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MEMORANDUM – COHABITATION, PRENUPTIAL AGREEMENTS, MARRIAGE, DIVORCE AND ESTATE MATTERS

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1. CO-HABITATION

Bermuda law does not recognize “common law marriage” regardless of how long-standing or permanent the relationship. Currently, unmarried cohabitants will have no claim under Bermuda intestacy rules to the estate of the deceased partner.

Also, under Bermuda law there is no legal duty to support a cohabiting partner either during cohabitation or after break-up. Their possessions, which may have been shared during cohabitation, remain the property of the legal owner upon break-up.

Cohabitants do not automatically inherit anything under the law of intestacy in Bermuda, unless the property is jointly owned (see discussion on Joint Ownership of Bermuda Property below).

Under the Bermuda Succession Act 1974, only spouses or former spouses may make a claim for financial support from the estate of a deceased person (not cohabitants).

Unmarried couples can make binding agreements which are effective so long as they remain unmarried.

2. PRENUPTIAL AGREEMENTS

What is a Prenuptial Agreement?

Prenuptial Agreements become relevant when prior to the marriage:

- both parties have separately acquired significant assets which they do not intend to become joint matrimonial assets after the marriage;
- where one party is in a significantly stronger financial position than the other; or
- where it is likely that during the marriage one party will inherit or be gifted financial resources from sources external to the marriage (such as a family trust).

A Prenuptial Agreement is a contract entered into by a couple who intend to marry in order to regulate arrangements to be made between them should the marriage break down. Providing for the financial issues tends to form the main part of any such agreement (i.e. specifying that certain assets are not to be treated as “matrimonial property”) but other aspects can also be dealt with, for example, arrangements in relation to any children that might be born; the forum for any disputes, and so on.

Respect for Prenuptial Agreements

At the moment there is no statutory law governing prenuptial agreements in Bermuda and for this reason they are **not** automatically upheld within divorce proceedings.

Nonetheless, Prenuptial Agreements are becoming more common following the decision of the U.K. Supreme Court in *Radmacher v Granatino 2010 UKSC 42* (“the Radmacher Case”) in which the Justices by majority of 8:1 broke with precedent and upheld the Court of Appeal’s decision to attach significant weight to the terms of a Prenuptial Agreement which is properly negotiated. The significance of this

case is that Prenuptial Agreements are no longer contrary to public policy. This case is binding under Bermuda law.

In deciding whether the Prenuptial Agreement is to be binding, as a result of the Radmacher Case, the court will consider a number of aspects which include the following:

- Did both parties fully understand the agreement?
- Did both parties fully understand the implications of entering into the agreement?
- Were both parties properly advised by their respective attorneys as to the terms of the agreement?
- Are the terms clear?
- Was there any pressure to sign up to the agreement?
- Was the agreement signed willingly? (There must be a reasonable time prior to the wedding date for the parties to take advice and to reflect on the terms being proposed in a calm and unpressurized environment);
- Did one party exploit a dominant position, either financially or otherwise?
- Has there been proper disclosure by the parties to each other of their financial positions with documentary evidence to verify where relevant?
- Is there any reason why the parties should not be held to the agreement?
- Have any unforeseen circumstances arisen since the agreement was made that now make it unfair or unjust?
- Were children contemplated?

If any of these basic safeguards are not adhered to, the Prenuptial Agreement will be tainted and this will affect the weight that the court will put on it.

Prenuptial Agreements – In Divorce Applications

Parties to a divorce cannot by private agreement (i.e. Prenuptial Agreement) prevent the court from considering and making orders distributing the assets of the marriage when it ends. Each case will depend on its own specific set of facts. The new rule following the *Radmacher case* is that the court will respect the wishes of parties who enter into properly negotiated Prenuptial Agreements and will give effect to them unless it would be unfair to do so.

When an application is made for ancillary relief in a divorce application, the court will now consider the terms of the Prenuptial Agreement, how much weight it should place on it, and to what extent the terms should be given determinative weight. Subsequent to the Radmacher Case, the court's power to intervene will be limited to rare circumstances where the provision made in the prenuptial agreement is either manifestly unfair or there is inadequate provision for children.

Prenuptial Agreements – Cohabitation

Unmarried couples can make binding agreements which are effective so long as they remain unmarried.

3. JOINT OWNERSHIP/TENANTS IN COMMON OF BERMUDA PROPERTY

Bermuda Property may be held by cohabitants or spouses either "Jointly" or as "Tenants In Common". Both Joint Ownership and Tenants in Common have their respective legal consequences.

Joint Ownership

If a person's assets are jointly held, ownership automatically passes to the survivor. Therefore, the need to file an Affidavit of Value when probating a Will does not arise and no stamp duty is payable upon the death of one of the joint owners. For those cohabitants or spouses, joint ownership is more commonly used when purchasing the Matrimonial Home.

Tenants in Common

If a person's property is held as a 'Tenant in Common', such person is able to devise, bequeath or gift his or her interest to third parties in a Will. This method of holding property enables each holder to devise his or her interest in the Property as he or she wishes.

4. WILLS & ESTATE MATTERS

Will made prior to Marriage

If you want to make a Will benefiting a person whom you are living with or to whom you are engaged, and you want that will to remain in force after the marriage, then you can do so by making the will which is stated to be made "in anticipation of marriage". Getting married cancels automatically any previous Will that you have made.

Person dies without a Will

If you marry without having made a Will "in anticipation of marriage", the intestacy rules (the rules which govern people who do not make wills) will apply to you in the event of your death.

If a person dies without a Will, then the law of intestacy will apply and will distribute the estate in a manner as prescribed by the Succession Act 1974. For example, a summary of two scenarios are set forth below:

Scenario One: If person leaves a spouse and no children, no parent, no brother/sister or issue thereof – the estate is held in trust for the surviving spouse;

Scenario Two: If person leaves a spouse and children, spouse takes 100% of the personal chattels and 50% of the residuary estate and children take 50% of the residuary estate (shared equally between the children);

Estate Stamp Duty

In respect of Bermuda Property, estate stamp duty payable on the Affidavit of Value filed after the death would be based on a range between 5% and 20%. The Stamp Duties Amendment Act 2005 removed estate stamp duty liability on the passing of the value of a single residential property in Bermuda where that property is designated as the deceased's primary family homestead.

Gifts made to spouses, Bermuda Charities and gifts of foreign real and personal property under a Will remain exempt from stamp duty on death.

5. DIVORCE LAW

Generally, Bermuda courts will not consider a divorce application unless the parties have been married for at least three (3) years unless it can be provided that someone will suffer exceptional hardship or depravity if an earlier divorce is not granted.

Grounds for Divorce

In Bermuda, one must establish “*irretrievable breakdown*” of the marriage which can be established in any of the following specific ways:

- The couple have been separated (physically) for two years or more and each consents to the divorce proceeding;
- One party establishes that the other has behaved unreasonably and sets out the details (particulars) of that unreasonable behavior in the divorce petition;
- One party proceeds on the basis that the other has committed adultery and names the “third party” in the divorce petition;
- The applicant has been deserted by the other for two years or more.
- The parties have been separated for at least 5 years, in which case the consent of the non-petitioning party is not required.

Division of Assets upon Divorce

(1) *Matrimonial Assets & Income*

In Bermuda, the Court is not obliged to give effect to Prenuptial Agreements and it exercises wide distributive powers over all “matrimonial assets and income” in the event of divorce with the goal of producing a fair outcome tailored to the facts of each case and within that has to consider a number of specific matters including:

- The needs of the parties (no legal definition of ‘needs’ but case law has used the principle of “commensurate with the marital standard of living”);
- The length of the marriage;
- The health of the parties;
- Earning capacity of each spouse (income, pension, etc.);
- Whether any assets were “brought into” the marriage;
- Inherited assets;

The division of assets, the payment of spousal and child support as well as child custody or child access issues are generally contentious matters and the courts will rely on the facts of each case in making its determination on these issues.

Some guidance on the proper approach to the exercise of discretion is given by the appellate courts, and there are a small number of landmark cases such as the decision of the House of Lords in *White v White* [2001] 1 AC 596, which is binding under Bermuda law.

The significance of the *White v White* case is that it introduced into Bermuda law the “Sharing Principle” in the law governing the division of assets upon divorce which recognized that there are many ways in which individuals contribute to a functioning family unit including the disproportionate role often taken

on by mothers in raising children and the fallout effect on levels of earnings as a result therefrom.

Regardless of whose name the property is in, a Bermuda court may order it to be transferred to the other and this applies to all property owned either by husband or wife as well as that which may be owned jointly.

(2) *Pre-acquired, gifted and inherited property*

Some property is regarded as “non-matrimonial” assets acquired before marriage, and property that has been inherited by or given to either party at any stage. Non-matrimonial property is generally not shared but there are no clear rules about this. It is not clear what happens when such assets are sold and replaced after marriage, or when either of the spouses invests money, time or effort in them.

This Memorandum is to inform readers of issues related to cohabitation, marriage, divorce and estate matters and does not constitute legal advice. You are strongly urged to seek legal advice on any of the matters highlighted herein.