

Family Law & Divorce

One reality of our times is that marriages and common-law relationships do not always endure. Accordingly, it is in the interests of the parties both upon embarking on a relationship and at separation to be aware of their potential rights and obligations, both for their own sake as well as the sake of any children of the relationship. While the prospect of having contentious issues resolved quickly may be appealing to ease an often stressful situation, a lasting resolution of all matters must nevertheless take into account not only current priorities but also the long-term interests of everyone affected, especially where children are concerned.

SEPARATION

When a relationship ends, whether the parties are married or living common-law, they may have many issues to consider as a result of their separation or prospective divorce. Some of these issues are as follows:

1. Custody of children;
2. Access to children;
3. Child Support and proportionment of any extraordinary expense;
4. Spousal support;
5. Possession of or, division of equity in, the family home;
6. Division of other family assets, such as savings, investments, furniture, automobiles and other property;
7. Division of responsibility for family debt;
8. Who will pay for insurance policies and who will be the beneficiary;
9. Entitlement to and division of employment or other pensions.

Generally, these issues can be settled through negotiation and the application of settled law or case authority. Lawyers can assist with the preparation of either a legally-enforceable Separation Agreement, or a combined Separation Agreement and Minutes of Settlement, if a divorce has been commenced or is anticipated to

be sought. The Separation Agreement and Minutes of Settlement can set out the agreed resolution of all the issues arising in the separation or divorce. A Separation Agreement may be executed to deal with certain issues leaving others to be resolved in a future agreement or a court hearing. If negotiations fail, or if it is not possible to settle all issues, then it will be necessary to apply to the courts for a hearing.

DIVORCE

The most common ground for a divorce is that the parties have been living separate and apart for a year or more. Other infrequently sought grounds for a divorce are mental cruelty, physical cruelty, adultery or some other conduct described in the Divorce Act. Either party may begin a divorce even before the one year separation has taken place. This filing for divorce enables the parties to apply to the courts for interim (temporary) or other relief under the Divorce Act on matters such as maintenance, custody and access of children and potentially suit costs which are costs paid by one party to the other to carry on the litigation.

LOOKING MORE CLOSELY AT SOME OF THE ISSUES ARISING FROM A SEPARATION

CUSTODY

Both parents have joint custody of their children until a court awards one or the other custody. A court may order joint custody post-separation in appropriate cases. The parties may agree in writing by Agreement to a custody arrangement or a judge can make a custody order. Interim or temporary custody can be ordered to one of the parents until a final custody decision is made. An interim order usually remains in effect until a hearing or agreement takes place as to a final order. Many interim orders are never finalized, and yet remain enforceable, as the parties are content that the interim order meets their needs. All custody orders, either interim or permanent, are subject to variation if there has been a change in circumstances.

ACCESS

Access is the common term for the time that the parent with whom the child does not primarily reside spends with the child. Grandparents or other persons with a close connection to the child can also apply for access in some circumstances. Interim access can be agreed or court ordered until a court orders

a final access schedule or the parties reach an out of court settlement. Access generally should not be denied unless the access parent poses a danger to the child. Once a problem with access presents itself, the custodial parent is encouraged to immediately apply to the court to change the terms. The courts have determined that access and maintenance are not related; ie. because a party does not pay child support or maintenance does not mean that he or she is disqualified from having access to the child.

SPOUSAL SUPPORT

Spousal support is periodic (usually monthly) or lump sum financial contribution between parties (of either sex) to a marriage, or marriage-like or common-law relationship. Entitlement to spousal support is based on such factors as the nature of the parties' relationship, economic sacrifice, income disparity, roles adopted by the parties during the relationship, the needs of the spouse seeking maintenance and the ability of the other spouse to pay that maintenance. Several other factors are also considered by the courts and they are as listed in the Divorce Act and applicable provincial statutes. Both spouses have an obligation to become or make reasonable efforts to become self-sufficient, in most circumstances.

CHILD SUPPORT

The amount of child support will normally be based on the Federal Child Support Guidelines and is available to children born under any circumstances, with rare exceptions. The amount of support will be determined by the paying parent's income and the number of children. The Guidelines dictate a base amount of support which is sometimes supplemented by a mandatory contribution to childcare, medical and other extraordinary expenses. In the case of children in college or university consideration will be given to their actual expenses and to their ability to contribute to their own support. The mother of a child born outside of wedlock can also seek compensation for related expenses which precede the birth. Applications for this type of maintenance should normally be made within two years of the child's birth.

MATRIMONIAL PROPERTY ACT

The Provincial Matrimonial Property Act presumes that each married spouse is entitled to fifty percent of the matrimonial assets. Some assets which have been determined by the courts to be matrimonial assets are the matrimonial home,

cottages or other recreational property if used by the family, pensions through employment, vehicles used by the family and bank accounts regardless of whose name they are in if they are used to pay family expenses. There are some exceptions to what are included as matrimonial assets and one of the most contentious are business assets. However, the courts will recognize the contribution of another spouse to the accumulation of business assets and the existence of the business assets. A common problem with regard to matrimonial assets is the valuation process. In some cases the parties can agree on the value or can hire experts to provide valuations.

COMMON-LAW RELATIONSHIPS

A common-law relationship occurs when two people are not married, but have been living together in a marriage-like relationship. Legal obligations that may arise from the common-law relationship are not necessarily the same as the obligations that arise from a marriage, however, the differences are becoming less significant all the time. Common-law spouses who have lived together for at least two years may have a duty to provide financial support for each other. There is no presumption of an equal sharing of assets and liabilities in common-law relationships, however, the courts and legislatures are increasingly recognizing that it may not be appropriate for the parties to a common-law relationship particularly one of some duration, to be less entitled to equal division. If a spouse feels they have an entitlement to property, they must apply to the court and demonstrate a contribution to the acquisition or upkeep of the property. This can be a financial contribution or a contribution made in other ways, such as caring for the children and home in order to give the other spouse the opportunity to work without worry and expense.

COHABITATION AGREEMENTS AND MARRIAGE CONTRACTS

Many of the issues discussed above can be resolved before parties cohabit or get married, as well as any time during the relationship prior to separation. Contracts can be made determining division of property and debt in the event of the end of the relationship. Preliminary agreements can also be made regarding custody, access, child support and spousal support. These issues may be reviewable by the courts which will assess the situation in light of the circumstances at the time of the breakup. It is a good idea to consider a marriage contract as it is often easier to make these decisions when emotions and stress are not involved.

CONCLUSION

Each party can save themselves a considerable amount of emotional anguish and legal fees if they are prepared to make reasonable compromises and sort out their affairs by way of a settlement agreement through their lawyers. Sometimes, however, negotiation is unrealistic, particularly, if a power imbalance exists in the relationship. The earlier in the process each party gets legal advice, the greater the possibility that these issues can be resolved without having to resort to a financially and emotionally draining court battle.