

To Wed or Not to Wed

By barbara findlay, Q.C.

Do you know what it means to be married (legally speaking, that is)? What are the differences in rights and responsibilities between two people living together as a common law couple, and two people living together and being married?

Every state, province, or country has a different answer to that question. This pamphlet addresses that question for people who live in British Columbia.

Try this test to see what you know at the moment about how the law affects you, whether you are married or unmarried. The answers are at the end of the article.

1. If you get married, the assets you owned before the marriage automatically become family assets and you are entitled to share them 50/50 during the marriage and if the marriage breaks down. ___ Yes ___ No
2. If you live together for more than two years, you have all the rights and responsibilities as if you got married. ___ Yes ___ No
3. If you get married, you are only financially responsible to maintain children born to you during the marriage. You are not responsible for any children born to your partner before you got married. ___Yes ___ No
4. If you live common law for more than two years, you are automatically entitled to 50% of the property that either of you owned, if you break up. Yes___ No___
5. Your obligations to support a child end automatically when the child turns 19.

Yes___ No___

6. One difference between being married and living common law is that a common law spouse cannot claim spousal support from you if you break up. Yes___ No ___
7. If you are in a common law relationship, and you break up, you are responsible for 50% of your ex-partner's debts. ___Yes ___ No
8. In a same sex relationship, a non-biological coparent does not have a right to claim custody of, or get access to, the child if the relationship breaks up. Yes___ No___
9. When a child is born by assisted insemination from an unknown donor, two lesbian co-mothers can put their names on the birth certificate. Yes ___ No ___
10. A cohabitation agreement is only recommended for people who have a lot of money. Yes___ No___
11. If both of you are U.S. citizens can you get married in Canada?
12. If two U.S. citizens marry in Canada, what do they have to do to get a divorce?

All of these questions are questions which a lesbian or gay man has asked me.

In B.C., The Law is the Same for Queers as it is for Heterosexuals

Whether you are living in an opposite sex or a same sex relationship, the laws which apply to you in British Columbia are the same.

The law governing relationships between lesbians, gay men, bisexual, transgender, intersex and heterosexual people who live together, but are not married, is the *B.C. Family Relations Act*.

Living Common Law

You are “living common law” if you have lived together for more than two years. (Some federal and provincial laws establish different periods of cohabitation for purposes of pension entitlement, etc; but *in relation to each other* you acquire rights and responsibilities in B.C. after two years).

There is no registration process required. The law deems you to be in a common law relationship after two years, whether you want to have that status or not.

After two years of cohabitation you acquire rights and responsibilities in relation to each other. But you may acquire rights and responsibilities in relation to third parties – the government, for example—after a shorter period. To give just one example, you are required to declare yourself in a common law relationship for income tax purposes after one year.

There is no such thing as living together “outside the law”. The law *always* has something to say about your relationship. To put that another way, a court will always hear a claim by one person against their ex. The person may not win...but the case will be heard.

Being Married

You are married if, and only if, you have gone through a marriage ceremony which is recognized in this province.

At the moment, same-sex partners who marry in Canada are recognized as ‘married’ in every Canadian province. But lesbians or gay men who married outside of Canada (eg in

Holland) may or may not have their status recognized in B.C. That issue has not yet been tested. Canada’s immigration law recognizes same sex marriages from several jurisdictions.

If you are from outside Canada and marry here

People from other countries which do not recognize same sex marriage, who marry in Canada and return home, are in for a shock if they break up. It is **impossible** to get a divorce in this country unless one spouse has been “ordinarily resident” in one province in Canada for at least one year. Since it is extremely difficult to get a visa to come to Canada to work for one year, this can have the effect of making it impossible for queers from outside of Canada to divorce. Your only option may be to get a divorce in a U.S. state that recognizes same sex marriages.

What are the similarities between being married and living common law?

Whether you are married or living common law, if you have a child together and then you break up, both of you have an obligation to support the child, and either of you can make a claim for custody of, or access to, the child.

A child may have more than two parents contributing to her support – for example, if she was born in one relationship, but is now being raised by one of her natal parents who has another partner. In that case, she has three parents with a responsibility to support her. (There are rules which spell out when you acquire an obligation to support a child who was not born to you, but with whom you lived before your relationship with the child’s parent ended).

Generally, child support payments are set in accordance with child support guidelines. But where there are more than two contributing parents, the guideline amounts do not automatically apply.

Also, whether you are married or whether you are living common law, if you break up at a time when one of you is financially dependent on the other, then the financially dependent partner can apply for 'spousal maintenance' from the other partner. Spousal maintenance is intended to bridge the period between economic dependence on a partner, and economic independence. Whether spousal support will be awarded, in what amount, and for how long, depends on a variety of factors.

What are the differences between being married and living common law?

- 1. If you are married, you must get a divorce to formally end the relationship; if you are common law, you do not.**

It may seem obvious. If you were not married, you need not get divorced, but if you were married, you do.

You don't actually need to "do" anything to end a relationship, whether you are married or not. Most couples separate physically, one or the other or both moving out of the home they have shared. But sometimes couples "break up" and continue to live in the same premises for financial reasons. Most married couples who break up ultimately get a divorce; but there is no requirement that they do so.

The date that you "break up" is sometimes important. There is a one year time limit after you break up or separate to bring a claim for spousal maintenance.

If you are married, then to end your marriage you have to get a divorce. The grounds for divorce are

- living separate and apart for more than one year
- one spouse commits adultery
- one spouse treats the other with cruelty

Many same sex marriages have ended in divorce. The courts have had to consider the provisions of the Divorce Act in light of the fact that lesbians and gay men are entitled to marry. The definition of "spouse" – formerly limited to a man and a woman – now include same sex spouses. I even had to go to court and get an Order that sleeping with someone of the same gender constituted 'adultery'!

- 2. If you are married, the law treats your property rights very differently than if you are common law.**

a. Living Common Law: Property Rights If You Break Up

If you are not married, the law treats you like roommates, for the purpose of property division. First, the court looks at whose name the property is in, or who paid for it. Whose name was on a mortgage, for example? Whether the spouses were on each other's life insurance, wills, workplace extended health plans, RRSP's, etc.

In order to get a share of the property, the non-owning spouse can prove that it would be unfair for the owning spouse to get all the property, just as it would be unfair for one roommate to get all the benefit of the property.

If the non-owning spouse can prove a financial contribution, then she can make a claim for an equitable share ('equitable' because she is not on title and therefore does not have a 'legal' share) in the property equal at least the percentage share of her contribution.

Or she can demonstrate the unfairness in other ways. This can be done by showing that the non-owning spouse put a lot of labour into the property, and the property increased in value as a result. It wouldn't be fair for the owner to get all the benefit of the increased value. Or the non-owning spouse might show he made an indirect contribution to the acquisition of the property, by doing the home chores and the entertaining, so his partner was able to focus on advancing his career.

Proving who contributed what, either in money or in work, after a relationship which has lasted 10 or 20 or 30 years is unbelievably complicated. How many weekends did you spend painting the back porch of the house (which is in his name only) in the summer of 1996, and how much would it have cost if you had hired someone else, and was it or was it not the case that the weekend trip to San Francisco was meant to be your reimbursement?

And the outrage you feel if you are the one claimed against! "What? After I *supported* him all these years he wants to make a claim against me because he painted the damn

porch? And I paid him already – I took him to San Francisco right after as his payment." Were you specific that the trip was payment for the back porch? "Yes! I said, anyone who worked that hard painting my back porch deserved a treat and we were going to San Fran for the weekend."

Complicated means two things: It is enormously expensive in legal fees because your lawyer has to figure out your entire relationship and which parts of it you should be compensated for.

And for you, the owner of the property, it also means mega legal fees because you have to document your defence: that he did very little, in fact he was actually more trouble than he was worth, or if he was worth anything at all he had already been generously compensated by all the trips he'd been taken on.

And as the legal bills roll in you begin to hate him, who is causing all this ridiculous expense. And he begins to hate you, hate the money you are insulated by while he maxes his credit cards to stay ahead of the lawyer's bills.

By the end, the lawyers have most of it, and neither of you agrees that the judge's division was fair.

It is not a great system. It is in fact a disastrous system which does not offer any certainty about what a court would do at the end of any relationship. That makes it harder to settle disputes without litigation, *unless you have a cohabitation agreement!*

b. Division of Property after Marriage

If you are married, the law says that any property used for a family purpose is 'family property', and if you separate, there is a presumption that family property will be divided between you 50/50.

In contrast to the separate property regime of common law spouses, where s/he who owns the property is entitled to keep it unless the other partner can demonstrate that s/he contributed to the property and should share in its value, the law treats most property of married people as 'family property'. And if property is 'family property', then there is a presumption that it will be divided between the parties 50/50 when the marriage ends.

'Family property'

Family property is property owned by either spouse, and used for a family purpose. It is to be contrasted to business property, which is exempt from the 50/50 division at the end of the marriage. If one party claims that a particular property is not a family asset, it is up to him or her to prove that it is not.

Family property includes

- savings accounts, if the money has been ordinarily used for a family purpose
- annuities, pensions, RRSPs
- a share or interest in a venture if one spouse has contributed to the venture

- shares in a corporation, if the corporation owns things which would be family assets if they were owned directly by a spouse

There are often complex questions about whether a particular asset – a business located in the family home, for example, is or is not a 'family asset'. It is important to seek legal advice about that question.

Though there is a presumption in favour of a 50/50 division of family property, a judge can vary that division in some circumstances. The factors a court can take into account are

- the duration of the marriage
- the duration of the period during which the spouses have lived separate and apart
- the date when the property was acquired or disposed of
- the extent to which the property was acquired by one spouse through inheritance or gift
- the need of each spouse to become or remain financially independent
- any other circumstance relating to the acquisition, preservation, maintenance, or improvement or use of property or the capacities or liabilities of a spouse.

The judge is specifically prohibited from considering any of the following factors, when it comes to deciding what the proportions between the spouses should be;

- the conduct of either spouse (no, your spouse will not be penalized because she was the one who had an affair and ended the relationship)
- contributions to day to day living expenses

- the fact that one spouse has less property at the end of the marriage than they did when the marriage began
- the fact that one spouse is temporarily unable to work
- whose name is on the property
- the fact that the spouses had no children

What to Do?

Whether you choose to live together in a common law relationship, or whether you decide to marry, you can choose to make an agreement between you about how your property will be divided if you break up.

Such an agreement is referred to as a ‘cohabitation agreement’ or a ‘marriage agreement’.

In such an agreement, you can specify how you want to organize your finances during your relationship, and how you intend to divide your property if a relationship ends. You can choose any regime you want; a totally separate regime, where each of you keeps your income separate, and you buy all your goods separately; or a totally combined regime, where you have only one bank account between you and you agree that everything you own – whether acquired before or during the relationship – will be divided 50/50 if you break up, to anything in between.

Though you cannot completely exclude the courts, who have a statutory power to review the fairness of your agreement, there is a strong policy reason to support the agreements as the parties have written it, since that promotes certainty in relationships.

But that is so unromantic!!!

The fact that you buy fire insurance does not mean that you are intending to have a fire. Nor does the fact that you have a cohabitation agreement or a marriage agreement mean you are intending to break up. On the contrary: it is an indication that you are serious and mature about ensuring that you can discuss issues like money between you, and that you have taken care of business.

You have just read an entire pamphlet explaining the tortuous process involved if you leave the division of your property in the hands of lawyers and courts. While it is much easier to predict what a court will decide after a marriage ends than it is to predict what a court will decide after a common law relationship ends, it is expensive and time consuming to have to involve lawyers at all. It is far far far less expensive to have a cohabitation agreement or marriage agreement – drafted when you are both in love and talking easily with each other – than it is to have to work out those issues in the raw time after a breakup, when you are not talking at all!

Answers to the quiz on page 1:

- | | |
|-------|---|
| 1. No | 7. No |
| 2. No | 8. No |
| 3. No | 9. Yes |
| 4. No | 10. No |
| 5. No | 11. Yes |
| 6. No | 12. One of you must <u>return to Canada and live here for one year</u> or live in a U.S. state that will give you a divorce for a Canadian wedding. |

Disclaimer: The information in this pamphlet is general information only. For specific advice about your particular situation, consult a lawyer. This pamphlet is current to October, 2009.

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