



# **They Say that Breaking Up Is Hard To Do:**

*Rights and Responsibilities for Lesbians and Gay Men when their  
Relationships End*  
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This booklet contains general legal information. It is not legal advice. The information is accurate as of May 4, 2000. But the law changes frequently. You should consult a lawyer for information about your particular situation.

Introduction

Who this booklet is for

What new laws there are about queer families

Provincially

Federally

Safety issues

Thinking ahead

When you break up: with or without an agreement

If you had a cohabitation agreement

If you did not have a cohabitation agreement:

factors the courts consider

When you break up: children

If children are part of your family: custody,

access and guardianship issues

Child maintenance

Property division

Generally

Family home

Pensions

RRSP's

What about the debts?

Factors which may affect you

If you are living on a reserve

If you are an immigrant to Canada

If you are on welfare

If you are under 19 years of age

Things to review at this point

Your will

Your insurance policies

Your power of attorney

Your representation agreement or health

care directive

Forward from Here

## **Introduction:**

This booklet is written for people in same-sex relationships, who are thinking about breaking up, or have broken up, or wonder what their situation would be if they did break up.

It goes with companion pieces from the Dahl Findlay Connors Out/Law Series, which are listed at the end of this booklet.

The law for lesbian and gay families has changed dramatically over the last five years. And the changes apply to anyone who has been in a relationship for as little as one year.

A rough-and-ready approach to thinking of the rights and obligations of same-sex partners when a relationship ends is to know that we are in a very similar situation to common law heterosexual couples. There are a few minor exceptions to that rule, but it applies generally. Because the laws are pretty much the same whether you are in a common law or a same sex relationship, transgendered people will find this booklet useful, regardless of the gender identity of themselves or their partners.

The federal government has amended all of the laws which discriminate against same sex partners *except* the laws governing marriage, immigration, and the right not to be compelled not to testify against your partner if s/he confesses a crime to you (a right that married people have). The provincial government has amended most of the laws affecting people in relationships to take out discrimination against same sex partners.

*Because the law is changing so quickly, you can use this pamphlet as a guide only. Discuss the facts of your case with a lawyer.*

## Safety Issues

There is a myth that spousal abuse does not happen in same sex relationships.

Has your partner

- ▼ hit you or your children?
- ▼ destroyed furniture?
- ▼ thrown things?
- ▼ got a weapon eg a gun?
- ▼ flown into rages, then apologized, then raged again?

*Take this behaviour seriously.*

The most dangerous time in a relationship is when it is ending. That is when most assaults are committed.

Things you can do if you are at risk:

- ▼ call the police
- ▼ if you are a woman, call a transition house (there are no transition houses for men currently)
- ▼ get emergency financial assistance from the Ministry of Social Services (welfare)
- ▼ talk to a lawyer
  - ▼ discuss changing the locks.
  - ▼ If you can't afford a lawyer, go to legal aid. Also, most lawyers will give you a first interview for free.
  - ▼ discuss getting a restraining order so your partner can't come near you
  - ▼ if you have the children, discuss getting an order that your partner has to let you live in the family home

## **Thinking ahead**

When you are thinking about leaving, make sure that you have all the financial records relating to the relationship, or copies of them. Also, take your identity documents (passport, birth certificate) and the documents of children who will be with you.

Either partner can take all the money from a joint account at any time. So if your accounts are joint, take the money you will need and do not assume it will still be there when you return.

You can certainly take your clothes and personal possessions. You may be entitled to take furniture and other property as well but it is impossible to generalize about this aspect of the situation.

### **When you break up: with or without an agreement**

Some people have a “cohabitation agreement” – a written agreement they made before or after they got together, which sets out what the agreements are between them about sharing expenses, owning property, dealing with the children, and so on both during and after the relationship.

If you have such an agreement with your partner, it is the first place to look to see whether it tells you the answer to your questions about consequences of breaking up. The courts will uphold those agreements most of the time. Sometimes those agreements were signed under duress, or when one party was missing crucial information. In those situations it is sometimes possible to have the agreement set aside. That requires a lawyer’s assessment.

The rest of this pamphlet is for people who lived together, are separating, do not have a cohabitation agreement when they break up...with hope that, in your next relationship, you will address that issue early on so you don’t have to deal with the ambiguity and difficulties again.

### **If Children Are Part of Your Family: Custody and Access Rights**

If children are part of your same sex family, you might have been

- the child’s biological parent
- the child’s co-parent, if the child was born during your relationship

- ▼ the child's adoptive parent: you may have adopted the biological child of your partner
- ▼ the child's stepparent: if the child lived with you, and you had parental responsibilities during the relations, then you are a stepparent, even if the child has two other natural parents

When your relationship ends, who will the children live with? One parent (biological parent, co-parent, adoptive parent, or stepparent) may have sole custody and guardianship. That means that the child lives at that parent's home, and that parent has the right to make the decisions which affect the welfare of the child.

**Custody:** Care for the child on a day-to-day basis. The person the child lives with has **custody**.

**Access:** The right of a person who does not have **custody** of a child to see the child.

Or two parents may have **joint custody and guardianship**. In that case, a child spends substantial time with each parent – for example, a week with one parent, a week with the other – though it does not have to be equal amounts of time.

**Guardianship:** The right to make decisions about the child, including health, education, etc; and managing the child's property if s/he has any.

Or two parents may have **joint guardianship** though one parent has **sole custody**. In that case, the child lives with one parent but both parents have to discuss matters affecting the child such as where the child will go to school.

If a parent does not have custody, she or he is entitled to **access** to the child.

Access is sometimes called "visitation rights". Usually a child will visit with the non-custodial parent at the home of that person, though sometimes with very young children that is not the case.

## **What if the child has other parents?**

If the child you were living with when you broke up was born to you and someone else (for example, was a child of a marriage you were in before), or was born to your partner and someone else, there may already be a custody and access arrangement in place between those two adults in the child's life about where the child will live and when the child will see each parent.

## **A child can have more than two parents!!!**

So there may be several people in the child's life who have rights and responsibilities with respect to the child. There may be more than one or two parents supporting the child, for example. Or more than two parents sharing time with the child.

## **Who Decides Where the Children Live?**

You and your partner – and any other parent or stepparent already in the child's life before you came along, if there is one – can make an agreement about where the child will live (**custody**), when the child will see her or his other parent(s) (**access**), and which adults have a say in major decisions affecting the child (**guardianship**).

If you and your ex do not agree about that question, either of you can apply to court for an order. The law treats an application for custody by a lesbian or gay parent exactly the same as an application from a heterosexual parent. The judge examines the circumstances and the proposed living arrangements that each person has to offer, and makes a decision about where the child will primarily live (or when the child will see his or her other parent) based upon what is in the "best interests of the child".

It is sometimes very difficult to predict what decision a judge will make in a particular case.

Some factors the courts take into account:

- ▼ stability for the child (for example, staying close to the same school/friends/extended family)
- ▼ the ability of each parent to care for the child
- ▼ the love, affection and similar ties that exist between the child and each parent
- ▼ the health and emotional well-being of the child, including the stability of the child
- ▼ education and training for the child
- ▼ sometimes, especially if the child is older, the wishes of the child
- ▼ the biological connection between a child and her or his parents
- ▼ whether a child has aboriginal heritage
- ▼ whether a parent has a record of misconduct which might affect the well being of the child (eg spousal or child assault)

Some factors the court does **not** take into account:

- ▼ the fact that one parent had an affair before the relationship ended
- ▼ whose “fault” it was that the relationship ended or whose decision it was to leave
- ▼ whether or not the parent is paying maintenance for the children (even if ordered to)
- ▼ misconduct by a parent which does not affect the well being of the child (eg a criminal conviction for passing a bad cheque)

Some factors that a court might take into account if they think that it may affect the best interests of a child:

- ▼ whether a parent is transgendered. There are very few custody/access cases in Canada involving the rights of trans parents.
- ▼ whether a parent has a history of mental illness which would affect the child
- ▼ the likelihood that one parent will be more reasonable about access than the other
- ▼ the likelihood that one parent may take the child out of the jurisdiction

The status quo is always a factor, since moving children from the parent with whom they have been living, and from the home in which they have been living, is traumatic. So if you are thinking about leaving, and you want to have custody of the children, you should either take the children with you, get an agreement from your ex that you will have custody, or get an interim custody order as quickly as possible.

**Terms of access** to a child can either be stated generally (eg “reasonable access” or “generous access”), or spelled out in a schedule (eg “alternate weekends from Friday at 6:00 pm. to Sunday at 8:00 p.m. and half of school holidays...”)

Obviously the terms of access will vary depending on the age of the children, where the parents live in relation to each other, the work schedules of the parents and school schedules of the children, and so on.

## **Child Maintenance**

In British Columbia, you have an obligation to pay child support if

- ▼ you and your ex were together for two years or more and
- ▼ you contributed to the support of the child for at least a year

Conversely, you have a right to claim child support from your ex if

- ▼ you and your ex were together for two years or more and
- ▼ while you were together your ex contributed to the support of your child

An application for child support must be made within one year of the time that the step parent stopped contributing – usually one year from the breakup.

## **How Much Child Support?**

If there are only two parents – you and your ex – concerned with supporting the children, the *Child Support Guidelines* apply to determine how much you have to pay. The child support guidelines look at how much you are earning, how much your ex is earning, how many children there are, and determines what amount of support each parent should be contributing to the child.

Special assessments for maintenance can be made for “extraordinary expenses” if those exist.

If you are the parent with the children, the fact that you get involved with someone else – even if they move in and begin to help with expenses related to the children – does not mean that your ex is off the hook.

So even if your ex has the children and develops a relationship with a new partner who is supporting the children,

you may still have to pay the same amount of child maintenance.

The obligation to pay child support continues till the child is 19 years old.

Once again, the amount of child support can be determined by agreement between you and your ex, or by a judge if you don't agree.

If you are the parent who is entitled to child support, you should register your agreement or court order with the Family Maintenance Enforcement Program. This is a free service which accepts payments from your ex, keeps track of them, and forwards them to you. If your ex gets behind, FMEP will take "enforcement action" such as garnishing your ex's wages, on your behalf.

If you are the parent who has to pay child support, and your circumstances change so you can't afford the amount you are supposed to pay (e.g. because you lost your job and you are on employment insurance benefits) you **must** get the amount changed to reflect your new circumstances. **Do not simply pay a lower amount, or think that it is enough to advise FMEP of your new circumstances.** Unless the amount of child maintenance is formally changed, either by agreement or by a new court order, you will continue to owe the original amount. And the amount owing will pile up (it is called "arrear"), and it can be enforced against you by garnishing your wages, taking money from your bank account, and other measures.

## **If you are on welfare**

Your welfare worker will require you to ask for child maintenance if you are entitled to receive it, even if you don't want to ask your ex for child support. If you don't want to go after your ex for child support because you are afraid for your safety, get help from Legal Aid.

You will be allowed to keep a certain amount of child support (ask your social worker how much) over and above your regular welfare payments.

If you are on welfare an order for child maintenance may still be made against you, even if it is for a very small amount like \$5 per month. Such an order keeps open the possibility of your ex getting the amount changed if you get back in the work force. If there was no order, your ex would be caught by the one year limitation.

## Property Division: Dividing Up the Stuff

Whether you and your partner owned only the furniture in your apartment, or whether you and your partner have stocks and bonds and real estate, the question is who gets what when the relationship breaks up.

Unfortunately this is not a simple question.

In fact, if you have to go through the painful process of arguing over who should get what, you will know why it is so important to have a cohabitation agreement the next time.

The law for people who are married is that each partner is generally entitled to 50% of the “family assets”. The percentage may be changed if the marriage was very short, or if one person owned most of the property before the marriage began, or if one of the partners inherited most of the assets, or for a number of other reasons.

If you are living common law, though, the law begins with the assumption that you are “roommates” for the purpose of property division. What’s yours is yours, what is your partner’s is your partner’s...and if you break up things are divided according to who owns it. But that is only the starting point.

A court may decide that even though one person “owns” an asset – has their name on it, or is the one who bought it, – the other is entitled to a share. Factors a court considers in deciding that issue include:

- ▼ whether the two of you shared expenses and things were purchased from a joint “pot”
- ▼ whether the relationship is one of a medium or long one
- ▼ whether one person has been the stay-at-home partner by agreement, and has looked after the household while the other one was working in the paid work force
- ▼ whether one person has put lots of labour into renovating a house which is registered in the name of the other
- ▼ whether the assets have been registered in joint names, even if one person has contributed most of the money to buy it.

The factors are many, and figuring out how they would play out in a particular case involves looking things such as:

- ▼ the length of the relationship

- ▼ how the two of you organized their finances while you were together
- ▼ whose name is on an asset
- ▼ who paid for the asset
- ▼ whether someone contributed labour and increased the value of an asset
- ▼ whether one or the other person owned the asset before the relationship began
- ▼ whether the asset has gone up or down in value since it was acquired by the parties

Once again, this sort of thing can be worked out by agreement between the parties; or a judge will decide. Having a judge decide can be a very very expensive proposition in legal fees, so parties often agree to divide their property in a way that neither is completely satisfied with, to save spending more in legal fees than the property is worth.

## **What counts?**

When a judge is examining how things should be divided fairly, he or she will look at all kinds of assets, including RRSP's, insurance policies, pension plans, recreational properties, stocks and bonds, art, vehicles, etc. Even a business which was run by one partner can be divided, if the other partner made direct or indirect contributions to the value of the business.

## **If You Owned a Home Together**

If the parties own a home together (and regardless whose name is on the title) and cannot agree about who will live in it/who will buy the other out, a court will generally order that the house be sold and the moneys divided. There may be an exception if there are children, in which case the custodial partner can request an order for "exclusive occupancy of the matrimonial home". But apart from that situation, a court will order the house be sold so that one person's equity is not tied up indefinitely.

## **Pensions**

Same sex partners are now entitled to name each other on their pensions at work. If you have named your partner, though, you need her or his consent to change the designation to someone else.

Canada Pension Plan benefits are available to the surviving “spouse” of someone who has died. As soon as pending federal changes are proclaimed into law, same sex partners who have lived together for more than a year will be entitled to survivor’s benefits. If a deceased has had more than one “spouse”, the survivor’s benefits are divided according to the length of time of each relationship.

Because property issues are so hard to predict, you should consult a lawyer to get a sense of how things would be divided in your case.

## **Spousal Maintenance**

If you have been living with your ex for more than two years in a common law relationship, and if your ex is financially dependent on you when you break up, you may be required to pay spousal support.

On the other hand if you are the partner who is financially dependent when the relationship ends, you may be entitled to an award of spousal maintenance.

Where there are no children involved, the philosophy behind spousal maintenance is that when people form a spousal relationship, it is sometimes the case that the economic unit of the relationship operates to the disadvantage of one person and that person should be able to get support from the other for a limited period of time after the relationship ends to be able to get back in the work force.

Unlike child maintenance, spousal maintenance amounts are not predetermined according to a schedule. Figuring out how much you could get or how much you might have to pay is something a lawyer will do for you by looking at other cases similar to yours and seeing what the courts awarded.

Also unlike child maintenance, spousal maintenance is deductible in the hands of a spouse paying the maintenance, and must be declared as income by the spouse receiving it.

Factors that a court will consider when deciding whether one partner must pay spousal maintenance to the other include:

- ▼ how the parties managed their finances when they were together: did they share all their income or did they each pay half the costs of running the household regardless of the differences in their income?
- ▼ how long the two people have been together
- ▼ in what way one person is dependent on the other (eg did they both agree that one go back to school, or stay home? Is one disabled?)
- ▼ whether one person needs a period of retraining to get back in the workforce
- ▼ the age of the parties

Spousal maintenance awards are usually of limited duration, to give the other a chance to get back on his or her feet financially and become self-sufficient.

## **Factors which may affect you**

Your legal situation may be affected by the fact that you and your ex are status Indians who were living on a reserve, because you are an immigrant, because you are on welfare, or because you are under 19.

If you and your ex were living on a reserve, the question of who gets to stay on the reserve when the relationship ends is complicated. You will need legal advice about your specific situation. Your rights and responsibilities with respect to the division of other property, and with respect to child and spousal maintenance, are the same as non aboriginal same sex partners in B.C.

If you have immigrated to Canada and are now a landed immigrant, the break up of your relationship will not affect your immigration status, even if you came to Canada as the same sex partner of your ex. If your application for landing has not yet been processed, your right to stay temporarily in Canada will depend on your current immigration documents (visitor visa, student visa, etc). Your application on the basis of your same sex relationship will not succeed if your relationship has ended. However, you still have the rights to child and spousal maintenance and property division outlined in this booklet.

If you are on welfare you should know that the definition of 'family' for welfare purposes includes same sex partners, so from their point of view you may be ineligible for benefits if the

person you live with (even if they are not your partner) has a job.

If you are under 19, you are a 'minor' in law. Among other things that means you do not have the legal capacity to sign a contract. So if you have been living in a same sex relationship and it breaks up, you should talk to a lawyer at Legal Aid. You have the right to maintenance from your ex if you have been together for two years. Your right to maintenance does not depend on how old you are, or how old your ex is.

## **Forward from Here**

Things to consider as you move forward with your life:

If you have named your partner as a beneficiary on your pension plan at work (as opposed to RRSP's) you cannot change that designation unless you have your partner's consent in writing to do that.

Canada pension credits determine the amount of CPP benefits you may be entitled to. Credits earned by both partners during a common law relationship are divided equally if the relationship ends. If the relationship lasted for at least one year, you or your spouse can apply for a division of pension credits any time after a 12 month separation period up to the death of your ex.

You should consider changing the beneficiary on your insurance policy. You can do that without your partner's consent unless you have designated your partner as an "irrevocable beneficiary".

And if your will, Power of Attorney, or Representation Agreement name your ex, you will want to consider changing that. (Note that Health Care Directives are no longer valid since they have been replaced by Representation Agreements).

**...And next time, write a cohabitation agreement!**

This pamphlet contains legal information. It is *not* legal advice. Laws change quickly, and individual situations vary. To find out how the law affects your situation, contact me. First interviews are always free of charge.

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