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Family law in Canada: separation and divorce

If you and your spouse are considering a separation or divorce—albeit a difficult time for both of you—there are many legal considerations that you should take into account.

A separation occurs when a married couple decides to live apart and has no intention of living together again. However, there are cases where couples were considered separated even though they lived under the same roof. The term "legal" separation is a misnomer in Canada since it really refers to the circumstances and spouses' intentions. Separation does not legally end the marriage. To do this, both married partners must institute divorce proceedings under the Divorce Act.

Separation agreements

Once the couple separates, several issues should be dealt with, usually through a separation agreement. This legal contract is signed by both people, and may be drafted for married couples or for common-law couples. Contracts generally deal with the various issues arising upon separation or the breakdown of the marital relationship (i.e., custody, access, spousal and child support; division of assets including the matrimonial home; and other assets such as pensions, RRSPs, investments, life insurance, medical/dental benefits or automobiles).

Separation agreements also deal with each person's financial obligations and liabilities (i.e., mortgages, personal loans, credit cards). The person who composes the separation agreement should have a strong working knowledge of the law of contract, the legal options available under the applicable jurisdiction and the tax consequences arising from the agreement. Because of this, it's advisable that a separation agreement be drafted with the advice of a lawyer. Even though separation agreements discuss issues of support and custody, the court can still review the contract.

In the absence of, or in conjunction with, a separation agreement, the governing law of the jurisdiction also determines issues of spousal and child support, support of dependent parents, custody and access. The jurisdiction's law determines who is a spouse (and is therefore subject to these legal issues), the amount of support paid (usually dependent on level of income), variation of support or custody arrangements, discontinuance of support obligations, and how assets are divided (including possession of the matrimonial home). Both spouses should seek legal advice when dealing with any of these matters. These issues are often addressed in a separation agreement immediately after the marital relationship breaks down and before divorce proceedings begin.

Divorce and annulment

Divorce proceedings, especially court dealings, can be very stressful and emotional since they involve very personal issues. Sometimes matters can be resolved through marriage counselling or mediation. For more information on marriage counselling and family services, contact the family court in your province. You can also visit your provincial website for more information on Canada's provincial courts.

Divorce and annulment are often confused. A marriage is declared and void because of a problem existing at the time of the celebration of marriage. For example, a prohibited marriage, impotence, a

prior existing marriage or lack of capacity are all grounds for an annulment. Note that the way a marriage is declared void may have important implications for property dealings. A divorce, on the other hand, results from difficulties that crop up during the course of the marriage. Contrasted with annulment, divorce involves a valid marriage.

Divorce proceedings can be initiated by anyone who was legally married in Canada or another country if the foreign marriage is recognized in Canada. The divorcing couple states their intention to live separately for the rest of their lives, believing there is no chance for reconciliation. Both spouses must have lived in Canada for at least a year prior to beginning divorce proceedings. Divorce proceedings, depending on the jurisdiction, can begin after both people live separately for at least one year or on other grounds for divorce such as adultery or cruelty.

Common-law spouses

Divorce does not apply to common-law spouses. If a couple was not married, they do not require a divorce, no matter how long they may have lived together. Common-law spouses may, however, decide to sign a separation agreement when the relationship breaks down. Where there are children born in a common-law relationship, the partners may also apply to the court for arrangements concerning custody, access and child support (unless this is made part of a separation agreement).

Common-law spouses may not have a legal right to an equal division of assets in certain jurisdictions. A division of assets between common-law spouses may nevertheless be made where one spouse enriches the other spouse to their deprivation.

Divorce proceedings

Unless determined beforehand (i.e., through a separation agreement), divorce proceedings deal with all issues arising from the breakdown of a marital relationship. Normally the grounds for divorce and custody will be dealt with first, followed by a division of assets and then, when the worth of each person has been determined, the amount of maintenance paid is established.

Divorce proceedings can take up to several months to conclude. A divorce judgment only becomes final 31 days after the judge signs it. At that point, the parties can apply for a certificate of divorce. If a party decides to remarry, the certificate of divorce is required before a new marriage license will be issued.

Family law has very important implications for spouses and their children before, during and after the marital relationship. There is no substitute for sound legal advice concerning legal matters with respect to the marital relationship, and they should not be dealt with without the advice of a lawyer with specific knowledge of family law.

There are numerous sources of information in each province both in terms of counselling and information concerning legal matters. Gather as much information as possible about the process and issues so that you can avoid disagreements and expense.

Before seeking a legal remedy, particularly in the case of a relationship, you may wish to consider other avenues and discuss the issue with a family counsellor, social worker, doctor or health professional.

Please note, this article is a general guide to certain laws applicable to family law in Canada. The information contained in this publication is given by way of general reference only, is not intended to provide legal advice, and is not to be relied upon in any factual situation as it does not cover all laws or regulations that may be applicable in all circumstances. No responsibility will be accepted by the authors or publishers for any inaccuracy, or omission or statement which might prove to be misleading. You are advised to seek your own professional advice before proceeding to consider issues of family law in Canada.

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