

Acknowledgement

LORNE J. FINE - B.A., LL.B. - is a well known and respected family law lawyer in Toronto who specializes in family /Divorce law. He is married and has three Children.

Lorne graduated from York University with a degree in Bachelor of Arts in History. He graduated from Osgoode Hall Law School in 1990 and was called to the Bar in 1992.

In addition, Lorne has furthered his study of the law in Oxford, England and has obtained a further Certificate in the field of negotiation. Lorne has also recently been certified in Collaborative Family Law and is a member of the Collaborative Practice Toronto.

After articling with a well known downtown Toronto law firm, Minden, Gross, Grafstein & Greenstein, Lorne established his law practice. Shortly thereafter, Lorne and his long time friend and associate, Brian Belmont, established Belmont, Fine & Associates - Barristers & Solicitors.

Belmont, Fine & Associates is a boutique law firm with offices in North York and Scarborough.

Lorne has been interviewed about important family law issues and events on several occasions, including appearances on Global television and CHCH television.

Lorne is a member and supporter of many community organizations. He has been requested to lecture at a number of Women Shelters, single parent events and Men's support Groups.

Since 1992, Lorne has provided effective representation for men and women throughout Ontario, Canada, the United States, England, the Middle East and the Caribbean.

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Notice to Reader

This Guidebook is not intended to provide legal advice and should not be relied upon as such. The purpose of the guidebook is to provide general information about Separation and Divorce. If you are intending to separate from your spouse, it is strongly recommended that you immediately obtain legal advice from an experienced family law lawyer.

Do not rely upon the advice of friends or family in handling a divorce/separation by yourself. Each case is unique on its facts. It is critical to obtain independent legal advice.

Separation/ Divorce is a very emotional and stressful experience for an individual. A lawyer will assist you through this difficult time in your life. He/she will guide you through the process to ensure that your rights are protected. A lawyer may also refer you to (or work with) other professionals, including, doctors, therapists, and accountants who will be of assistance during the process.

The law of Separation/Divorce is not as simple as it may seem. It can be complicated and confusing. Trying to act for yourself in a Separation/Divorce may save money in the short term, by way of legal fees, but it may very likely cost much more in the long term.

An experienced family law lawyer will evaluate your situation on an objective basis and ensure that your rights and obligations are protected.

FREQUENTLY ASKED QUESTIONS:

SEPARATION /DIVORCE

1. Q: How do I become legally separated?

A: If there is "no reasonable chance of reconciliation" between you and your spouse you are "legally separated". You can be "legally separated" and continue to reside in the same residence. The test to determine if you are separated, includes, but is not limited to the following:

1. do you have sexual relations?
2. do you go out socially together?
3. does one spouse do household chores for the other?
4. do you and your spouse hold yourself out as separated to third parties?

The date of separation may be difficult to determine. It is sometimes a question of fact. However, the date can be critical as it may effect the division of property and the issue of support.

2. Q: How do I resolve the issues arising out of my separation from my spouse?

A: Once you are separated from your spouse, it is preferable that that parties attempt to negotiate a separation agreement. Once the terms are agreed upon, they are incorporated into an Agreement to be drafted by a lawyer.

3. Q: What if we are unable to agree on terms of a Separation Agreement?

A: If you and your spouse (with or without the assistance of counsel) are unable to agree on terms of an Agreement, it will be necessary to seek the assistance of a court in determining the issues. Either party can initiate court proceedings to ensure that his/her interests are protected.

4. Q: What is a Separation Agreement?

A: A Separation Agreement may deal with custody/access, child/spousal support and a division of net family property. The parties can be creative and agree to resolve issues that are not necessarily reflective of the "legal model" (eg. property division may be different than as provided under the Family Law Act). In order to have a valid Separation Agreement, the Agreement must be in writing, signed by the parties and witnessed by a third party. It is very important that prior to executing the Agreement, both parties exchange full and complete financial disclosure of all assets/liabilities that exist on the date of separation and the date of marriage. Furthermore, in order to solidify the terms of your Separation Agreement, so that it will be difficult for either party to challenge the Agreement in the future, it is highly recommended by both parties have independent legal advice prior to signing the Agreement.

5. Q: How do I become Divorced?

A: In order to obtain a Divorce, either party must initiate court proceedings, by way of an Application for a divorce. Once the Divorce Application is issued by the court, it must be served on the opposing party. If the opposing party does not dispute your claim within 30 days of receiving the Divorce Application, the person can be noted in "default". You must then swear an Affidavit in support of the Divorce Judgment. The Affidavit, along with a Notice of Motion, will then be filed with a Court. A Judge will then receive the materials and review same. If the Judge is satisfied with the contents of the Affidavit, he/she will grant a Divorce Judgment. You are then Divorced. If the Divorce Judgment is not appealed by the other spouse, after the Divorce Judgment is obtained, a Certificate of Divorce can then be obtained from the court. You can only remarry if you have a Certificate of Divorce.

6. Q: How long does it take to get a Divorce?

A: The entire process takes between 3-6 months if your spouse lives in Ontario and there are no problems with the Divorce materials (ie. serving your spouse, rejection of the Divorce materials by the court for deficiencies etc.).

7. Q: Can my spouse prevent me from obtaining a Divorce?

A: In Canada, Divorces are granted on a "no fault" basis. If you want a Divorce, a court will grant you a Divorce. A court will only refuse to grant a Divorce if the Judge is not satisfied that there are proper provisions in place for the support of the Children (ie. a spouse is not paying child support).

8. Q: What if I am living in a “common law” relationship with another individual, do I have any rights?

A: There is a difference between how the law treats “married couples” and “common-law couples”. “Common law couples” can be defined as “two persons who are not married to each other and have cohabited either continuously for a period of not less than three years or are in a relationship of some permanence and are parents of a child”. “Married couples” have greater rights under the Family Law Act . Although “Common Law couples” have rights to spousal support just like “married couples”, the Family Law Act does not provide for a scheme of division of property as between “Common Law couples”. As a result, it can be very complicated to divide property as between “common law” spouses. It is critical to consult a lawyer. In order to terminate a “common law” relationship, it is possible to enter into a Separation Agreement, but you do not require a court document to terminate your relationship.

CUSTODY/ACCESS

9. Q: Once I separate from my spouse, how is custody of my Children determined?

A: Custody of a Child is determined by a court based on the “best interests” of a Child. In the event of a custody dispute, a court must determine which parent is most capable of providing for the health, education and welfare of a Child. Sometimes, the court uses the assistance of a professional (ie. the Office of the Children’s Lawyer, a psychologist, a social worker etc.), in order to determine the “best interests” of a Child.

10. Q: What is the Office of the Children's Lawyer?

A: The Office of the Children's Lawyer can be appointed by the court to evaluate the custody/access issues in a particular case. The Office of the Children's Lawyer ("OCL") must accept the appointment from the court. Once the appointment is accepted, the OCL may assign a Social worker to investigate each parent and determine who can best provide the best interests of the "Child". In the alternative, if the child is older, the OCL may be appointed as the Child's lawyer in the proceedings. The OCL would then act as the voice of the Child during the proceedings.

11. Q: What is the difference between sole custody and joint custody?

A: The traditional arrangement (although changing with our times), is that the primary caregiver of the Child has "sole custody" of the Child (usually the Mother), and the other parent (the Father) has access to the Child.

"Sole custody" of the Child means that the custodial parent can make all major decisions with respect to the health, education and welfare of the Child without consulting the other parent.

Although the "Access parent" has the right to obtain all information concerning the health, education and welfare of the Child, he/she would not have the right to make sole decisions with respect to the health, education and welfare of the Child.

“Joint custody” of the Child means that both parents equally share in all major decisions with respect to the health, education and welfare of the Child. Both parents must consult with each other prior to making any major decisions with respect to the Child. When the Child resides primarily with one parent, he/she makes all of the day to day decisions with respect to the Child.

It is unlikely that a court would award joint custody to a parent (usually the father, when the mother is the primary caregiver), if there is any history of abuse in the relationship. The parents must be able to communicate and work together if a “Joint custody” arrangement is to be effective.

“Shared custody” of the Child is an expansion of the concept of “joint custody”. In a “shared custody” arrangement, the Child resides equally with both parents and they both make all major decisions with respect to the Child.

Today the courts are moving away from the concepts of “custody” of a Child” as the term implies “ownership” of the Child and encourages parties to litigate. The courts are encouraging people to enter into “Parenting Plans”. These Agreements set out in detail how the child is going to be cared for without inserting any terms which gives more rights to one party over another.

It is always preferable to attempt to negotiate custody/access issues between the parents of a Child, rather than having such an important issue be determined by a Judge that does not know you, your spouse or the Child.

It is always important to remember that your child’s welfare is paramount in any separation/Divorce. You should attempt to minimize the disruption in your child’s life as a result of your separation/divorce. It is always a good idea to seek counseling to assist you or your child during this difficult time.

CHILD SUPPORT

12. Q: Do I have to pay child support?

A: The law considers “child support” to be for the benefit of the Child. Child support is paid to the primary caregiver of the Child from the other parent. The quantum of Child support is based on the payor’s income. The recipient’s income is irrelevant.

Although some parties express concern that their support payments will not be spent on the Child, it is very difficult to convince a court that you should not pay child support. The law assumes that the recipient of child support will use the monies received from the benefit of the Child.

Child support is not tax deductible to the support payor or taxable to the support recipient.

13. Q: How is the quantum of child support determined?

A: The quantum of child support is based on the income of the support payor. The Federal Child Support Guidelines provides a formula for the determination of Child support based on the income of the support payor and the number of Children of the relationship.

Under very limited circumstances (ie. “undue hardship”), can the quantum of support be varied from that provided under the Federal Child support Guidelines.

A support payor’s income is relatively easy to determine when the payor is not self-employed. The payor will receive a T4 which will set out his income. The payor’s Income Tax Return would then be examined, and the quantum of

support would be based on his income as set out in line 150 of his Income Tax Return.

However, when a support payor is self-employed, his income for support purposes may not be the same as his declared income as set out in his Income Tax Return. The support payor's income for support purposes may be more difficult to determine than someone who is an "employee".

When a support payor is self-employed, a court may determine that certain deductions from the payor's income or business be added back into the payor's declared income in order to determine his/her income for child support purposes. This is a difficult process that may require the assistance of an expert (ie. accountant etc.).

An experienced Family Law Lawyer can assist you in determining your child support obligation or how much child support you are entitled to for the care of your child.

14. Q: Do I have to pay any more money to my former spouse for child support, other than the base amount of support as determined by my income and the Federal Child Support Guidelines?

A: The Federal Child support Guidelines also provide that in addition to the base amount of child support to be paid by a payor (as determined by his/her income and the Federal Child Support Guidelines), a support payor must also pay his/her pro-rata share of the Child's extraordinary expenses.

Section seven (7) of the Federal Child Support Guidelines, provide that Extraordinary expenses include, but are not limited to, the following:

- health expenses for the child;
- orthodontic expenses for the child;
- daycare expenses;
- extraordinary expenses for primary or secondary school education;
- extraordinary expenses for post-secondary education; and,
- extraordinary expenses for extracurricular activities.

In order to determine the amount of the extraordinary expenses, the parties must determine the cost of the expense to the recipient (net of tax), after deducting any contribution from the child (the child's income, inheritance, loans etc.)

In determining the support payor's proportionate share of the s.7 expenses, you must also determine the support recipient's income.

The extraordinary expense is then shared by the parties in proportion to their respective incomes.

15. Q: My former spouse has refused to allow me to visit with my Child. Do I still have to pay child support?

A: The law considers child support to be the right of the Child. Therefore, it is irrelevant if the support payor is not visiting with his/her child or the support recipient is preventing same. If you have a child and are earning income, you must pay child support.

16. Q: I am not the biological father of the Child. Do I still have to pay child support for the Child?

A: If you have treated the Child as if he was your biological child, you will likely have an obligation to pay child support. This is always a question of fact.

SPOUSAL SUPPORT

17. Q: Do I have a right to claim spousal support?

A: If you are a spouse (married or common-law), you have a right to claim spousal support. Usually spousal support would be granted by a court if a spouse was dependent on the other spouse financially during the relationship or the spouse has suffered some "detrimental economic circumstances" as a result of the relationship (ie. stayed home to raise children, was in ill health, etc.).

Unlike child support, the quantum of spousal support is tax deductible to the support payor and taxable to the support recipient.

18. Q: How is spousal support determined?

A: There are numerous factors to consider in determining whether or not a spouse is entitled to support and the quantum of spousal support. They include, but are not limited to, the following:

- The needs of the dependent spouse based on the lifestyle enjoyed during the relationship;
- The ability of the payor to pay support;
- The length of the marriage which will include the time lived together prior to marriage;
- The age and physical and mental health of both spouses;
- The dependent's capacity to contribute to their own support;
- The standard of living enjoyed during the marriage;
- The career sacrifices of the dependent spouse for the career advancement of the other spouse.

19. Q: Is there a "guideline" to determine the quantum of spousal support?

A: Unlike child support, there are no legislated guidelines in order to determine the quantum of spousal support. However, recently the "Spousal Support Advisory Guidelines" (the "SSAG") was developed by leading family law academics and family law specialists which attempts to assist parties in determining the quantum of spousal support. Although not binding on a court, the SSAG are helpful in determining the proper quantum of spousal support.

The SSAG are based on a formula which considers the parties respective incomes, the length of the marriage, whether there are other children and other considerations. Most family law lawyers have a computer program which can assist in the determination of the quantum of spousal support.

PROPERTY DIVISION

20. Q: How does the division of property between spouses work?

A: The Family Law Act provides for a division of "Net Family Properties" of the parties/spouses as of the date of separation. It is not simply a 50/50 division of all of the parties' property as of the date of separation. It can be a very difficult calculation.

Sometimes it is necessary to retain the opinion of experts to advise as to the value of an asset as of the date of marriage or the date of separation (eg. business valuations, pension etc.).

A pension can be a very valuable asset. Although a spouse may not have access to a pension (which they obtained through their employer) as of the date of separation, it must still be valued for the purposes of determining a division of net family property and included in the calculation.

Furthermore, some parties do not realize the full extent of his/her spouse's assets. Some assets may be hidden or the parties do not realize that they have an asset that must be shared with his/her spouse. An effective Family Law lawyer would be able to assist you with these issues.

An individual's "Net Family Property" is defined as the "value of all of the property, except excluded property, that a spouse owns on the valuation date (ie. the date of separation), after deducting the spouse's debts and liabilities and the value of property, other than the Matrimonial Home, that the spouse owned on the date of marriage, after deducting the spouse's debts and other liabilities, calculated as of the date of marriage".

Therefore, a party must essentially determine the increase in value of his/her net worth (assets less all liabilities) from the date of marriage to the date of separation.

Therefore, the determination of the date of separation (defined as when there was "no reasonable prospect of reconciliation" between the spouses) is critical. It will be a question of fact.

Sometimes parties can differ greatly as to the date of separation. If the value of a spouse's assets increased or decreased significantly between the Wife's date of separation and the Husband's date of separation, the determination of the division of properties between the spouses can be difficult.

Once each party determines his/her "Net Family Property", one party usually pays the other party an "Equalization Payment."

An "Equalization of Net Family Properties" is defined in the Family Law Act as "the spouse whose net family property is the lesser of the two net family properties is entitled to one-half of the difference between them".

Therefore, if a Husband's "Net Family Property" (ie. Assets –less- Liabilities –less- net worth as of the date of marriage) is determined to be \$100,000.00 and the "Net Family Property" of a Wife is determined to be \$0, the Husband would owe the Wife an "Equalization Payment" of \$50,000.00 in order to divide their respective "Net Family Properties".

21. Q: I inherited money during my marriage. Do I have to share my inheritance with my former spouse?

A: In determining a party's "Net Family Property" not all property is treated equally. Property that is not included in your "Net Family Property" is called "Excluded Property". This property is not shared with your spouse. "Excluded Property" includes, but is not limited to, the following: gifts, inheritances, income from any gift or inheritance, damages or a right to damages for personal injury etc.

Although you may receive a Matrimonial Home by way of a gift or inheritance, a Matrimonial Home cannot be considered "Excluded Property". A Matrimonial Home is considered to be special property under the Family Law Act.

Furthermore, if you obtained excluded property during the marriage, you must be able to trace the excluded property to an asset existing on the date of separation. If a major gift or inheritance was paid into the Matrimonial Home or mixed with joint assets owed by you and your spouse during the marriage, you cannot claim exclusion.

You must consult with a lawyer to determine if you have "Excluded Property" that you do not have to share with your spouse.

22. Q: What is a "Matrimonial Home" as defined by the Family Law Act?

A: A "Matrimonial Home" is treated very differently from other assets under the Family Law Act.

A "Matrimonial Home" is defined as "Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home".

A "Matrimonial Home" cannot be considered "Excluded Property". Therefore, if you inherited a "Matrimonial Home", or received the house by way of a "gift" from a third party, the value of the house as of the date of separation must be shared with your former spouse.

Furthermore, if you owned a house on the date of marriage and you and your spouse lived in the same house on the date of separation, unlike other property owned on the date of marriage, you cannot deduct the value of the house from your "Net Family Property" as of the date of marriage

23. Q: How can I protect my property that I am bringing into a marriage?

A: It is possible to enter into a "Marriage Contract" with your new spouse that specifically contracts out of some of the provisions of the Family Law Act. The "Marriage Contract" would set out how a division of Net Family Properties would be calculated in the event of a breakdown of the marriage. You can specifically exclude property that would not be considered part of your Net Family Property in the event of a breakdown in your marriage (ie. pensions, RRSPs, savings etc.).

Since a "Matrimonial Home" is considered special property under the Family Law Act (see above) if you are bringing a house into a relationship, it would be prudent to enter into a "Marriage Contract".

An experienced Family Law Lawyer can assist you in properly executing a "Marriage Contract" in order to attempt to ensure that the Contract is enforceable in the event of a separation from your spouse. It is not wise to draft your own "Marriage Contract".

CONCLUSION

The law of Separation and Divorce is not always as simple as most people believe.

It is critical to obtain Independent legal advice from a lawyer experienced in family law as soon as possible when you are having family problems.

As stated in the introduction, do not rely on the information herein for legal advice. If you have family problems, immediately consult a Family law/ Divorce lawyer.

An effective family law lawyer can assist you in resolving the issues of custody/access of a child, child support, spousal support and property division quickly and on the best possible terms.

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