

IACP FORUM
Toronto, 2023

Build Your Future: Using the Collaborative Process to Negotiate Cohabitation Agreements/Marriage Contracts¹

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September 2023

Although Marriage Contracts and Cohabitation Agreements are legal contracts often viewed as “protection” for one or both parties, the negotiation of them provides an opportunity to a couple to build and solidify their relationship while contemplating the potential demise of that same relationship. This dissonance may best be navigated through a Collaborative Process. In this paper, we consider the goals of Marriage Contract negotiations, the legal, financial, and emotional complications in these negotiations, and the innovative ways in which the Collaborative Process can be used to turn a potentially harmful negotiation into an exercise that deepens a couple’s understanding of each other and provides them with a roadmap for their future.

Goals of Cohabitation Agreement and Marriage Contract Negotiation

Legal

From a legal perspective, the goal of a Marriage Contract negotiation is to create a binding contract that will stand up to scrutiny if challenged. The purpose is often to protect a spouse’s² asset(s) from equalization and/or being shared as equity in a jointly owned matrimonial home that was funded in unequal proportions. The Marriage Contract negotiation provides the couple with an opportunity to make a plan for their future that feels more predictable than waiting to apply the law to their circumstances should they ever separate.

Emotional

Like most family negotiations, what seems simple on the surface is always complicated by family members' emotional responses to the circumstances. Negotiating a Marriage Contract may raise challenging or unanticipated thoughts and feelings about the relationship, the

¹ For ease of reading, we mean for the term marriage contract to include both cohabitation agreements for non-married partners and marriage contracts.

² In this paper, the word spouse also includes prospective spouse.

couple's commitment to each other and the role families of origin play in the new family structure. The intense feelings that negotiations raise, need to be tended to so the spouses can move into their future with clarity, a sense of optimism, and greater understanding. Using a Collaborative Process ensures that the couple's emotional needs are cared for in addition to their legal and financial needs.

Financial

When entering into a marriage contract, it is important to have a thorough understanding of the finances of each party to allow for informed decision-making. Full financial disclosure is tantamount to an agreement that is valid and stands the test of time. An Income, Assets, and Debts statement for each party summarizes their current financial position and may be supplemented with tax returns, business valuations, compensation summaries, or other reports. This helps facilitate discussions, such as who will manage the family finances, spending habits, attitudes toward money, and saving strategies. A financial neutral may help identify any gaps within the couple's professional network and make appropriate introductions, educate those not as comfortable with finances, or provide financial planning projections to provide peace of mind.

Key Elements of Successfully Negotiating a Marriage Contract

1. The negotiation of a Marriage Contract would ideally include the following elements.
 - a. Each spouse has a lawyer to provide guidance, advocacy, and, of course, independent legal advice.
 - b. Both spouses and their respective lawyers are involved in the negotiation and drafting of the contract in a meaningful way.
 - c. The spouses have the necessary facts to make fully informed decisions.
 - d. Each spouse is comfortable expressing their views and concerns throughout the process and neither feels the other or their lawyer is controlling the negotiation.
 - e. The resulting contract is not "unconscionable" and is reasonable in the circumstances.
 - f. Both spouses have an opportunity to understand the law as it applies to them.
 - g. The spouses have time to consider and evaluate the options open to them.
 - h. Neither spouse feels rushed, coerced, or pressured to reach an agreement.
 - i. The spouses can see their shared and individual futures secured in the final agreement.
 - j. The couple's relationship and their relationships with interested third parties are not damaged because of the negotiation process.

Challenges in Negotiating a Marriage Contract

2. Negotiating Marriage Contracts can be more complicated than negotiating separation agreements. The additional challenges stem from some of the following circumstances:
 - a. The couple is being asked to contemplate the potential demise of their relationship at a time when they are focused on building their future. The need for a contract can challenge the couple's trust in each other and their relationship with third parties.
 - b. Marriage Contracts and Cohabitation Agreements may need to account for the preferences of extended family or others who are not at the negotiation table (elder generation, adult children, business partners) and who may not share the same priorities or goals as the couple creating the contract.
 - c. Obtaining financial information from third parties who are not in the negotiation process can be difficult (extended family, business partners).
 - d. A wealth disparity can generate a strong power imbalance between the couple. The less wealthy client may feel obligated to sign an agreement, negatively impacting their relationship with their partner as well as their relationship with their partner's parents.
 - e. The clients may have little information about their family of origin's wealth, and they may not be aware of structures in place (such as an estate freeze) which result in them having a substantial amount of wealth in the eyes of family law. Either client may not think of family wealth as their money or wealth.
 - f. The clients may be reluctant participants in this process, their parents or other third parties may request the contract more urgently than the couple themselves. The couple may ask to be given whatever contract the lawyer thinks is appropriate so the process can end quickly (which, of course, makes lawyers contemplate calling their insurance provider).
 - g. The lawyer's advice could alienate their client because it does not reflect the client's perception of their spouse or their perception of their future. For example, they may say, "My spouse would never cut me off, I'm not worried" or "I don't want my spouse's family's money" and "I don't need to know what the trust is worth".
 - h. Legal advice for each client may have the unintended consequence of pitting them against each other as they start their life together (or continue a relationship) or create a rift between the clients and third parties.
 - i. It is impossible to predict the future. Any change to the way the family laws are applied can create inadvertent unfairness in certain circumstances.

- j. The clients may underestimate the time needed to negotiate and complete a marriage contract. The wedding date is a deadline, placing pressure on the couple to complete the process quickly.
- k. Clients may have been married for a long time and something happens which leads them into a marriage contract negotiation. In some cases, the relationship is not stable, and they are hoping a marriage contract can help them stay together.
- l. Sometimes, the relationship does not survive the Marriage Contract negotiation process and the lawyers and clients negotiate a separation negotiation.

The Benefits of a Collaborative Process in Negotiating a Marriage Contract

- 3. With its commitment to fair and frank discussion, transparency, and informed decision-making, the Collaborative Process will address the many challenges and complexities encountered in a Marriage Contract negotiation. The following list highlights the benefits of the Collaborative Process approach.
 - a. In discussions with the clients, the purpose of the contract is reframed from “protecting” assets from claims by the less wealthy client to “making a plan for their life together”.
 - b. Immediate issues, such as a Standstill Agreement, can be addressed in a Collaborative Process quickly and respectfully.
 - c. Building trust between each lawyer and the other client helps promote free-flowing and frank discussions.
 - d. Neutrally explaining the law helps clients understand the need for a Marriage Contract. For example, explaining that assets are treated differently in law (in Ontario, Canada) if they are gifted before marriage or after marriage depersonalizes the need to protect that asset.
 - e. The Collaborative Process is designed to respect the goals and interests of the clients. Avoiding positional bargaining maintains the couple's shared identity and focuses the spouses on joint problem-solving.
 - f. A commitment to meaningful participation in the process prevents or minimizes post-agreement resentment. Spouses know their perspective has been heard and understood and their goals are reflected in the result.
 - g. Following agendas, making progress notes, and holding regular meetings, keep both clients engaged and involved in the negotiations, and maintains momentum.
 - h. A Family Professional will manage the challenging emotional dynamics, helping to create a smoother process and bring the clients to the table to have the difficult conversations.

- i. Being transparent about third-party goals and interests may help the clients engage in the process without straining the relationship between the couple and their parents or business partners.
- j. Working with neutral Financial Professionals including a Chartered Business Valuator on the disclosure, helps to neutralize the process and ensure completeness of disclosure.
- k. Transparency about the discomfort in sharing the information can be helpful to ward off feelings of suspicion or mistrust.

The Collaborative Marriage Contract Process

4. The Collaborative Process used to negotiate separation agreements can be modified to suit the needs of clients negotiating a Marriage Contract. Depending on the complexity of the couples' financial circumstances the process can be streamlined and personalized. The following steps form the basis of the process, with modifications as required.
 - a. Create an appropriate team, two Collaborative Lawyers, and Financial and/or Family Professionals as necessary (they are usually necessary). Sign respective retainers and possibly a joint service agreement. Complete intake meetings with Family and Financial Professionals.
 - b. First Meeting – Review Goals and Concerns, or similar exercise to determine interests, and the clients will explain what they want the contract to achieve. Identify financial information to be collected and how (which professionals are required, timelines, how to pay for the work, etc.). If time is needed, a Standstill Agreement is put in place immediately.
 - c. Gather and review financial information, business values, statements of assets and debts, etc. Prepare clients for the option generation stage of negotiations.
 - d. In the second (and subsequent) meeting, the financial information including any Valuation Reports, Trust, or Business Statements is reviewed and understood. Once the clients are fully informed, with their lawyer's input, the clients will generate options, evaluate, and refine them.
 - e. Based on the views of the team members and the preferences of the clients, there may be private meetings with lawyers, the Family Professional, and/or the Financial Professional along the way.
 - f. The professional team will speak regularly to keep things on track. Most of the work is done jointly with the clients. If meetings are on Zoom, the breakout function can be used to quickly check in with clients privately, if necessary.
 - g. If there is a Family Professional on the team, they will connect with the clients to manage any relationship or communication issues that arise. The Family

Professional may also facilitate the settlement meetings with the clients and lawyers.

- h. Once the terms of the contract are agreed upon, the lawyers will jointly draft the Marriage Contract and identify any questions or concerns that come up during the drafting process. These concerns will be reviewed with each client and their lawyer. The agreement will be revised and once finalized it will be signed.

Summary of Collaborative Marriage Contract Negotiation Process

Retain Collaborative Lawyers	<ul style="list-style-type: none">• Interim or Standstill Agreement• Retainer Agreements and Joint Process Agreement• Goals and Concerns/Values/Vision of future
Team as Appropriate	<ul style="list-style-type: none">• Value Assets and Debts• Financial Disclosure• Relationship/Emotional Work
Negotiation Meeting(s)	<ul style="list-style-type: none">• Neutrals to Facilitate• Explain the law, types of marriage contracts• Review Financial Information• Generate Options
Settlement Drafting	<ul style="list-style-type: none">• Joint drafting with questions and comments• Review with Clients/ Time to reflect• Tweak, Finalize and Sign

To Use a Participation Agreement or Not

5. There is debate in the Collaborative community in Toronto, Ontario about whether a Participation Agreement (“PA”) needs to be signed for a Marriage Contract negotiation. Many professionals believe a PA is not needed because there is no disqualification clause required, and because the disclosure obligations in law and the PA might create a greater or lesser right making the contract more susceptible to challenge. Furthermore, many professionals will agree to follow the principles of the Collaborative Process without the PA being signed. Authorization to share information can be incorporated into each

professional's retainer making the PA even less necessary. Finally, if the Marriage Contract were to be challenged, a client may need to rely on documents produced in the negotiation process as evidence, however, the PA provisions could limit access to those documents because of contractual admissibility limitations.

6. A modified PA could be helpful in the collaborative Marriage Contract negotiation for several reasons. The PA focuses the clients and professionals on an interest-based model. The PA can be modified, removing the provisions dealing with Court and the admissibility of documents produced in the process. Furthermore, having the authorization to communicate freely as part of the PA signed by all (lawyers sign not as parties but as representatives), reduces missteps in the communications among the team and manages client expectations. A final reason to use a modified PA is to ease the transition from a Marriage Contract negotiation to a Separation Agreement negotiation should the relationship end.

Conclusion

Whether a PA is signed or not, applying the principles and approach of the Collaborative Process creates a negotiation in which clients feel safe, supported, and heard. The couple can have challenging discussions about their future and feel invested in the negotiation and the outcome. It also encourages teamwork, to produce the best contract possible for both clients, reviewing different scenarios together and evaluating the terms against the goals and interests expressed by the clients. This approach improves the chances that both clients will be satisfied, and neither will be interested in challenging the contract in the future.

Citations

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This paper is based on a paper presented at the Ontario Bar Association program “Mastering Marriage Contracts and Cohabitation Agreements: Practical Insights and Creative Drafting Solutions” on June 16, 2022 by Cori Kalinowski called “Applying the Collaborative Process to the Negotiation of Marriage Contracts and Cohabitation Agreements”. Input from members of the Toronto Collaborative community is gratefully acknowledged and, in particular, Deborah Graham, Ellen Nightingale and Nicola Savin.

SAMPLE COLLABORATIVE PRACTICE PARTICIPATION AGREEMENT

BETWEEN :

Party 1

(“Party 1”)

and

Party 2

(“Party 2”)

1. We have chosen to enter into this agreement to use the collaborative process to develop a Cohabitation Agreement/Marriage Contract.
2. We will work toward an agreement on all issues, including but not limited to financial issues, relating to our Cohabitation Agreement/Marriage Contract through negotiations based on our respective goals and interests.
3. This process is focused on our future well-being and the success of our relationship. The Cohabitation Agreement/Marriage Contract is intended to provide for our financial and other arrangements during cohabitation or marriage and on our separation or death.
4. Guidelines for Participation in the Collaborative Process:
 - (a) We will deal with each other in good faith
 - (b) Written and verbal communication will be respectful and constructive
 - (c) We agree to follow the problem-solving steps set out in schedule “A” to resolve our concerns.
 - (d) We will express our interests, needs, goals and proposals and seek to understand those of the other.
 - (e) We will develop an array of options on the issues and use our best efforts to negotiate mutually acceptable terms on these issues.
 - (f) We will not take advantage of mistakes made by another, but will disclose them and seek to have them corrected. We will immediately correct mistakes and advise of changes to information previously given.
 - (g) We will give complete, honest and open disclosure and provide all relevant information.

5. Exchange of Information/Communication

(a) We may decide to use a Dropbox link accessible by us and our lawyers and their staff to collect information in a common place.

(b) We will decide together how to document our financial disclosure and, in particular, our respective incomes, assets and debts. We may do this by:

- i. Sworn or unsworn Financial Statement
- ii. Sworn or unsworn Net Worth Statement
- iii. Sworn or unsworn Statements of Income, Assets and Debts
- iv. Summaries or spreadsheets; and
- v. Other agreed upon formats.

6. We understand that in this process we are expected to discuss our interests and goals and that our lawyers will help us to do this.

7. We understand that each of our respective lawyers has a professional duty to represent each of us diligently and that each of our lawyers is retained to provide each of us with legal advice and information. We understand that we are each represented by our own lawyer, even though both lawyers share a commitment to the process and will work as a team to resolve all issues.

8. Where interests differ, each of us will use our best efforts to create proposals that are acceptable to both and that take the other person's perspective into consideration.

9. This process will end when:

- (a) we sign a Cohabitation Agreement/Marriage Contract. The Cohabitation Agreement/Marriage Contract will be an enforceable legal document which we can rely on and which will be binding on our respective estates in the future;
- (b) one of the lawyers or either of us withdraws from the process, as further set out in paragraphs 10 and 11 below. If we agree, the process can continue with a different lawyer or lawyers; or
- (c) If either lawyer believes her client is not abiding by this agreement, she must terminate the process; for example, if her client is withholding financial information.

10. Withdrawal of Party or Lawyer from Collaborative Process

(a) If either of us decides to withdraw from Collaborative process, we will provide written notice of the intention to withdraw.

(b) If either of us ends our professional relationship with his or her lawyer, but wishes to continue with the Collaborative process, he or she will provide written notice of this intention. The new lawyer will sign a new Participation Agreement within 30 days of the party giving notice. If a new Agreement is not signed within 30 days, the other person will be entitled to proceed as if the collaborative process was terminated as of the date notice was given.

11. Mandatory Termination of the Collaborative Process

- (a) A lawyer must withdraw from the Collaborative process if her client has withheld or misrepresented important information and continues to do so; refuses to honour agreements; delays without reason; or otherwise acts contrary to the principles of the collaborative process.

12. Privacy Policy

- (a) We consent to allow the lawyers to collect, use, disclose and retain personal information in order to provide services to us and to administer client time and billing data bases.
- (b) We may withdraw our consent to the collection, use disclosure and retention of our personal information as described above by giving the lawyers reasonable written notice. Our withdrawal of consent still allows the lawyers to use and disclose our personal information to collect or enforce payment of amounts owing as a result of our prior or continuing use of the Collaborative law firm.

13. Acknowledgement of Commitment to Collaborative Process

We have read this Agreement in its entirety, understand its content and agree to its terms.

Dated at Toronto, this day of

Party 1

Party 2

I, Lawyer 1, confirm that I will represent Party 1 in the collaborative process hereunder.

I, Lawyer 2, confirm that I will represent Party 2 in the collaborative process hereunder.

Lawyer 1

Lawyer 2

Schedule “A”

Collaborative Negotiation Steps for Effective Problem-Solving

Step 1 BUILD THE FOUNDATION

- Introduction and overview of the collaborative process
- Decide problems to be solved
- Consider the need for other professionals, such as family, child and/or financial specialists

Step 2 GATHER AND EXCHANGE INFORMATION

- Identify goals, needs and interests
- Identify what financial information is needed
- Agree upon and initiate any joint valuations

Step 3 IDENTIFY INTERESTS

- Prioritize goals, needs and interests – immediate and long-term – regarding issues and process

Step 4 IDENTIFY CHOICES

- Explore widest range of possible solutions
- Consider everything, rule out nothing

Step 5 EVALUATE CONSEQUENCES OF EACH CHOICE

- How would each option affect each person and the children?
- Consider immediate, intermediate, long-term impacts

Step 6 COME TO A DECISION AND IMPLEMENT DECISION

- Generate settlement proposals that satisfy interests of both
- What do you see as the best solution for both?
- Prepare Separation Agreement incorporating joint decisions

SAMPLE Client Goals and Concerns Questionnaire – Cohabitation Agreement/Marriage Contract

Name: _____

Date: _____

Part A:

1. What are your goals in preparing a cohabitation agreement/marriage contract?

2. Why are these important?

3. What are your most important worries / concerns / fears about negotiating the terms of a cohabitation agreement/marriage contract?

4. Why are these important to you?

5. What do you think your partner's most important goals are in preparing a cohabitation agreement/marriage contract?

6. Why do you think these are important to your partner?

7. What do you think your partner's most important worries / concerns / fears about a cohabitation agreement/marriage contract are?

8. Why do you think these are important to your partner?

9. What are your concerns/ fears / worries and hopes / beliefs of using this process?

10. What does conflict typically look like between you and your partner?
(i.e. silent withdrawal, angry outbursts, calm discussion, changes of mind, giving in, getting stuck)

11. Is there a pattern you would like to avoid / change during this process?
(i.e. always giving in, getting lost in the details, drawing early lines in the sand)

12. Do you have any concerns about your emotional well-being, physical health, mental health, capacity to make decisions, anger management, alcohol or drug use?

13. Do you have any concerns about your partner's emotional well-being, physical health, mental health, capacity to make decisions, anger management, alcohol or drug use?

Part B

1. How can I best support you during this process?
(i.e. What would your closest / wisest friend or family member worry about for you in this process?)

For questions 2 to 5 answer as if you were looking back 3 years from now and reflecting on the Collaborative Process:

2. What would have had to happen to cause you to be highly dissatisfied with the Collaborative Process and not recommend it to anyone? For you not to recommend me as a lawyer?

3. If this process were unsuccessful, how would you have contributed to its failure?

4. What would have had to happen for you to feel highly satisfied and recommend the Collaborative Process to anyone you cared about? To recommend me as a collaborative lawyer to anyone you cared about?

6. If this process were successful, how would you have contributed to its success?

7. Is there anything else you think it would be helpful for me to know

SAMPLE AGENDA FOR FIRST MEETING

First Collaborative Meeting

Eric and Andrea

Via Zoom

July 4, 202X from 2:30 pm to 5 pm

Agenda

1. Introductions
2. Sign Participation Agreement
3. Eric & Andrea to discuss goals and interests
4. **Lawyer1** and **Lawyer2** to provide overview of cohabitation agreements (why we have them, what terms may be included, etc.)
5. **Lawyer1** and **Lawyer2** to provide family law information – property, support, matrimonial home – married vs unmarried
6. Discuss the house; how it was purchased, ownership now and in the future, current value and options for handling in the agreement
7. Spousal support options
8. Any other terms?
9. Cost of process
10. Prepare further to do list/next steps/work to be done off line
11. Book next meeting