

The following is not legal advice specific to your situation. It is general information on Contracting Out Agreements which we give in response to common questions we get asked. If your specific query isn't covered, or if you need advice on your particular situation, please get in touch.

Why do I need a Contracting Out Agreement / Pre-Nup?

Contracting Out Agreements (also referred to as "pre-nups") gives couples the power to make their own arrangements about how they will divide their property should a separation happen, or should either party pass away during the relationship.

Without such an Agreement, the rules in the Property (Relationships) Act 1976 ("**PRA**") will apply.

Where there is no Contracting Out Agreement, the PRA classification of who has what interests in what property on a separation, can have a significantly different outcome, particularly if one party had built up substantially more assets than the other prior to the relationship.

Such pre-relationship assets may be a house, inheritances, or a KiwiSaver fund.

It can also lead to unexpected outcomes on separation, such as when a couple has been treating their income during the relationship as their separate property.

Most people are aware of the situations that arise, and therefore entering into a Contracting Out Agreement may also be helpful to a relationship by removing the stress that arises from unaddressed issues. It can also be looked upon as a kind of safely belt. No one expects to crash their car, but you wear one just in case you do.

When should I get a Contracting Out Agreement?

Generally, you should ideally enter into a Contracting Out Agreement before you have been in a de facto relationship for 3 years (or 2 years if you have kids), before you marry, or before you enter into a civil union.

"De facto" means you are together 'as if husband and wife'. There is no strict definition of what constitutes a de facto relationship.

In effect, you want to get a Contracting Out Agreement in place before your relationship becomes "qualifying" under the PRA.

If you are moving into a home owned by one partner or buying a property with your partner and contributing unequal amounts to the purchase, this would be a good time to get an Agreement in place (even if you have not been in a relationship for 3 years, are married, or in a civil union).

Agreements can ringfence separate contributions to the purchase of your family home and can also determine whether the capital gain in the family home should be relationship property, or separate property (and in what proportions).

It is possible to enter into Contracting Out Agreements after you have been together for 3 years or more, but because these kinds of Agreements often involve property being reversed out of the pool of relationship property, they can be hard, and sometimes impossible, to get agreement on.

What assets are "relationship property?"

In the context of a qualifying relationship without a Contracting Out Agreement, assets which are automatically relationship property (ie: ½ share each on separation) are:

- The family home;
- Your income (including KiwiSaver);

- Vehicles and chattels used for the family; and
- Anything else you acquire during the relationship.

The latter can extend to the increase in the value of pre-relationship assets, as well as inheritances and gifts from family members, depending on what they are used for.

Do we need lawyers involved to do a Contracting Out Agreement?

Yes, section 21 of the PRA says that each party needs an independent lawyer, and those lawyers need to sign a prescribed certificate towards the end of the Agreement. Without this, the Agreement will not be binding or enforceable.

There is no point in doing a Contracting Out Agreement unless it is done correctly.

Yes, this adds to costs, but that increase should not be huge. And the investment made now may be worth it in the future.

What's the easiest approach to getting a Contracting Out Agreement put together?

Contracting Out Agreements can be awkward for couples to discuss. To help with this, we can provide the following comfort: the process does not need to be complicated, difficult, or expensive.

If you and your partner would like to do one, then as a start what we need from you are three lists:

1. Stuff that will remain yours;
2. Stuff that will remain theirs; and
3. Stuff that will be joint.

This is the key info needed to put together a draft Agreement for your review. At this point, you do not need another lawyer involved.

Once you are both happy with the draft Agreement, that is when we will help you get a second lawyer involved.

There is no rule about which party goes to see the second lawyer and we will discuss this with you as part of the process. We can help by liaising with another lawyer at another firm – keeping the process as simple and efficient as possible.

To help couples wanting to do Contracting Out Agreements, we have a web form which either of you could have a crack at filling in. This is on the following link: <https://www.alaw.nz/instructionscontractingout/>

How reliable are Contracting Out Agreements once they have been signed?

Contracting Out Agreements can be set aside by the Family Court (on a separation occurring) if giving effect to the Agreement would cause a serious injustice to occur.

The most common circumstance where Agreements get set aside are where they are relatively old and have not taken into account changes in the relationship over time. The end point is that one party for instance, has all the assets, and the other has none.

It is therefore recommended to agree to review the Agreement at pre-determined intervals, or to include provisions that automatically vary the Agreement on the occurrence of certain events. For example:

- On getting married, our income becomes joint;
- On having kids, any increase in the value of separate property will be joint; or
- After being together for 10 / 15 / 20 years, all assets are joint.

By including such provisions, the specter of your Contracting Out Agreement being set aside can be avoided by making sure that on separation, the Agreement does not cause a serious injustice.

What are the consequences if we don't get an Agreement signed?

As mentioned at the outset, without a Contracting Out Agreement, the PRA determines if the property is separate or joint.

As highlighted above, this is by default, the family home, income earned during the relationship (and as a result saving and KiwiSaver, regardless of whose names those funds are held under), and assets acquired or used during the relationship for the partnership (which can extend to the increase in value of separate property acquired prior to the relationship). Inheritances and gifts can become relationship property, depending on how they are handled or what they are used for.

The PRA then determines that there should be equal sharing (ie 50/50) of the relationship property.

Can someone else from your firm sign off the Agreement for my partner / spouse?

Unfortunately, as the duty to you as a client is from the firm, another lawyer in the firm is not considered independent for the purposes of signing off a Contracting Out Agreement.

Part of our help to both of you will be to provide a recommendation of another lawyer outside the firm who we know works well and efficiently on these kinds of Agreements.

We can then set up an introduction, which would include providing that lawyer with all the key information they need to provide advice and sign off the Agreement.

I have a Trust. Can the assets in the trust be protected by a Contracting Out Agreement?

Yes, a Contracting Out Agreement can ringfence your interest in a Trust (ether one you have created, or one created by other family members of which you are a beneficiary) just in the same way that separate assets can be ringfenced.

However, that Trust and your rights under it will need to be expressly referred to in the Contracting Out Agreement.

If the Trust (and the funding of the trust) pre-dates the relationship, there should be no problem with the Trust being protected by the Agreement.

Getting a ringfence around a Trust formed during the relationship using property that would have become joint property can be more difficult to negotiate with your partner. However, if this is done before your relationship becomes qualifying, it will be easier.

In addition, the same advice given earlier applies: undertaking regular reviews and possibly automatic variations to the Agreement over time can help avoid a 'serious injustice' occurring should you separate in the future.

I have a Trust which predates my relationship. Do I really need a Contracting Out Agreement to protect the assets in that Trust?

Even though this kind of Trust and its assets will likely not fall into the pool of relationship property if handled right, a 'belt and braces' approach means that we think it would still be a good idea to invite your partner to agree to enter into a Contracting Out Agreement which ringfences as your separate property, the Trust assets as well as your powers and rights under the Trust.

It will also ensure that the understanding about the parties' respective assets is clearly understood, thereby avoiding stress within the relationship further down the track.

If we have an Agreement what then happens if we separate?

You will both be bound to divide the assets in accordance with the terms of that Agreement. For this reason, it is important that the Agreement be clear about which assets are separate, and which are joint.

As noted above, if the division results in a serious injustice, then the party on whom the serious injustice is being visited could try and get the Court to set the Agreement aside.

Do Contracting Out Agreements only have effect on separation?

No, the Agreement would also be relevant to when you pass away.

As a Contracting Out Agreement determines what is your property, it will therefore determine what assets form part of your Estate.

Giving thought to what you would like to happen on your passing will therefore be important at the same time you enter into a Contracting Out Agreement.

To help capture your wishes in relation to drafting a Will for you, have a look at the web form on the following link: <https://www.alaw.nz/instructionswills/>

Do we need to update our Contracting Out Agreement after it is signed?

As noted above, a Contracting Out Agreement that results in a 'serious injustice' can be set aside by the Court.

Therefore, review and amendment to reflect the changing nature of your relationship is recommended. See our earlier comments on how this can be done.

How much do Contracting Out Agreements cost?

In their simplest form, generally the cost will be about \$1,500. This includes the independent lawyer's costs (which will be at least \$600).

Obviously, if your situation is more complicated and there is more negotiation involved, the end point on final costs will likely be more than this.

Sometimes, if the only reason for the Contracting Out Agreement is to protect the pre-relationship assets of one party, that party will meet the legal costs. Our recommendation is that, if you are the party who will substantially benefit from the Contracting Out Agreement, it's probably going to be good for the relationship if you offer to meet the legal costs of getting it done.



ARROWSMITH

a l a w . n z

163 West Street Ashburton 7700

9 / 21 Humphreys Drive Christchurch 8023

Telephone (03) 928 8165

office@alaw.nz