



Domestic Contracts

All Women. One Family Law.
Know your Rights.

flew Family Law
Education for Women
Women's Right to Know

fodf Femmes ontariennes et
droit de la famille
Le droit de savoir

First edition by:



CCMW

Canadian Council of Muslim Women
Le conseil canadien des femmes musulmanes

Domestic Contracts

This booklet is meant to give you a basic understanding of legal issues. It is not a substitute for individual legal advice and assistance. If you are dealing with family law issues, it is recommended that you get legal advice as soon as possible to understand your options and to protect your rights. For more information about how to find and pay for a family law lawyer, see FLEW's booklet and webinar on "Finding Help with your Family Law Problem". There are also other resources for Muslim women on the FLEW website. For a complete list, go to: <http://www.onefamilylaw.ca/en/muslimwomen/>.

This information has been prepared in consultation with Muslim women. It is intended to provide Muslim women with basic information about family law in Ontario and how it applies in Muslim communities.

Domestic contracts are agreements between two people living in a family relationship. They set out specific rights and responsibilities that the two people agree to. When domestic contracts follow certain rules, they are legal and a Court may order you to follow the contract.

Marriage Contracts, Cohabitation Agreements and Separation Agreements are different kinds of domestic contracts. You can use a domestic contract to agree with your spouse or partner about what will happen during your relationship, as well as what will happen if your relationship ends.

Domestic contracts are not legal unless they are in writing. Both you and your spouse or partner must sign the contract in front of a witness. To change anything in the contract, or to end the contract, your new agreement must also be in writing and both of you must sign in front of a witness.

Domestic contracts can take away important rights. They can take away your property rights, as well as your right to support payments which your spouse or partner might have to pay you, under the law. **It is important to talk to a lawyer before you sign any kind of domestic contract.**

Types of Domestic Contracts

1. Marriage Contract

Under Ontario law, you and your spouse can agree to a **marriage contract** before or after you get married. If you prepare it before you get married, it could be called a **“pre-nuptial” agreement**.

A marriage contract can say:

- how you want to organize some things in your relationship, for example, you can agree that you will keep your money issues, such as bank accounts, separate;
- what you will do if your marriage ends, for example, how to divide property, and how much money for spousal support one of you will pay to the other.

You could also decide in a marriage contract that neither of you will claim spousal support if you separate or get divorced. **A marriage contract cannot say anything about custody and access for your children.** The Court will not enforce these parts, if they are in a marriage contract. Child custody and access can only be decided after you and your spouse separate.

Marriage Contracts and Family Property

Under Ontario law, married spouses who are separating usually have the right to equally share any increase in the value of their property that built up during the marriage.

The law sets out a special calculation to determine what each spouse has a right to get. This is called “equalization”.

There are also special rules under Ontario law about sharing the value of the “matrimonial home”. This is the home where both you and your spouse were living as a family at the time of your separation.

A marriage contract allows you and your spouse to make your own arrangements about sharing your property, including the matrimonial home. You might be asked to sign a marriage contract that says if you separate, the value of your home or other property will not be shared. Or a marriage contract might say that your share of family property will be an amount that is less than what you have a legal right to get. The law allows marriage contracts to include such arrangements, and the Court may enforce them.

Be very careful about including your home and property in a marriage contract. You could give up rights that you have under the law. It is important to talk to a family law lawyer to understand your rights and options.

The Right to Live in the Matrimonial Home

The law also says that you and your married spouse both have the right to live in your matrimonial home, unless the Court decides or both spouses agree on something different. It does not matter whose name the house is under. The law says that one spouse cannot sell or mortgage your home without getting permission from the other spouse.

Marriage contracts cannot change these rights about the matrimonial home.

Islamic Marriage Contracts

An **Islamic marriage contract** (sometimes called *nikahnameh*, *aqd al-zawáj* or *aqd*) could be accepted as a legal marriage contract in Ontario, if it meets these requirements:

- it is in writing;
- it is signed by both you and your spouse in front of a witness; and,
- it follows the rules about what things can and cannot be included in a marriage contract in Ontario.

This means an Islamic marriage contract, like any marriage contract in Ontario:

- could take away a spouse's rights that apply under the law, to share the value of family property and the matrimonial home;
- cannot make arrangements for the custody and access of a child if the marriage ends.

Any clause dealing with custody, for example "the father will get custody of his sons when they reach the age of 6 years old", is not allowed under Ontario law. **Even if a woman signed an Islamic marriage contract that says her husband gets custody, she can go to Court in Ontario for a different decision about who gets custody and access of her children.**

Sometimes, people get married in Ontario under religious law, but do not follow all the rules for making their marriage legal in Ontario (see the Booklet for Muslim women on *Marriage and Divorce*). In these cases, a Court may still decide the marriage contract is valid, depending on the

circumstances of your marriage. **If you have questions about enforcing your Islamic marriage contract, it is important to talk to a lawyer in Ontario.**

The Mahr

In an Islamic marriage, the husband promises to pay his wife money or other gifts as part of the marriage contract. This agreement is sometimes called a *Mahr*. Courts have accepted the *Mahr* as a valid marriage contract, when it follows the rules for marriage contracts in Ontario, including fairness.

The Court may consider the *Mahr* when it is determining the spouses' rights to division of family property and to the payment of spousal support. Courts in Ontario have generally treated the *Mahr* as separate from other property that is shared between spouses when they separate. This means you may be able to get the *Mahr* as well as other rights to property under Ontario family law. If you have a *Mahr* and you are thinking about separating from your spouse, it is a good idea to talk to a family lawyer who is familiar with the *Mahr*.

2. Cohabitation Agreement

A **cohabitation agreement** is like a marriage contract, but it is **for people who live together without being married**. Cohabitation agreements can be about the same kinds of issues as marriage contracts. A cohabitation agreement cannot say anything about child custody and access. The Court will not enforce these parts, if they are in a cohabitation agreement. These issues can only be decided after you separate.

It is very important to know that **Ontario family law about property and the matrimonial home does not apply to unmarried partners who are living together.** When an unmarried couple separates, the home that they lived in belongs to the person whose name is on the legal title. If you helped look after or pay for the home, you should talk to a lawyer about what rights you may have to share the value of the home.

Another kind of Muslim marriage agreement is a so-called “temporary marriage contract” (such as *mutah*, *urfi* or *sirri* marriages). If you and your spouse made this kind of agreement, it might also be considered a cohabitation agreement under Ontario law. If you are considering entering into such an agreement in Ontario, it is important to talk to a lawyer to understand how it may affect your rights.

3. Separation Agreement

A **separation agreement** is another kind of domestic contract. You can use a separation agreement to decide how to deal with issues when you and your spouse or partner separate. **You can have a separation agreement if you were married or if you lived with someone you did not legally marry.**

A separation agreement can make arrangements for how family property will be divided, support payments from one spouse or partner to the other, and also plan for child custody, access, and child support payments.

You and your spouse or partner may choose to use a separation agreement to resolve these issues because:

- deciding on an agreement together can be quicker and easier than going to court;
- you can control what is in your agreement;
- you and your spouse or partner may be more likely to follow the agreement because you chose and agreed to what is in it.

Domestic Contracts and Family Abuse

If there has been violence, abuse or bullying in the family, a woman should be careful about agreeing to any domestic contract.

Women are sometimes pressured into giving up claims for financial support or to receiving the *Mahr* in a separation agreement. Sometimes women are pressured to give away their rights, in exchange for getting custody of the children, or the promise that the husband will give the wife a religious divorce.

If you are in this situation, it is important to talk to a lawyer about your rights and options.

How to Enforce a Domestic Contract

The Court will not review your domestic contract unless you or your spouse/partner challenges it. If a domestic contract follows the rules to make it legal in Ontario, then it may be a contract that the Court will enforce.

If your contract includes an agreement about paying spousal or child support, you can file the contract with the Court, and then the Family Responsibility Office (an Ontario government office), can help to make sure the support payments are paid.

If you think your domestic contract is very unfair, because you did not have all of your spouse/partner's financial information, or because you felt pressured, or if there was abuse or an imbalance of power between you and your spouse/partner, the Court might decide the agreement is not valid. A lawyer can help you understand your options.

Enforcing an agreement about cultural or religious practices

If your domestic contract includes terms related to religious or cultural practices, the Court may enforce the terms depending on the situation.

For example, the Court may say your husband has to pay the *Mahr*, if it is included in your marriage contract.

But if one spouse tries to deny a religious divorce to pressure the other spouse to settle their family issues, the Court may refuse to help the spouse who is refusing the religious divorce.

One thing a Canadian Court cannot do is force a person to give their spouse a religious divorce. But the Court can order a spouse to pay money for breaking a promise in a domestic contract.

Be very careful about agreeing to anything in exchange for your spouse's promise to give you a religious divorce. Courts in Canada cannot force a person to get a religious divorce, even if it was part of an agreement or domestic contract.

If you and your spouse got married in an Islamic country, some of the terms of your marriage contract may conflict with family law in Ontario. It is best to review your contract with a family law lawyer to make sure you understand your rights and options under Ontario law.

Will the Courts Change an Unfair Contract?

If you want to challenge something in your domestic contract, you must apply to the Court. But it is important to know that Courts usually do not interfere with these agreements and will not change a contract just because it gives someone less than what they would get under family law.

You are more likely to succeed in challenging the agreement if you can show that:

- your spouse or partner was not honest about their financial situation;
- you were pressured into signing the contract;
- you didn't feel you could change the contract because of threats or abuse;
- the agreement is extremely unfair.

Courts don't usually change what contracts say about dividing property. They are a little more likely to change what a contract says about money payments to help support you

and your children. Also, if your situation is worse than it was when the contract was signed, the Court may be more likely to change the agreement.

When a domestic contract is challenged, the Court may decide that one part of the contract should be taken out. If that section is a key part of the contract, the Court may decide that the whole agreement is not legal. In that case, you and your spouse can make a new agreement or, if you cannot agree, you can ask the Court to help you deal with these issues.

It is always important to talk to a lawyer before you sign a domestic contract. Make sure you understand what is in the agreement. Make sure you understand how your rights in the agreement are different from your rights under the law. A lawyer can also help you find out if you have all of the information about your spouse's finances, to decide if the agreement is right for you.

Case Examples:

Example 1:

Ismael and Amna enter into a *nikahnameh* agreement just before they get married. Their agreement says that if they divorce, Amna will give Ismael custody of their children. In exchange, he promises that he will not object to a religious divorce and will pay the *Mahr*. Is their agreement enforceable?

Answer:

- Any marriage contract that deals with issues of who gets custody of a child is not legally enforceable in

Ontario. Amna can try to agree to a different custody arrangement with Ismael when they separate. If they are not able to agree, Amna can ask the Court to give her custody of her children. The Court must consider the “best interests of the children” to decide about custody and access arrangements. This is a legal test that includes many factors.

- The Court will consider whether the *Mahr* follows the rules of marriage contracts in Ontario, and decide whether Amna can get the *Mahr* as well as other family property and spousal support.
- The Court cannot force Ismael to give Amna a religious divorce, but the Court may not accept any of Ismael’s arguments in the divorce settlement, if he is refusing to give a religious divorce to Amna.
- These are all things Amna should ask a lawyer about.

Example 2:

Mustafa and Miriam were married for two years and have separated. Miriam’s father negotiates a separation agreement with Mustafa, and signs it on behalf of his daughter Miriam. The agreement deals with a *Mahr* and a religious divorce. Will the courts say this agreement is legal and enforce it?

Answer:

This agreement is not legal in Ontario because both Miriam and Mustafa must agree, and both of them must sign the written agreement in front of a witness. In addition, if Miriam signs the agreement, she has to have full information about it and feel that she is not being pressured into signing it.

*There are other resources for Muslim women on the FLEW website.
For a complete list, go to: <http://www.onefamilylaw.ca/en/muslimwomen/>.*

There is a greater risk of violence when an intimate relationship is ending. If you are in immediate danger, call 911. If you or someone you know is at risk, visit the FLEW website for information on getting support.

If you are a francophone woman living in Ontario, you have the right to access French language services in family law court proceedings. For more information regarding your rights, contact a lawyer, a community legal clinic, or the support line Femaide at 1-877-336-2433, TTY 1-866-860-7082.

You can find more information on how to access services in French on our website at www.onefamilylaw.ca or www.undroitdefamille.ca.

The views expressed in these materials are the views of FLEW and do not necessarily reflect those of the Province.

While financially supported by the Law Foundation of Ontario, the content of this publication does not necessarily reflect the views of the Foundation.

Family Law topics available in English*

1. Alternative Dispute Resolution and Family Law (ENG 001)
2. Child Protection and Family Law (ENG 002)
3. Child Support (ENG 003)
4. Criminal and Family Law (ENG 004)
5. Child Custody and Access (ENG 005)
6. Domestic Contracts (ENG 006)
7. Family Law Arbitration (ENG 007)
8. Family Law Issues for Immigrant, Refugee and Non-status Women (ENG 008)
9. Finding Help with your Family Law Problem (ENG 009)
10. How Property is Divided in Family Law (ENG 010)
11. Marriage and Divorce (ENG 011)
12. Spousal Support (ENG 012)

** Booklets are available in multiple formats and languages. Please see www.onefamilylaw.ca for more information. You can also find additional materials on the website to help you understand your family law rights.*

flew Family Law
Education for Women
Women's Right to Know

fodf Femmes ontariennes et
droit de la famille
Le droit de savoir

 **The Law
Foundation
of Ontario**

Funded by: / Financé par :

 **Ontario**

The views expressed in these materials are the views of FLEW and do not necessarily reflect the views of the funders.