25 Harold or Wendy's failure to insist on the strict performance of any terms in this Agreement will not be a waiver of any term.

Costs

16.26 The parties will pay their own costs for the negotiation and preparation of this Agreement.

Independent Legal Advice

16.27

(a) Harold and Wendy have both had independent legal advice, Harold from [name] and Wendy from [name].

(b) Harold and Wendy:

i understand their respective rights and obligations under this Agreement and its nature and consequences;

ii acknowledge that this Agreement is fair and reasonable;

iii acknowledge that they are not under any undue influence or duress; and

iv acknowledge that both are signing this Agreement voluntarily.

> Select only one of the following 2 clauses: "Independent Legal Advice"; or "Independent Legal Advice Declined."

Independent Legal Advice Declined

16.28

(a) [Harold or Wendy] has been told to obtain independent legal advice, has had the opportunity to obtain independent legal advice, and has declined it. [Harold or Wendy] will execute the attached Schedule, "Waiver of Independent Legal Advice".

(b) Harold and Wendy:

i understand their respective rights and obligations under this Agreement and its nature and consequences;

ii acknowledge that this Agreement is fair and reasonable;

iii acknowledge that they are not under any undue influence or duress; and

iv acknowledge that both are signing this Agreement voluntarily.

> Select only one of the following 2 clauses: "Independent Legal Advice"; or "Independent Legal Advice Declined."
>
> If one of the parties acknowledges that he/she has been told to get independent legal advice, it is incumbent upon the other's counsel to make sure that this message was in fact clearly communicated. It is better to insist that the other party get independent legal advice in order to protect the spouse who already has received advice, but sometimes one of the parties declines. The Agreement should then clearly delineate that counsel acted for only one party.

Where Consent is Required in Agreement

16.29 Where consent is required under this Agreement, it will not be unreasonably withheld. If Harold and Wendy cannot agree whether consent is being reasonably withheld, they will use the section of this Agreement entitled "Dispute Resolution" to resolve the matter.

Execution - Counterparts; Electronic Signature/Delivery

16.30 The Agreement may be executed and delivered as follows:

(a) This Agreement may be signed in one or more counterparts, as may be convenient or

required. All counterparts of this Agreement will collectively constitute one document.

(b) This Agreement or any counterparts may be signed by electronic means, and will bind any such party the same way as the party's handwritten signature would.

(c) Delivery of a signed Agreement or any signed counterparts by facsimile and/or electronic mail or other electronic means will be sufficient, and an electronic copy will have the same effect as an original executed Agreement.

> In our ever expanding virtual world, this clause is necessary for the purposes of executing the Agreement.

Effective Date

16.31 The effective date of this Agreement is the date on which the latter party signs it.

Joint Preparation

16.32 This Agreement was prepared jointly by both parties [and their solicitors].

17. Schedules

Certificates of Independent Legal Advice

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, [name], of [city/town], [province], Barrister and Solicitor, certify that I was consulted by Harold Doe, one of the parties to the attached Separation Agreement with respect to Harold's rights and obligations under this Agreement.

I acted only for Harold Doe and fully explained to Harold the nature and effect of the Agreement. Harold Doe acknowledged that they completely understood the nature and effect of the Agreement. Harold Doe executed the Agreement in front of me and confirmed that they were entering into the Agreement of their own volition without any fear, threats, compulsion or influence by Wendy Doe or any other person.

Dated at [city/town], [province], on [date]

[name]

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, [name], of [city/town], [province], Barrister and Solicitor, certify that I was consulted by Wendy Doe, one of the parties to the attached Separation Agreement with respect to Wendy's rights and obligations under this Agreement.

I acted only for Wendy Doe and fully explained to Wendy the nature and effect of the Agreement. Wendy Doe acknowledged that they completely understood the nature and effect of the Agreement. Wendy Doe executed the Agreement in front of me and confirmed that they were entering into the Agreement of their own volition without any fear, threats, compulsion or influence by Harold Doe or any other person.

Dated at [city/town], [province], on [date]

[name]

> Where a client is prepared to execute a separation agreement, but the lawyer suspects that the client is being pressured or unduly influenced to do so, the lawyer would be well-advised to decline to act on behalf of the client. If, however, the lawyer continues to act for the client, a watered down version of the attestation and this Certificate of Independent Legal Advice should be prepared so that the solicitor is not falsely vouching for the client's voluntariness. Furthermore, if a client is prepared to execute the Agreement contrary to the lawyer's advice, it is good practice to have the client sign an acknowledgement indicating his or her decision to execute the Agreement contrary to the lawyer's legal advice, in order to protect the lawyer from potential negligence claims in the future.
>
> Where a client has been advised by the lawyer but is executing the Agreement before the lawyer's law clerk or another lawyer/associate in the office, it may be necessary to separate the Certificate of Independent Legal Advice from the execution, by including a separate Affidavit of Execution (see Schedule that follows).

Affidavits of Execution and Certificates of Independent Legal Advice, where separate

AFFIDAVIT OF EXECUTION

I, [witness' name], of [City], [province], make oath and say as follows:

I was personally present and did see the attached Separation Agreement executed by Harold Doe in the City of [specify] in the Municipality of [specify], in the Province of [province].

I know Harold Doe. I am a subscribing witness to this Agreement.

SWORN BEFORE ME at [City], [province], on [date]

A Commissioner, etc.

[commissioner's name]

[witness' name]

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, [name], of [city/town], [province], Barrister and Solicitor, certify that I was consulted by Harold Doe, one of the parties to the attached Separation Agreement with respect to Harold's rights and obligations under this Agreement.

I acted only for Harold Doe and fully explained to Harold the nature and effect of the Agreement. Harold Doe acknowledged that they completely understood the nature and effect of the Agreement and that they were entering into the Agreement of their own volition without any fear, threats, compulsion or influence by Wendy Doe or any other person.

Dated at [city/town], [province], on [date]

[name]

AFFIDAVIT OF EXECUTION

I, [witness' name], of [City], [province], make oath and say as follows:

I was personally present and did see the attached Separation Agreement executed by Wendy Doe in the City of [specify] in the Municipality of [specify], in the Province of [province].

I know Wendy Doe. I am a subscribing witness to this Agreement.

SWORN BEFORE ME at [City], [province], on [date]

A Commissioner, etc.

[commissioner's name]

[witness' name]

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, [name], of [city/town], [province], Barrister and Solicitor, certify that I was consulted by Wendy Doe, one of the parties to the attached Separation Agreement with respect to Wendy's rights and obligations under this Agreement.

I acted only for Wendy Doe and fully explained to Wendy the nature and effect of the Agreement. Wendy Doe acknowledged that they completely understood the nature and effect of the Agreement and that they were entering into the Agreement of their own volition without any fear, threats, compulsion or influence by Harold Doe or any other person.

Dated at [city/town], [province], on [date]

[name]

> While it is preferable to have the Agreement executed by the lawyer, sometimes it is difficult to do so given scheduling conflicts. Where a client has been advised by the lawyer but is executing the Agreement before the lawyer's law clerk or another lawyer/associate in the office, it may be necessary to separate the Certificate of Independent Legal Advice from the execution, by including a separate Affidavit of Execution. Note that if the Agreement is not able to be executed before the lawyer, it should be executed before someone associated with the lawyer's office.
>
> See Commentary under the "Certificates of Independent Legal Advice" Schedule above regarding Independent Legal Advice.

Waiver of Independent Legal Advice

WAIVER OF INDEPENDENT LEGAL ADVICE

I, Wendy Doe, of [city], [province], certify that:

17.1 I have read and understand the attached Separation Agreement dated [specify] , and I am fully aware of each and every term therein. I have read and understand to my satisfaction my obligations and rights under the Agreement.

17.2 I acknowledge and understand that [name] is the solicitor for my [former] spouse, Harold Doe, and only for my [former] spouse. I understand that [name] is NOT my solicitor and is NOT the solicitor for me and my [former] spouse together. I have received no legal advice from [name].

17.3 I acknowledge that [name] has recommended that I seek independent legal advice with respect to the terms of the Agreement, and that I have been given an opportunity to seek such legal advice. Notwithstanding such recommendation, and said opportunity, I acknowledge and declare that:

(a) I wish to enter into this Agreement without independent legal advice;

(b) I understand the terms of this Agreement and that they correctly set out my wishes and intentions;

(c) I will not seek to challenge this Agreement at some later date on the basis of a complaint that I did not receive independent legal advice or that I did not understand the terms; and

(d) I agree to be bound by those terms.

17.4 I acknowledge and declare that I am executing this Agreement of my own volition and without fear, threats, compulsions or influence by my [former] spouse, [name] or any other

person.

Dated at [City], [province], on [date]

Witness [provide full name, address/contact info]

Wendy Doe

> It is always advisable to try to convince the party on the other side to get independent legal advice to protect the agreement for the sake of your own client. However, where the party refuses, it is important to have them sign this waiver indicating that they understand what they are signing and understand that you are not acting for them.

Financial Disclosure - Statements of Income, Assets, Debts and Excluded Property with values

[See Form GEN 1 - "Financial Disclosure (at separation)" available in your DM Forms Cloud.]

[OR See Form 00 - Schedule - Financial Disclosure (Separation Agreement) available in your "Available Forms" tab in your Forms One desktop software.]

> The importance of full financial disclosure in the negotiation of a separation agreement cannot be stressed enough. Although not an express statutory requirement in the *Family Law Act*, for all practical purposes financial disclosure should be treated as if it is one. Section 56(4) of the *Family Law Act* cites failure to disclose to the other "significant assets, or significant debts or other liabilities, existing when the contract was made" as one of the grounds for setting aside a domestic contract or any provision in it - an obligation that cannot be waived (s. 56(7)).
>
> Furthermore, the Supreme Court of Canada, in *Rick v. Brandsema*, [2009] 1 S.C.R. 295, recently affirmed that the parties are under a duty to make full and honest disclosure of all relevant financial information when negotiating separation agreements. A failure to do so could result in the agreement being set aside.
>
> This schedule requires each party's financial disclosure to be appended to the Agreement. This allows the parties and, subsequently, a court or mediator/arbitrator to understand the basis of the agreement and more easily determine whether there has been a material change in financial circumstances.
>
> While some counsel like to attach the financial statements that were prepared and sworn by the parties as

> schedules to the agreement, some prefer to attach statements listing the party's income, assets and debts/liabilities as set out in this schedule. This is particularly so if the parties have not been involved in a court procedure and sworn financial statements have not previously been prepared and are not readily available.
>
> On occasion, the agreement may be given to third parties, such as schools, medical practitioners and CRA and, accordingly, the parties may not wish to have the financial statements as a schedule. This is a matter of negotiation and the advantages and disadvantages of such an approach will have to be carefully considered.

Authorization and Direction for Information from Third Party

Schedule

AUTHORIZATION AND DIRECTION

To:

From:

Re:

[Teachers, School Officials, Doctors, Dentists, Health Care Providers, Summer Camp Counsellors or others involved with the children]

Wendy Doe

Charles and Claire [and birthdate(s)]

I, Wendy Doe, the undersigned, hereby authorize and direct you to provide to Harold Doe, directly:

(a) any information Harold may request from you, from time to time, in relation to Charles and Claire; and

(b) a copy of any information you may provide to me in relation to Charles and Claire.

Dated at [City], [province], this [date]:

Wendy Doe

Travel Consent Form

Schedule

TRAVEL CONSENT FORM

To:

From:

Re:

[travelling party's full name]

[other party's full name]

Travel

I, [other party's full name], consent to my children, namely [names and birth dates] travelling with their [mother] [father], [travelling party's full name], to [location], pursuant to the following schedule:

[insert dates, times and airline as well as other travel information]

Dated at [City], [province], this [date]:

Notary Public (affix seal)

[full name]

Indexing Calculation

Schedule

INDEXING CALCULATION

Note: The following is an example of an indexing calculation for either spousal or child support:

Example: To calculate an adjustment to child support for April 1, 2022, using a January to January calculation date:

Assume the change in the Consumer Price Index for All-Items for Canada, not seasonally adjusted, between January 1, 2021 and January 1, 2022 is 1.5% (0.015 is indexing factor).

Support is $620.00 pursuant to the agreement as of April 1, 2021.

Support will increase to $629.30 on April 1, 2022 as follows:

$620.00 (current amount) x 1.015 (indexing factor) = $629.30 (new amount)

To determine the indexing factor, refer to the Consumer Price Index tables on the Statistics Canada website at http://www.statcan.gc.ca/tables-tableaux/sum-som/

NOTE: This is an example only.

> This standard schedule is useful to help the parties do their own calculations for the indexing change.
>
> Be careful not to apply the indexing section to the "Section 7 Expenses" section unless they are a fixed amount that do not relate precisely to the expense being incurred. That is, the parties may have agreed that Harold will contribute a global amount of $300 a month toward the section 7 expenses. If that is the method chosen and indexing is being used, then the section 7 expenses amount should also be indexed.

Calculation of Adjustment if Payor's Income Change is Less Than Indexing Factor

Schedule

CALCULATION OF ADJUSTMENT IF PAYOR'S INCOME

CHANGE IS LESS THAN INDEXING FACTOR

Note: The following is an example of a "lesser of" adjustment to either child or spousal support:

Example: To calculate an adjustment to spousal support for April 1, 2022, using a January to January calculation date:

1. Assume the change in the Consumer Price Index for All-Items for Canada, not seasonally adjusted, between January 1, 2021 and Janyar 1, 2022 is 1.5% (indexing factor is .015).

2. Assume Harold's income calculated under the Spousal Support section in 2020 was $100,000.00.

   Assume Harold's income calculated under the Spousal Support section in 2021 was $100,700.00.

   Therefore, Harold's income over that period increased by .7% or 0.007 which is less than the 0.015 increase in CPI.

3. Support is $620.00 under the agreement as of April 1, 2021.

   Support will increase by .7% to $624.34 on April 1, 2022 as follows:

   > $620.00 (current amount) x 1.007 (the percentage increase in Harold's income) = $624.34 (new amount)

To determine the indexing factor, refer to the Consumer Price Index tables on the Statistics Canada website at http://www.statcan.gc.ca/tables-tableaux/sum-som/

NOTE: This is an example only.

> See the Commentary under the "Indexing Calculation" Schedule above for more information.

Mediation/Arbitration Agreement

Schedule

MEDIATION/ARBITRATION AGREEMENT

BETWEEN:

Harold Doe

- and -

Wendy Doe

SUBMISSION TO MEDIATION/ARBITRATION

The parties wish to attempt mediation of the issues listed below. Failing a mediated settlement

(which failure shall be determined by the mediator), the parties wish the mediator to immediately arbitrate the issues on a final basis.

17.5 BACKGROUND

(a) The parties have been separated from each other since [date];

(b) The parties have agreed to submit their differences to a mediator/arbitrator; and

(c) The parties have agreed that, except as necessary because of any particular facts or circumstances arising out of their dispute, this document will form the written submission to mediation/arbitration.

17.6 SUBSTANTIVE ISSUES

(a) [issue and brief description]

(b) [issue and brief description]

(c) [issue and brief description]

The following issues are being submitted for final determination:

(d) [issue]

(e) [issue]

(f) [issue]

17.7 CONFIDENTIALITY

The proceedings and the record thereof shall be private and confidential.

17.8 PROCEDURAL ISSUES

(a) Time and Place:

The hearing shall take place at [location] in the City of [City], in the Province of Ontario, on [date] commencing at [time].

(b) Mediator/Arbitrator:

The mediator/arbitrator shall be [name]. If [he/she] is unavailable, [name] will be the mediator/arbitrator.

(c) There shall be no reporter or stenographer and there shall be no formal record of the hearing and the mediation/arbitration shall be [open] [closed].

(d) The parties acknowledge their right of appeal for errors in law, with leave, or for a breach of natural justice. [provide more expansive rights of appeal if desired]

(e) The parties waive section 35 of the *Arbitration Act*.

17.9 MEDIATOR'S/ARBITRATOR'S FEES AND DISBURSEMENTS

(a) The mediator's/arbitrator's fees shall be $[amount] per hour plus H.S.T.

(b) The disbursements of the mediator/arbitrator shall include the cost of photocopies, couriers, facsimile and long distance charges.

(c) The estimated fees and disbursements of the mediator/arbitrator shall be paid to the mediator/arbitrator in trust at least seven (7) days before the scheduled commencement of the session, based upon the amount of time reserved.

(d) If the mediation/arbitration hearing is cancelled, the mediator/ arbitrator shall be paid for any time spent or disbursements incurred prior to receipt by the mediator/arbitrator of notice of cancellation.

(e) The parties [and their solicitors] shall be jointly and severally liable for the fees and disbursements of the mediator/arbitrator.

17.10 WAIVER OF MEDIATOR'S/ARBITRATOR'S LIABILITY

The parties hereby waive any claim or right of action against the mediator/arbitrator arising out of these proceedings for any cause or reason.

17.11 INDEPENDENT LEGAL ADVICE

(a) Harold and Wendy have both had independent legal advice, Harold from [name] and Wendy from [name].

(b) Harold and Wendy:

i understand their respective rights and obligations under this Agreement and its nature and consequences;

ii acknowledge that this Agreement is fair and reasonable;

iii acknowledge that they are not under any undue influence or duress; and

iv acknowledge that both are signing this Agreement voluntarily.

17.12 GENERAL TERMS

(a) This arbitration shall be conducted in accordance with the laws of Ontario [or another Canadian jurisdiction].

(b) This Agreement is a secondary arbitration pursuant to the *Arbitration Act* and the *Family Law Act*.

(c) The invalidity or unenforceability of any term of this Agreement does not affect the validity or unenforceability of any other term. Any invalid term will be treated as severed from the remaining terms.

DATED:

[name]

Solicitor for Harold Doe

Harold Doe

DATED:

[name]

Solicitor for Wendy Doe

Wendy Doe

> Mediation-arbitration ("medi-arb") is becoming a common dispute resolution method. The chosen person acts as a mediator for a limited period of time and then, failing an agreement, resolves the matter by arbitration. If arbitration is going to be used, then the parties will, in due course, have to draft and sign an

> Arbitration Agreement or a Mediation/Arbitration Agreement, similar in form to this Schedule. If the parties are using mediation and/or arbitration as a dispute resolution process, they may wish to choose the mediator/arbitrator or his or her alternate in advance, or, at a minimum, set out the method of choosing him or her. If the parties wish the mediator and arbitrator to be the same person, the parties must specifically waive s. 35 of the *Arbitration Act*.
>
> The *Arbitration Act* makes a distinction between "family arbitrations" and other arbitrations. Family arbitrations are defined as arbitrations that deal with matters that can be dealt with in domestic contracts under Part IV of the *Family Law Act* and conducted exclusively in accordance with the law of Ontario or another Canadian jurisdiction. Therefore, religious based arbitrations in the family law context are no longer legally effective and parties cannot submit to arbitration in accordance with any law outside of Canada.
>
> Arbitration agreements are now considered domestic contracts under the *Family Law Act* and must be in writing, signed, witnessed, with the parties having received independent legal advice. Parties can no longer contract out of the right to appeal questions of law. Parties can only enter into a family arbitration agreement once the underlying dispute has arisen. Therefore, arbitration provisions in marriage contracts will be unenforceable. Arbitration provisions in separation agreements, however, will be protected as they are classified as "secondary arbitration" provisions, addressing arbitration of future disputes relating to the management or implementation of the agreement, order or award, and don't have the same rigid formalities as a family arbitration.
>
> Section 4 Comment:
>
> "(d) Appeal" Comment: Pursuant to the *Arbitration Act,* parties cannot contract out of the right to appeal questions of law, with leave. They can, however, provide more expansive rights of appeal.
>
> "(e) Section 35" Comment: If the parties wish the mediator and arbitrator to be the same person, the parties must specifically waive s. 35 of the *Arbitration Act*.
>
> Section 7 Comment:
>
> Pursuant to the *Arbitration Act,* parties to arbitration agreements must have independent legal advice. However, secondary arbitrations, such as the one contemplated herein, do not similarly require independent legal advice, although it is generally advisable to do so in any event.

Authorization and Direction to Insurer re: Irrevocable Beneficiary and Insurance Information

Schedule

AUTHORIZATION AND DIRECTION

To:

From:

Re:

[Insurance Company]

[and Name of Employer if Insurance is through Employer]

Harold Doe

Insurance Policy through [Insurance Company], Number [number] (the "Policy")

I, Harold Doe, the undersigned, hereby irrevocably authorize and direct you to:

(d) make Wendy Doe the beneficiary of $[amount] of the Policy;

(e) provide to Wendy Doe directly:

i any information Wendy may request from you, from time to time, in relation to the status of the policy premiums, the amount of coverage, and the termination terms of such coverage; and

ii a copy of any notice(s) you provide to me in relation to your intention to, or confirmation to me of directions you have received from me, to terminate or change the terms of such coverage.

Dated at [City], {{ SsPayorProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Harold Doe

Schedule

AUTHORIZATION AND DIRECTION

To:

From:

Re:

[Insurance Company]

[and Name of Employer if Insurance is through Employer]

Wendy Doe

Insurance Policy through [Insurance Company], Number [number] (the "Policy")

I, Wendy Doe, the undersigned, hereby irrevocably authorize and direct you to:

(f) make Harold Doe the beneficiary of $[amount] of the Policy;

(g) provide to Harold Doe directly:

i any information he may request from you, from time to time, in relation to the status of the policy premiums, the amount of coverage, the termination terms of such coverage; and

ii a copy of any notice(s) you provide to me in relation to your intention to, or confirmation to me of directions you have received from me, to terminate or change the terms of such coverage.

Dated at [City], {{ SsRecipientProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Wendy Doe

Consent To Release of Irrevocable Beneficiary Status

Schedule

CONSENT TO RELEASE OF IRREVOCABLE BENEFICIARY STATUS

To:

From:

Re:

[Insurance Company]

Harold Doe

Wendy Doe

Insurance Policy through [Insurance Company], Number [number] (the "Policy")

I, Wendy Doe, the undersigned, hereby consent to release my irrevocable beneficiary status in relation to the Policy when Harold Doe's support obligation ceases under our Separation Agreement dated [date].

Dated at [City], {{ SsRecipientProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Wendy Doe

Schedule

CONSENT TO RELEASE OF IRREVOCABLE BENEFICIARY STATUS

To:

From:

Re:

[Insurance Company]

Wendy Doe

Harold Doe

Insurance Policy through [Insurance Company], Number [number] (the "Policy")

I, Harold Doe, the undersigned, hereby consent to release my irrevocable beneficiary status in relation to the Policy when Wendy Doe's support obligation ceases under our Separation Agreement dated [date].

Dated at [City], {{ SsPayorProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Harold Doe

Transfer of Interest in Insurance Policy

Schedule

TRANSFER OF INTEREST IN INSURANCE POLICY

To:

From:

Re:

[Insurance Company]

Wendy Doe

Harold Doe

[or person's representative if person is incapable of managing their own affairs or is dead]

Insurance Policy through [Insurance Company], Number [number] (the "Policy")

I, Harold Doe, the undersigned, hereby transfer my interest in the Policy, with a face value of $[amount], to Wendy Doe.

Dated at [City], {{ SsPayorProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Harold Doe

Schedule

TRANSFER OF INTEREST IN INSURANCE POLICY

To:

From:

Re:

[Insurance Company]

Harold Doe

Wendy Doe

[or person's representative if person is incapable of managing their own affairs or is dead]

Insurance Policy through [Insurance Company], Number [number] (the "Policy")

I, Wendy Doe, the undersigned, hereby transfer my interest in the Policy, with a face value of $[amount], to Harold Doe.

Dated at [City], [province], this [date]:

Witness [provide full name, address/contact info]

Wendy Doe

Joint Election Under Section 74.5(3)(b) Of The Income Tax Act

Schedule

JOINT ELECTION UNDER SECTION 74.5(3)(b) OF THE *INCOME TAX ACT*

We signed a Separation Agreement on [date].

Pursuant to section 74.5(3)(b) of the *Income Tax Act*, we jointly elect that section 74.2 of the *Income Tax Act* not apply to any loans or transfers of property between us under our Separation Agreement and to any dispositions of property to which section 74.2 would otherwise apply but for this election.

Dated at [City], {{ Party1ProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Harold Doe

Dated at [City], {{ Party2ProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Wendy Doe

Direction to RRSP Planholder

Schedule

DIRECTION TO RRSP PLANHOLDER

From:

To:

Re:

Copy:

Harold Doe

RRSP Planholder

RRSP of Harold Doe

Account Number [number]

Wendy Doe

I, Harold Doe, the undersigned, hereby direct you not to collapse or transfer my RRSP without the written consent of Wendy Doe.

Dated at [City], [province], this [date]:

Witness [provide full name, address/contact info]

Harold Doe

NOTE: This Direction is to be withdrawn by Harold with Wendy's consent once the equalization payment is made by Harold to Wendy.

Acknowledgement Regarding Division of Household Contents

Schedule

ACKNOWLEDGEMENT REGARDING DIVISION OF HOUSEHOLD CONTENTS

Pursuant to our Separation Agreement dated [date], we hereby acknowledge and agree that we have divided our household and personal contents to our mutual satisfaction, in accordance with the list attached, and that there are no further claims between us in this regard.

Dated at [City], {{ Party1ProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Harold Doe

Dated at [City], {{ Party2ProvinceName }}, this [date]:

Witness [provide full name, address/contact info]

Wendy Doe

Form 6: Acknowledgement of Service

[See Form FLA 6 - "Acknowledgement of Service" available in your DM Forms Cloud.]

[OR See Form 06 - "Acknowledgement of Service" available in your "Available Forms" tab in your

Forms One desktop software.]

Form 35.1: Affidavit (decision-making responsibility, parenting time, contact)

[See Form FLA 35.1 - "Affidavit (decision-making responsibility, parenting time, contact)" available in your DM Forms Cloud.]

[OR See Form 35.1 - "Affidavit (decision-making responsibility, parenting time, contact)" available in your "Available Forms" tab in your Forms One desktop software.]