

The Ironclad Agreements.....Fact or Fiction???

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by

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I. INTRODUCTION

The client's emphatic instructions are "Draft an agreement with respect to 'what's mine is mine and what's hers is hers' subject to certain 'gifts' I may choose to make in the event of separation, divorce or death, and make absolutely sure that the agreement and my Will cannot be challenged by her or her children. "

Is it possible for lawyers, as part of the estate planning process, to oblige? Is it possible to guarantee that any agreement is 'ironclad'? Can we, as lawyers, and as a result of our brilliant draftsmanship and turn of phrase, confirm to a client, "Yes, Mr. Smith, your agreement is *ironclad*"?

Are we expected to be guarantors or warrantors of our clients' written agreements?

Why is an 'agreement' not a 'contract'? Surely, 'a contract is a contract is a contract'. Unfortunately, this is not always so when one of the parties to an agreement has died and is, therefore, no longer able to speak for himself or herself. Does it not run totally counter to established contract principles to have a surviving spouse unilaterally endeavour to vary a pre-marriage or post-marriage agreement?

When a challenge to a pre-marriage or post-marriage agreement is advanced, where does that challenge often come from? Too frequently we see that the surviving spouse's children are driving the 'variation bus'.

At the last LESA Refresher Course on *Wills, Estates & Elder Law* (2002), I spoke on a similar topic. Are we any wiser now than we were then?

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II. AGREEMENT PROVISIONS

An agreement which includes the following *may* get parties as close to 'ironclad' as is reasonably possible:

1. Background or preamble which sets out the parties' intentions and philosophy in making the agreement.
2. Full financial disclosure (best if sworn).
3. A comprehensively-worded waiver with respect to no financial disclosure.
4. Independent legal advice which includes reference to specific legislation or common-law principles.
5. A comprehensively-worded waiver with respect to no independent legal advice (not recommended). (*Query*: Who gives advice on the waiver?)
6. Acknowledgement by the parties that they are specifically contracting out of their legislated or common law rights.
7. Agreement cannot be varied or revised despite any subsequent change in the circumstances of either party, no matter how catastrophic or unforeseen. Specifically, the parties recognize and acknowledge that their agreement contemplates:
 - (a) any economic advantage or disadvantage which may result from or be experienced by either party due to the death of the other;
 - (b) that the financial circumstances of either party may be altered in the future by changes in health, the cost of living, employment or otherwise, and that no such changes will give either party the right to apply to a Court under the *Dependants Relief Act*, R.S.A. 2000, c. D-10.5 (the "*DRA*"), or under any other provincial or federal legislation, in variance with the provisions of the parties' agreement;