

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used in conjunction with the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1), CLIENT FILE OPENING AND CLOSING (A-2), and FAMILY PRACTICE INTERVIEW (D-1) checklists, and the SEPARATION AGREEMENT DRAFTING (D-3), MARRIAGE AGREEMENT DRAFTING (D-4), <i>CHILD, FAMILY AND COMMUNITY SERVICE ACT PROCEDURE</i> (D-6), or POLYFAM AGREEMENT PROCEDURE (D-7) and POLYFAM AGREEMENT DRAFTING (D-8) checklists. This checklist is not specifically designed to relate to cohabitation agreements, although many of the provisions will apply. This checklist is current to September 1, 2021.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Divorce Act amendments. Amendments to the <i>Divorce Act</i>, R.S.C. 1985, c. 3 (2nd Supp.) under <i>An Act to Amend the Divorce Act</i>, S.C. 2019, c. 16 received Royal Assent on June 21, 2019, and came into force on March 1, 2021. The amended provisions on care of children are similar to the regime in the <i>Family Law Act</i>, S.B.C. 2011, c. 25 (the “FLA”). Family law practitioners are advised to familiarize themselves with the amendments. • COVID-19 pandemic. The COVID-19 pandemic continues to have significant impacts on society, including families in British Columbia and the practice of family law: inability to attend, or aversion to, in-person meetings; possible delays at government agencies and public registries; border closures; un-predictable economic circumstances, etc. Counsel should keep apprised of developments related to COVID-19 (and response measures) that may affect family practice. Check the BC Courts website (www.bccourts.ca) to obtain up-to-date Practice Directions, Notices to the Profession, guides to remote proceedings, and announcements from all levels of court in response to the COVID-19 pandemic. Confirm procedures for case conferences, filing materials, in-person appearances, use of remote technology, and etiquette for video and telephone appearances. • New Provincial Court Family Rules. On May 17, 2021, the Provincial Court Family Rules, B.C. Reg. 236/2020 (the “PCFR Rules”) came into force. These rules replace the previous Provincial Court (Family) Rules, B.C. Reg. 417/98 and apply to all matters filed in B.C. Provincial Court, whether before or after May 17, 2021. Key changes include: <ul style="list-style-type: none"> ○ New forms: the Application to Obtain an Order, Application Respecting Existing Orders or Agreements, and Notice of Motion forms will no longer be used and have been replaced by new specific-use forms. ○ Introduction of family needs assessment, consensual dispute resolution (“CDR”), and parenting education: in any family law matter, as defined by the PCFR Rules, parties may be required to engage in these processes before setting a first appearance date. The specific requirements vary by court registry. ○ Streamlined court processes: the new PCFR Rules eliminate the family management conference, establish a picklist of standard terms for drafting consent orders, provide a framework for filing documents and setting dates electronically, and allow for the filing of unsworn affidavits. <p>For more information about the new PCFR Rules, see “What You Need to Know about the New Provincial Court Family Rules”.</p>					

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<ul style="list-style-type: none"> • Retroactive adjustment of child support. It is possible in certain situations to vary child support retroactively, even when the children are no longer “children” for the purposes of support; see <i>Michel v. Graydon</i>, 2020 SCC 24. • Arbitration provisions in <i>Family Law Act</i>. Division 4—Arbitration in Part 2 of the <i>FLA</i> came into force on September 1, 2020 (B.C. Reg. 160/2020). It is strongly recommended that practitioners review Division 4 before drafting or revising arbitration clauses in agreements or commencing any arbitration proceeding. • Land Owner Transparency Act. The <i>Land Owner Transparency Act</i>, S.B.C. 2019, c. 23 (the “<i>LOTA</i>”) is in force as of November 30, 2020 (except for specified provisions that came into force on April 30, 2021) (B.C. Reg. 250/2020) and may affect the implementation of the division of real property in family law matters. The <i>LOTA</i> requires a transparency declaration to be filed in the new Land Owner Transparency Registry any time an application is made to register or transfer an interest in land under the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250. A reporting body under the <i>LOTA</i>—which includes most corporations, trusts, and partnerships, subject to limited exemptions—will have to file a transparency report any time there is a change in interest holders or beneficial owners, even if legal title is not transferred. For further information, see the Land Owner Transparency Registry website and also the course presentation and materials by S. Carter, R. Danakody, and C.R. MacDonald, “Land Title and Survey Authority of British Columbia: Land Owner Transparency Registry”, in <i>Residential Real Estate Conference 2020</i> (CLEBC, 2020), available through CLEBC Courses on Demand. • Transparency register. The operative provisions of the <i>Business Corporations Amendment Act, 2019</i>, S.B.C. 2019, c. 15 came into force on October 1, 2020 (B.C. Reg. 77/2020). This may affect corporate matters in family law proceedings. The Act requires private companies incorporated under the <i>Business Corporations Act</i>, S.B.C. 2002, c. 57 to create and maintain a “transparency register” of information about “significant individuals”. The transparency register must contain the following information for each significant individual: full name, date of birth, and last known address; whether the individual is a Canadian citizen or permanent resident of Canada and, if not, a list of every country of which the individual is a citizen; whether the individual is a resident of Canada for tax purposes; the date on which the individual became or ceased to be a significant individual; a description of how the individual meets the definition of a significant individual; and any further information that may be required by regulation. For more information, see www2.gov.bc.ca/gov/content/employment-business/business/bc-companies/bearer-share-certificate-transparency-register. • Remote Child Support Mediation. In September 2020, Legal Aid BC launched a Remote Child Support Mediation service. The online program provides free mediation services to assist with child support issues. See www.mylawbc.com/remote-mediation/ for more information. <p>Of note:</p> <ul style="list-style-type: none"> • Aboriginal law. If the client or the other party has ties to an Indigenous community, special considerations may apply (e.g., see items 1.13 and 2.18.6 in the FAMILY PRACTICE INTERVIEW (D-1) checklist). Note the requirements of <i>FLA</i>, Part 10, Division 3, which provide for standing and notice in cases concerning Nisga’a and treaty First Nations children and treaty lands. Review the federal <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>, S.C. 2013, c. 20, which pertains to the ability of First Nations to make rules about family 					

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<p>residences on reserve lands and how those homes will be used and occupied upon the breakdown of a spousal relationship. Sections 13 to 52 apply to First Nations that have not enacted their own matrimonial real property laws. The Act applies to married and common-law spouses living on reserve lands where at least one spouse is a First Nations member, as defined in the Act. It provides separate regimes for matrimonial property division for member and non-member spouses on reserve and is very different from the provincial legislation. Consider whether a lawyer with Aboriginal law experience should be consulted. Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Areas” section of the CLEBC website (www.cle.bc.ca) and in other CLEBC publications.</p> <ul style="list-style-type: none"> • Tax alert. As some aspects of a family law agreement may have significant tax implications for the parties, it is recommended the parties seek advice from their respective tax advisors, especially if pensions are involved. • Additional resources. For more information regarding the drafting of family law agreements, see <i>Family Law Agreements: Annotated Precedents</i>, 3rd. ed. (CLEBC, 1998–). • Law Society of British Columbia. For changes to the Law Society Rules and other Law Society updates and issues “of note”, see LAW SOCIETY NOTABLE UPDATES LIST (A-3). The Law Society’s resources related to procedures generally and issues arising from COVID-19 can be viewed at www.lawsociety.bc.ca/about-us/covid-recovery/. <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Preliminary Matters 2. Drafting the Agreement (Summary) 3. Concluding the Agreement 4. Closing the File <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. PRELIMINARY MATTERS <ol style="list-style-type: none"> 1.1 Conduct a conflicts of interest check. Complete the CLIENT FILE OPENING AND CLOSING (A-2) checklist, and refer to the FAMILY PRACTICE INTERVIEW (D-1) checklist. 1.2 Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110). 1.3 Review the applicable provisions of the <i>Family Law Act</i>, S.B.C. 2011, c. 25 (the “FLA”), starting with ss. 6 and 7, in drafting the terms of any family law agreement. Specific agreements are dealt with at s. 44 (parenting arrangements), s. 50 (guardianship), s. 58 (contact with children), s. 92 (property division), s. 127 (pension division), s. 148 (child support), and s. 163 (spousal support). 1.4 Note that <i>FLA</i>, s. 6(5) allows a minor who is a parent or spouse to enter into and be bound by an agreement. (Sections 29 and 31 of the <i>Infants Act</i>, R.S.B.C. 1996, c. 223 on marriage contracts and settlements were repealed in 2011.) 					

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<p>1.5 In the case of a separation agreement, consider whether the client might be best served by a separation agreement, by minutes of settlement embodied in a consent order, or by a consent order in a joint family action. Review <i>FLA</i>, s. 93 regarding the court’s jurisdiction to set aside a property division agreement, <i>FLA</i>, s. 148 regarding the court’s jurisdiction to set aside or replace a child support order, and <i>FLA</i>, s. 164 regarding the court’s jurisdiction to set aside spousal support agreements. If support reviews and variations or changes to parenting arrangements are contemplated, discuss with the client the differences between varying an agreement and varying an order, in terms of both law and process, and under both the <i>Divorce Act</i> R.S.C. 1985, c. 3 (2nd Supp.), and the <i>FLA</i>.</p> <p>1.6 Determine the client’s wishes with regard to specific terms of the agreement (see the SEPARATION AGREEMENT DRAFTING (D-3), the MARRIAGE AGREEMENT DRAFTING (D-4), or the POLYFAM AGREEMENT PROCEDURE (D-7) and POLYFAM AGREEMENT DRAFTING (D-8) checklists).</p> <p>1.7 Advise the client that a spouse’s interest in “family property” arises on separation (under <i>FLA</i>, s. 84).</p> <p>1.8 Consider filing a Form P1 (Division of Pensions Regulation, B.C. Reg. 348/2012, under the <i>FLA</i>) to notify pension administrators of a party’s interest in the other party’s pension, pending a completed agreement.</p> <p>1.9 If the client or the other party has ties to an Indigenous community, special considerations may apply (e.g., see items 1.13 and 2.18.6 in the FAMILY PRACTICE INTERVIEW (D-1) checklist); consider whether a lawyer with experience in Indigenous matters should be consulted.</p> <p>1.10 Request schedules of assets and liabilities from your client as well as supporting documents, if available.</p>					
<p>2. DRAFTING THE AGREEMENT (SUMMARY)</p>					
<p>2.1 Prepare an outline of the agreement indicating the clauses from your precedent file that will be included (see the SEPARATION AGREEMENT DRAFTING (D-3), the MARRIAGE AGREEMENT DRAFTING (D-4) checklist, or the POLYFAM AGREEMENT PROCEDURE (D-7) and POLYFAM AGREEMENT DRAFTING (D-8) checklists; see also <i>Family Law Agreements: Annotated Precedents</i>, 3rd. ed. (CLEBC, 1998–) for precedents and discussion).</p> <p>2.2 Consider any tax implications for the disposition or transfer of assets. If uncertain, refer questions to a tax specialist. If there are any Aboriginal parties, consider the tax implications if a party is exempt from federal or provincial taxation.</p> <p>2.3 Consider and specify the principal facts and assumptions underlying the agreement. This will assist the parties and any reviewing lawyer or court to understand the basis of the agreement.</p> <p>2.4 Include formal or informal statements of assets and awareness of each other’s assets:</p> <p>.1 Ensure that the agreement contains a specific assurance of the completeness and accuracy of each spouse’s asset disclosure, and indicates that each is relying on the other’s truthfulness.</p> <p>.2 Provide a method for resolving disputes if the statements later prove to be inaccurate (e.g., provide that undisclosed assets are deemed to be</p>					

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<p>owned by the parties as tenants-in-common or that there is a rebuttable presumption that they will be divided 50/50).</p> <p>.3 Consider either recommending that the parties exchange sworn financial statements (particularly if the parties’ assets and debts are significant or complex) or providing the client with a written notice disclaiming any responsibility for checking the accuracy of their spouse’s statement of assets. Alternatively, insert a “whereas” clause confirming that no independent investigation of the value of property or liabilities has been made by the lawyers, and that the parties desire to make the agreement without such further investigation. Specific disclosure of assets and values is recommended.</p> <p>.4 Where the client is incapable of checking the accuracy of their spouse’s statement of assets, consider and discuss retaining experts (e.g., valuator, appraiser, accountant). Document a client’s decision not to obtain valuations of significant assets and your recommendation that further investigations should be undertaken, to reduce the vulnerability of the agreement to court intervention later and to reduce the risk of a professional complaint.</p> <p>2.5 Prepare the first draft of the agreement.</p> <p>2.6 Review the first draft, checking each clause to ensure that it achieves the client’s objectives, and checking the document as a whole to ensure that it is internally consistent. Make necessary corrections and prepare a second draft.</p> <p>2.7 Send the second draft to the client with a request that the client review it in its entirety and note any changes or questions the client may have. (If sending the document electronically, remove metadata to prevent the reader from viewing draft changes in the document’s history.) Caution the client not to share the draft with the other party until you and the client have agreed that the draft is in order.</p> <p>2.8 Review the entire agreement with the client and discuss any proposed changes or questions. Make any changes required to the second draft. Send a copy of the revised draft to the client’s spouse or the spouse’s lawyer. (If sending the document electronically, remove metadata to prevent the reader from viewing draft changes in the document’s history. Consider whether to send the agreement in a format in which changes can be made by the other lawyer/party.) Decide whether to send the draft “without prejudice”. If appropriate, confirm with the other party’s lawyer the other party’s contribution to the cost of preparing the agreement. Review any alterations with the client.</p> <p>2.9 If the client’s spouse does not have counsel, have the client’s spouse fully execute the agreement first and give the executed copy to your client for their signature to ensure that the agreement is returned. Consider providing a sufficient number of copies for execution to allow each spouse and their counsel to have an original copy.</p> <p>2.10 Satisfy yourself that there are no problems with regard to:</p> <ul style="list-style-type: none"> .1 Lack of certainty of terms. .2 Failure to disclose, fraud, or misrepresentation. .3 Undue influence. .4 Unconscionability. 					

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<p>2.11 Consider who will draw all required forms: e.g., irrevocable designation of beneficiary, authorization to insurer to give notice of default, authorizations to pension plan administrators, RSP rollover forms, and releases to and from any corporations in which the parties were involved and confirm with the client in writing. Consult experts as appropriate. Where third parties are involved (e.g., pension plan administrators or insurers) consider having them review the proposed wording to ensure effectiveness.</p> <p>2.12 Consider whether to draft non-expiring travel letters for minor children. Consider specific protocols for travel with children, including restrictions to countries that are signatories to the <i>Hague Convention</i>.</p> <p>2.13 Consider including a dispute resolution mechanism such as mediation or arbitration in the event of disputes. See <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”), rule 3.2-4 on a lawyer’s obligation to advise and encourage settlement of disputes.</p>					
<p>3. CONCLUDING THE AGREEMENT</p>					
<p>3.1 Where the other spouse has chosen not to obtain independent legal advice, ensure that they acknowledge (preferably in writing) that you have advised seeking legal advice, that they have refused, and that you have advised that you are not protecting their interests (see rule 7.2-9 of the <i>BC Code</i>).</p> <p>3.2 Where the client insists on signing an agreement against your advice, put your opinion in writing and confirm with the client that, notwithstanding your advice, the client has instructed you that they still wish to sign the agreement. Consider declining to take the client’s signature on an agreement you consider to be against their best interests (you might be called as a witness in the future).</p> <p>3.3 Ensure compliance with relevant formalities:</p> <p>.1 Under the <i>FLA</i>, an agreement may be verbal or written, unless specified. A “written agreement” is defined in <i>FLA</i>, s. 1(1) as an agreement in writing signed by all parties. Ideally, the signatures to the written agreement would also be witnessed (<i>FLA</i>, s. 93).</p> <p>.2 <i>FLA</i>, ss. 44(3), 58(3), 148(2), and 163(3) permit the specified agreements to be filed with the court (either Provincial or Supreme) for enforcement as a court order. Note <i>FLA</i>, s. 194 regarding the overlapping jurisdiction of the Supreme and Provincial Courts under the Act. If an agreement is to be filed in Provincial Court, do not put in a clause giving the Supreme Court exclusive jurisdiction over the agreement.</p> <p>.3 Formalities required by any other jurisdiction where property is located (e.g., recording of agreement, witnesses, statement/certificate as to independent counsel).</p> <p>.4 Description of real or personal property for filings under the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, or <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359.</p> <p>3.4 Consider obtaining an extra original signed separation agreement for filing under <i>FLA</i>, ss. 44(3), 58(3), 148(2), or 163(3). Note: under <i>FLA</i>, s. 99, notice of a property agreement may be filed in the land title office and, under <i>FLA</i>, s. 100 a financing statement in relation to a manufactured (mobile) home may be filed in the personal property registry.</p>					

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<p>4. CLOSING THE FILE</p> <p>4.1 Send a copy of the agreement to other party or their counsel, if they are represented.</p> <p>4.2 File with the Supreme Court or the Provincial Court, if so instructed (<i>FLA</i>, ss. 44(3), 58(3), 148(2), and 163(3)).</p> <p>4.3 File notice in the land title office, if so instructed (<i>FLA</i>, s. 99).</p> <p>4.4 Send notice of irrevocable designation of beneficiary to the insurance company or confirm the designation with the insurer, and request that written acknowledgment be sent to the policy holder.</p> <p>4.5 Send notice of any agreement regarding pensions to the employer or pension trustee, requesting that acknowledgment be sent to your client.</p> <p>4.6 Complete or confirm any transfers of property.</p> <p>4.7 Complete or confirm filing of Canada Revenue Agency Form T2220 for transfer of RRSPs.</p> <p>4.8 Prepare a reporting letter and account as soon as practicable after closing. Remind the client to review and update any existing will, power of attorney, or representation agreement.</p> <p>4.9 Close the file. See the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p>					

