



## Novel Coronavirus (COVID-19)

### Family Law

April 2020

# Settling family law cases: Lawyer beware

By Lorne H. Wolfson

While court operations are suspended during the COVID-19 pandemic, many separated or separating spouses will rely more than ever on the advice of family lawyers. Whether an agreement is arrived at through mediation or through negotiation, with or without lawyers, ultimately a family lawyer is usually engaged to draft an agreement. In doing so, family lawyers should consider the following in order to protect their clients and themselves.

1. In the absence of formal screening by a qualified third party screener, a family lawyer cannot know if his or her client is entering an agreement under duress or undue influence, the risk of which is particularly heightened if the parties are still co-habiting under the same roof. The standard solicitor's certificate, "My client is not suffering from duress or undue influence," should be amended to reflect the particular circumstances in each case.
2. Property settlements that rely on asset valuations or support arrangements that are based on current or proposed incomes should be viewed with caution since the value of assets and the level of incomes could suffer dramatic changes within days of finalizing a settlement. For property division, an "if and when" asset division may protect both parties against an unfair and unexpected drop in the value of a major asset. Support arrangements should clearly articulate the income assumptions on which the settlement is based, so that there is no doubt if a future decline in income constitutes a "material change in circumstances" from that which prevailed at the time the agreement was signed.
3. In order to avoid a dispute in the future as to what constitutes a "material change in circumstances," the agreement should contain an acknowledgment that a change in either party's income of X per cent or \$Y is deemed to constitute a "material change." The agreement should also formally acknowledge that a change in circumstances that was foreseeable at the time the agreement was signed may still constitute a material change in circumstances.
4. When an agreement is being signed without full financial disclosure or without all of the information that would usually be required, it should clearly be expressed to be a temporary, without prejudice agreement that will stay in force until a future date or event (a further agreement, a future variation or review, or when the courts resume regular operations).

5. Non-variable support agreements should be viewed with particular caution. In the past, many payors were prepared to pay a lump sum in exchange for a full and final spousal support release. Today, such agreements may be more fraught with risk. Even if the non-variation clause is drafted to permit a review if there is a “catastrophic” change in circumstances, that exception still leaves open the possibility of a dispute as to what constitutes a “catastrophic change.”
6. Variation in child and/or spousal support can also be justified even if there have been no changes in the incomes of the parties. For example, s. 7 expenses that were previously being shared (childcare, summer camp, activities and access costs) may no longer be incurred. In the absence of these expenses, the level of both child support and spousal support may need to be adjusted.
7. Given the health threat posed by the current pandemic, security for support and equalization payments takes on enhanced importance. The presence or absence of life insurance, the appropriate level of insurance and what insurance can be obtained at what cost if either party loses his or her employment are issues that should be canvassed.
8. In a majority of cases, the time the children spend in the care of each parent will not need to be changed. However, where parents are now working from home, are not working at all because of the loss of their employment or the division of parenting time necessitates a change to the residential schedule, the impact of these changes on child and/or spousal support needs to be carefully considered.

As a result of the economic meltdown and the closure of the courts, many parties will be trying to resolve these issues on their own and then asking a family lawyer to finalize the deal. As a result of limited financial disclosure and familiarity with the case, many lawyers will be asked to write agreements that may not be appropriate in the circumstances.

Limited scope retainers and waivers of liability may be helpful, but they will not insulate the family lawyer from liability if it turns out down the road that the agreement failed to address an issue that subsequently becomes significant.

The moral of the story is: “Lawyer beware.”

*This article was originally published by The Lawyer's Daily, part of LexisNexis Canada Inc.*

## Author

**Lorne H. Wolfson**  
Specialist in Family Law

**Tel:** 416 777 5414  
lwolfson@torkinmanes.com

The issues raised in this publication are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.