

The Out/Law Series of Legal Guides

Breaking Up is Hard to Do

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Introduction

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

It applies to heterosexual and to gay, lesbian, or transgender relationships; to relationships where the couple has lived on a reserve and to relationships where they have not; to relationships where one partner is an immigrant to Canada and to relationships where neither or both are immigrants; to relationships where a partner has a disability and to relationships where neither does. Where there are special provisions relating to those statuses, there is an explanation in this booklet.

The booklet applies to married people and to anyone in a “common law relationship”. In B.C., a common law relationship is one where you have been living together for at least two years but are not married.

In this booklet we use the word ‘partner’ to apply both to married spouses and to people in a common law relationship.

Safety Issues

Has your partner

- Hit you or your children?
- Destroyed furniture?
- Thrown things?
- Got a weapon, e.g. a gun?
- Flown into rages, then apologized, then raged again?

Take this behaviour very 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. They will direct you to available resources and, probably, insist that your partner leave the house temporarily. They may also lay charges.
- If you are a woman, call a transition house (there are no transition houses for men in BC currently). They will provide a safe place to stay for a short time, and will help you reestablish yourself.
- Get welfare (social assistance) if you have no source of income.
- Talk to a lawyer. A lawyer can help you plan your strategy, explain what your rights are, and make any emergency court applications that might be necessary. For example they can get a restraining order, or, if you have children, an order that you and your children have exclusive possession of the family home. Most lawyers will do a first interview for free (we do), or for very little charge.
- Go to legal aid. If you can't afford a lawyer, legal aid will appoint one for you. Make sure you tell them about the abuse you have experienced.

Thinking Ahead

If you are thinking about leaving, make sure that you have all the financial records relating to your relationship, or copies of them. By financial records, we mean pay stubs, investment records, bank account statements, ownership documents of any kind. These records are much harder to get if we have to ask your partner for them later. Also, take your identity documents (passport, birth certificate, etc) and the identity 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 all the money you will need. Do not assume that the money will be there the next day.

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

When You Break Up: If You Have Cohabitation Agreement or a Marriage Agreement

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

If you have such an agreement, it is the first place to look to see whether it tells you the answer to your questions about the consequences of breaking up. It may specify what property you can take, how child or spousal maintenance is to be calculated, etc. Generally, courts will uphold agreements that people make, but they do have discretion to vary (change) the agreement if the agreement seems unfair to one party. You need a lawyer’s assessment to know whether that would be true in your case.

The rest of this booklet is for people who lived together, are separating, and do NOT have a cohabitation or marriage agreement...with the hope that, in your next relationship, you will make such an agreement early on so you don’t have to deal with the ambiguity and difficulties we tell you about in this booklet!

If You Have Children: Custody and Access Rights

A child is part of your family if

- You are one of the child’s biological parents, or;

- You are an adoptive parent (if you and your partner adopted a child together) or;
- You are an adoptive parent (if you adopted your partner's biological child) or;
- You are a 'stepparent' (if you are not a bio-parent or adoptive parent, but you are married, or have lived with your common law partner for more than 2 years, and supported the child for at least one year (in B.C.)).

This is true whether you are in a same sex or opposite sex relationship.

When your relationship ends, who will the children live with primarily? One parent (biological parent, adoptive parent, or stepparent) may have **sole custody and guardianship**. That means that the child lives at that parent's home most of the time, and that parent also has the right to make decisions affecting the welfare of the child, such as education, religion, and health care decisions.

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

Or two parents may have a **joint custody and guardianship**: The child spends substantial time with each parent, for example week on/week off (though the amount of time doesn't have to be equal) and the parents make decisions about the child's welfare together.

Guardianship: the right to make decisions about the child, including health, education, etc., and managing any property the child

It is possible for one parent to have sole custody, but to have joint guardianship: the child lives primarily with one parent but both parents have to make the major decisions affecting the child.

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 that parent’s home, though with infants that is not always the case.

<p>Access: the right of a parent who does not have custody of a child, to see the child on a regular basis.</p>

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 three or more 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 financially, and/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) can make an agreement about where the child will live, when she will see her other parent(s), and which adults have a say in major decisions affecting her life.

Or one of you (or another parent of the child) can ask a judge to decide for you. If you ask a judge to decide, he or she will look at the question from the point of view of the ‘best interests of the child’. Some of the factors that will be taken into account include

- 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;
- Who the child's primary caregiver has been;
- The love, affection and similar ties that exist between the child and each parent;
- The health and emotional well being of the child;
- Education and training for the child;
- If a child is older, the wishes of the child;
- The biological connection between a child and his parent;
- Whether a child has aboriginal heritage;
- Whether a parent has a record of misconduct which could affect the well being of the child (e.g. spousal or child assault).

Some facts which the court will **not** take into account include

- The fact that one parent had an affair before the relationship ended;
- Whose 'fault' it was that the relationship ended, or which parent decided to leave;
- Misconduct by a parent which does not affect the well being of the child (e.g. a criminal conviction for passing a bad cheque).

Some facts which a court **might** take into account include

- The likelihood that one parent will be more reasonable than the other about access;
- Whether a parent has a history of mental illness which could affect the child;
- The likelihood that one parent may take the child out of the jurisdiction;
- The fact that one parent is transgender (there are almost no custody cases involving trans parents).

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 always traumatic. So if you are

thinking about leaving, and you want to have custody of your child(ren) in the long run, **take the child(ren) with you and get an interim custody order as soon as possible.**

Terms of access to a child can either be stated generally (e.g. “reasonable access”) or spelled out in a schedule. The terms of access will depend on the age of the child(ren), where the parents live in relation to each other and to the child’s school, the parents’ work schedules and the child’s school schedule, and so on.

If you are going to want child support for your child from your ex and your ex was a step parent of the child, you have to make a court application within one year unless your ex agrees voluntarily to pay child support.

Child Support

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

- You are one of the child’s bio-parents, or;
- You and one of the child’s bio-parents were married, or;
- You and your ex were partners for two years or more and you contributed to the support of the child for at least a year while you were together.

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

- Your ex is one of the child’s bio-parents;
- You are the child’s bio-parent and you and your ex were married or;
- You and your ex were partners for two years or more and she or he contributed to the support of the child for at least a year while you were together.

How Much Child Support?

If there are only two parents - you and your ex - concerned with supporting the child, the *Child Support Guidelines* apply to determine how much you have to pay, or how much you will receive (depending on whether your ex or you has the child most of the

time). Those guidelines are based on how much the **paying parent** earns, and how many children there are. Special assessments can be made for “extraordinary expenses” if those exist.

If you are the parent who has the child(ren), the fact that you get involved with someone else after you break up with your ex does **not** mean that your ex is off the hook with respect to child maintenance. Conversely, if your ex has your child and develops a new relationship, you will still have to pay maintenance.

The obligation to pay child support continues till your child is 19, and may last longer if he is continuously in school, or is disabled, after that time.

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

Family Maintenance Enforcement Program

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” for you, such as garnishing your ex's wages.

If you are the parent who has to pay child support, and your circumstances change so that you can't afford the amount you are supposed to pay (for example because you lose your job) 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 arrears will pile up. The arrears 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 for some reason. **If you don't want to go after your ex because you are afraid for your safety, get a legal aid lawyer to help you.**

When you are on welfare, welfare will take most of the maintenance. You will be allowed to keep a certain amount. Ask your social worker how much you will be allowed to keep in addition to your welfare payments.

If you are on welfare an order for child maintenance may still be made against you, even if 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 go back into the work force. If there was no order, your ex might be caught by the one year time limit and unable to get maintenance from you.

Property Division: Dividing Up The Stuff

Whether you and your partner owned nothing but the furniture in your apartment, or whether the two of you had extensive stocks, bonds, and real estate, the question is who gets what if the relationship ends.

“Property” includes all kinds of assets, including RRSPs, insurance policies, pension plans (including CPP), recreational properties, stocks and bonds, art, vehicles, boats, etc. Even a business owned by one partner may be divided if the other made a direct or indirect contribution to it.

Married or Not? Makes a Big Difference

If you and your partner were married, each partner is generally entitled to 50% of the “family assets”. A “family asset” is defined in the law as “property owned by one or both spouses and ordinarily

used by a spouse or a minor child of either spouse for a family purpose”. That includes such things as bank accounts, RSPs and RIFs, and in some circumstances shares in a corporation or the interest a spouse has in a trust. But it does not include such things as business assets when only one spouse was involved in the business, or an asset which was owned by one spouse before the marriage and never touched or used during the marriage. It is sometimes difficult to figure out if an asset is, or is not, a “family asset”.

Note: the fact that an asset is in the name of one spouse or the other has no bearing on whether it is a family asset.

And the 50/50 general division of family assets can be changed. Factors which are taken into account to decide whether the 50/50 division would be unfair to one party include:

- The duration of the marriage;
- The duration of the period during which the spouses have lived separate and apart;
- The date when property was acquired or disposed of;
- The extent to which property was acquired by one spouse through inheritance or gift;
- The needs of each spouse to become or remain economically independent and self sufficient, or;
- Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

It is almost impossible for a lawyer to make an accurate assessment of what a court will decide when making a property division, because it may be difficult to know what assets will count as “family assets” and it is almost impossible to predict which circumstances a judge may take into account, and how much weight he or she may give to a particular factor. This makes it potentially very expensive in legal fees to figure out who gets what.

Common Law Partners

The law treats common law partners like roommates when it comes to the division of property. What's yours is yours; what is your spouse's remains your spouse's. When you break up, you take what's yours, and your spouse takes what is his or hers.

But it does not always turn out to be that simple. For example, if one person's name is on the property, but the other made a substantial financial or non-financial contribution to the acquisition, maintenance, or improvement of that property, then the non-owner will be awarded a share in the property (or compensation in lieu of a share). For example, one partner may have bought the house and have it in her/his name, but the other partner may have done all of the work to modernize it for resale. It would be unfair to let the partner have the full value of the house just because their name was on the title, without compensation for the work done by the other partner. Factors that a court will consider are many, and unless your finances were very straightforward you need a lawyer to give you an idea of what the property division might be. Some of the things a court will take into account:

- Who paid for the asset;
- Whether one partner contributed labour and increased the value of the asset;
- Whether the asset was purchased with funds from a joint account (even if all the money in the joint account came from one partner);
- Whether both parties are on the mortgage.

Because the law is unclear, property disputes are very expensive. For that reason parties often agree about how 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.

As you can see, we do not even attempt to give you more than the general rules, in this booklet. But you can see why in an earlier

section we advised you to make sure you had a list of everything either of you owned, *before* you leave the relationship!

Special Case: The House

If you and/or your partner owned a house that you lived in, and you have children, you may be able to get an order for “exclusive occupancy” of the family home till the children finish school. Otherwise, it is likely that the house will be sold and the proceeds divided. However, if you lived on a reserve during your marriage, the family home cannot generally be sold, because reserve land cannot be sold to a third party.

Spousal Maintenance

Once again if you have a cohabitation agreement or a marriage agreement that spells out what one spouse will pay/receive by way of spousal maintenance, and/or for how long spousal maintenance will be paid, that is the first place to look.

In the absence of an agreement, the rules regarding spousal maintenance are the same for married and for common law couples.

One partner may be required to pay support (spousal maintenance) to the other after the relationship ends.

The clearest case is the traditional family, where the husband went to work and the wife stayed home to raise the children. If the marriage ends, the husband must pay support to the wife.

But where both spouses worked, and there were no children, it is much less likely that there will be a spousal support order. Things a court will take into account, in determining whether to award spousal support, include

- The role of each spouse in their family;

- An express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- Custodial obligations respecting a child;
- The ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
- Economic circumstances;
- The effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
- Any other source of support and maintenance for the applicant spouse;
- The desirability of the applicant spouse having special assistance to achieve financial independence from the spouse against whom the application is made;
- The obligation of the spouse against whom application is made to support another person;
- The capacity and reasonable prospects of a spouse obtaining education or training.

If one partner has a disability, it is likely that the other partner will be required to pay spousal maintenance.

How Much Spousal Maintenance? For How Long?

There are now “Spousal Support Advisory Guidelines” which have a formula for determining a range of spousal support payments and the length of time the support should be payable. That formula takes into account two factors: the difference between the salaries of the spouses, and the length of time that they were together. Where there are children, the calculations are different. The result of the formula is a range of dollar amounts, and a range of lengths of time. Though courts are not required to follow the guidelines, they generally do.

Sometimes one partner has sponsored the other to become a permanent resident in (immigrate to) Canada. In that case, Citizenship and Immigration Canada has required the sponsor to sign an agreement that he or she will support her partner for three years after their permanent residence begins.

This law does **not** affect spousal support. It only affects the relationship between the sponsor and the federal government. (If the sponsored spouse goes on welfare, the federal government will demand payment for all welfare granted to the sponsored spouse, from the sponsoring spouse).

How To Resolve Your Family Issues

There are several ways to work things out with your ex-partner if you have separated or plan to separate.

You can negotiate an agreement (with or without the help of lawyers).

You can employ a mediator to help you come to an agreement. A mediator is someone who is “in the middle” and whose job it is to make sure each side gets heard, then helps to develop an agreement that you can both live with. It is useful to have a mediator if things between you and your partner are fraught emotionally. Again, you can do this with lawyers or without.

You can use a new process called “collaborative family law”. This is especially valuable where there are children, and so you and your partner are destined to have a long relationship with each other whether you like it or not. In such a case, it is worthwhile to work things out in a way that doesn’t make the rest of your life harder! In collaborative family law, there are two specially trained lawyers. (I am trained in collaborative family law). Both lawyers and both clients sign an agreement that they will work things out among them without going to court, but will work out an agreement in four-way meetings involving them and their lawyers. The lawyers’ task is not only to look out for their own client’s interests, but also to manage the process so that the clients can speak productively to

each other and come out with an agreement fair to both of them and to their children. Collaborative family law is usually quicker, cheaper, and less acrimonious than going to court.

Finally, you can go to court. Family Court in B.C. is less expensive than B.C. Supreme Court, and much easier to do if you don't have a lawyer to help you. But family court can only deal with custody, access, and maintenance; it cannot deal with property disputes. So if property is one of the issues you are dealing with, you have to go to Supreme Court.

Varying Orders

Most family law orders, including custody, access and maintenance but not including division of property, can be **varied** (changed) if there is a significant change in the parties' circumstances.

Forward From Here

In this booklet we have given you a brief introduction to the issues that come up if you have separated, or are considering separation, from your partner. But every case is different, so **you need advice about your particular circumstances.**

Some of the other things to think of, at the time of separation, is whether you need to change your Will and/or your Representation Agreement; and whether you need to change designations on your RRSP, pension (if you can), or life insurance.

And next time . . .

Make sure you have a cohabitation or marriage agreement!! An ounce of prevention is worth a pound of cure.

The information in this booklet is current to
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