

LERNERS



LAWYERS

A FAMILY LAW PRIMER: NEVER A DULL
MOMENT

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MODERN RELATIONSHIPS: IS LIVING TOGETHER UNMARRIED THE WAY OF THE FUTURE AND DOES IT MATTER?

- To live together married and to live together unmarried is not the same in law and arguably in life.
- For family law purposes, at least in Ontario, if you cohabit for more than 3 years and then separate, each of you as a spouse is eligible to have to support the other.
- If you live together in a relationship of some permanence and have a child but you're together for less than 3 years, if you separate, you may have to support each other.
- If you're married, and you separate, you may have to support each other.
- Child support needs to be paid and received whether you're married or not.
- For property purposes in Ontario, if you separate, what you get if you are married and what you get if you are not married is not necessarily the same.



MODERN RELATIONSHIPS: IS LIVING TOGETHER UNMARRIED THE WAY OF THE FUTURE AND DOES IT MATTER?

- If you have a lot of money, and you want to keep your money, and not have to pay it to a spouse, not to get married tends to be a good idea, at least in Ontario.
- Whether you're in a same-sex relationship or a heterosexual relationship makes no difference in terms of how the law is applied, and it seems to me in real life.
- There seems to be a theory particularly amongst young women who feel independent that marriage is not necessary.
- If you separate having lived in a common-law relationship sorting out what you're entitled to for property purposes can be time-consuming and difficult to establish.
- There is a concept now of a joint-family venture.



WHAT DOES IT MEAN TO COHABIT?

- Cohabit means in a technical sense to be in a conjugal relationship which means in the technical sense to have sex.
- You may very well be cohabitating even if you're not having sex.
- There is more to a spousal relationship married or unmarried than the sex.



WHAT DOES IT MEAN TO COHABIT?

- Factors to consider as to whether you are cohabiting include shelter, personal behaviour and sexual behaviour, services performed, social presentation, societal perspective, economic support, and children.
- With marriage, it is usually easier to establish a couple as spouses.
- In unmarried relationships, it is more difficult because a public ceremony celebrating the union as in a marriage is not there.
- When do we start and when do we stop cohabiting comes up a lot.



ELECTRONIC INFORMATION

- Facebook, LinkedIn, Twitter, Instagram, Snap Chat, Instant Messaging, texting, BBM'ing and the like can cause endless issues in family law.
- You need to remember that you're electronic presence is readily available to the public and even if you delete something it's saved somewhere and people like me find it.
- You should not say or do anything that will be recorded electronically by you or someone else even when you don't know about it, that may come back to bite you later.
- If you access your spouse's various electronic accounts when he or she doesn't know you are doing it, arguably it's a criminal offence.
- Be alert to the devices available to collect information.
- Limit your electronic presence as much as possible.



- “Hidden” money is presently harder to hide.
- The speed at which electronic information is sent can come back to bite you.
- If you’re going to have a relationship outside of your relationship, try to stay away from electronic information.
- 30 seconds and one picture can ruin a 30-year relationship.
- Is electronic information accurate? Often not.

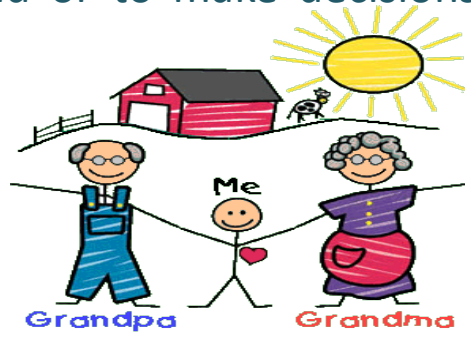


DO PARENTS HAVE RIGHTS?

- In family law, parents don't have rights, they have obligations.



- If you separate and have a child, the child has a right to be parented by both parents and to spend time with both parents.
- A grandparent's "rights" to spend time with a grandchild or to make decisions for a grandchild (and these aren't the same thing) are not clear.



IF A RELATIONSHIP ENDS, WHO HAS TO PAY SUPPORT AND HOW MUCH?

- There are two kinds of support, spousal and child.
- If you are the biological parent of a child, you have to support the child.
- If you are not the biological parent of a child but you have treated the child as your child in a relationship, you may well have to support the child.
- The amount of child support paid is governed by *The Child Support Guidelines*.
- There are *Tables* and monthly amounts for each province in Canada.
- There are extra expenses to which the payor and recipient have to contribute .
- Child support is not deductible to the payor and not taxable to the recipient.



IF A RELATIONSHIP ENDS, WHO HAS TO PAY SUPPORT AND HOW MUCH?

- Sometimes, how much child support has to be paid is easy to figure out.
- If the payor is a T4 employee then the *Tables* that are part of the *Child Support Guidelines* work well.
- Typically, to figure out income, we look at Tax Returns of the payor. Sometimes however, Tax Returns are meaningless.



- However, if the payor is not a T4 employee, then to determine what is the income of the payor is not always easy.
- If you have a biological child, whether or not you spend time with the child, see the child, treat the child as your child or have anything to do with the child, you still have an obligation to pay child support.

IF A RELATIONSHIP ENDS, WHO HAS TO PAY SUPPORT AND HOW MUCH?

- if you are a recipient of child support, and you go through multiple relationships, you may be able to collect child support from two or three or more people for the same child.
- if the payor spouse spends 40% or more of his or her time with the child then he or she may get to pay less than what would be the ordinary amount of monthly child support.
- Generally, for every \$10,000.00 in income in Ontario a payor earns, he or she has to pay an extra \$90 a month for one child, more or less.
- When does child support end?
- Under the Divorce Act, a child receives support until he or she is no longer a dependant and it used to be that that was through for one university degree for a child who was getting educated in a general sense.



IF A RELATIONSHIP ENDS, WHO HAS TO PAY SUPPORT AND HOW MUCH?

- Just because your child is 16 or 18 does not mean the child support stops.
- If there is an agreement between parents that terminates child support then that agreement is not necessarily going to be upheld because the support is the right of the child and parents cannot bargain away that right.
- Can you get out of paying child support? Maybe, but that depends too.
- The *Child Support Guidelines* provide that if the payor has an income of more than \$150,000.00 then maybe the *Guidelines* do not strictly apply. This has been challenged frequently in the Courts and as a rule of thumb, generally, it strikes us now that if a parent makes say up to \$2M or even \$2.5M, the *Guidelines* may be strictly applied.



PROCESS: WHEN A RELATIONSHIP BREAKS DOWN

- Often, if a person can afford it, he or she will seek therapy and legal advice when a relationship breaks down.
- Persons who separate can choose between processes to try to resolve the situation.
- Consensual processes are negotiation, mediation, a collaborative process, and arbitration.
- Where there is no agreement as to process, Court is the alternative.
- What is the difference between a Mediator and an Arbitrator?
- Sometimes an Arbitrator and a Mediator are the same person.
- The collaborative process is a process all its own.



PROCESS: WHEN A RELATIONSHIP BREAKS DOWN

- In the collaborative process, the parties/clients and the lawyers sign an agreement that they participate in the collaborative process.
- As part of that agreement, the lawyers are always to be paid up to date and if resolution is not achieved, the lawyers cannot go to Court with the parties.
- There is a strong movement towards collaborative law.
- To practice collaborative law, a lawyer needs a special certification and my experience is to be certified takes more work as time marches on .
- Clients need to understand when they enter the formal collaborative process that they sign the participation agreement, the lawyers will always be paid up to date, and the lawyers will never go to Court with them.



PROCESS: WHEN A RELATIONSHIP BREAKS DOWN

- Arbitration is a private process to which parties must agree.
- Many lawyers prefer the arbitration process.
- Many clients prefer the privacy of the arbitration process.
- You hire your “private judge” who may be a person well versed in the issue(s).
- You set the rules and the timelines.
- For a sophisticated client, arbitration may make it harder for the other side to get a result that is enforceable in Court.
- Once parties submit issues to arbitration, the parties are generally precluded from taking those issues to the Court.



PROCESS: WHEN A RELATIONSHIP BREAKS DOWN

- Court is the last stop for most of our clients.
- Just because you enter the Court process does not mean you are stuck in it forever.
- In Family Law process matters.
- Negotiation is likely still the most prevalent process and for most lawyers, going to Court is the least prevalent.



DOMESTIC AGREEMENTS

- There are various kinds of domestic agreements: cohabitation agreements, marriage agreements, and separation agreements are the most popular.
- A separation agreement is negotiated to resolve the issues arising from a separation.
- A marriage agreement is negotiated before the marriage or during the marriage to deal usually with financial issues arising during the marriage and to provide typically what might happen on separation or death.
- A cohabitation agreement is the same as a marriage agreement except it applies when the parties are not married.
- Having a “pre-nup” is one of the “cool things” to do.
- To make an agreement between two parties, spouses or not, separated spouses or not, the parties have to have a meeting of the minds.



- Marriage agreements and cohabitation agreement tend to look at what is happening in the present to deal with what will happen in the future.
- To make one of these agreements and have it enforceable later takes time and thought and tends to cost money.
- Typically, the purpose of making a marriage agreement or a cohabitation agreement is to keep money or property off of the table, so it is not shared.
- To be enforceable the agreement needs to be made with full financial exchange and a complete understanding of what is going on and good legal advice.
- Full financial exchange can be a taxing exercise.

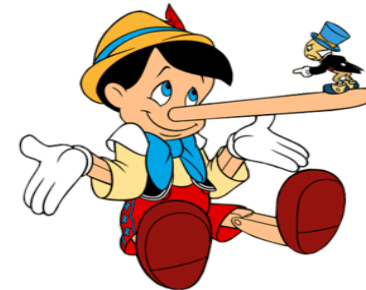


- When you act as a lawyer, you want to please your client.
- Many lawyers in Toronto will not do marriage agreements or cohabitation agreements anymore.
- Separation agreements are typically easier to do.



THE IMPORTANCE OF FINANCIAL STATEMENTS IN FAMILY LAW

- The Courts in Ontario including the Court of Appeal have made it absolutely clear over and over again and the *Family Law Rules* make it clear that the most basic obligation in family law is the duty to disclose financial information.



- This requirement is immediate and ongoing.
- Still, getting accurate, complete financial disclosure remains challenging.
- In our office, the greatest part of a law clerk's time is spent getting the Financial Statement draft done.
- Divorcemate provides the software to complete Financial Statement.
- Completing the Financial Statement and gathering the documents is both a clerical task, and an exercise in advocacy.

THE IMPORTANCE OF FINANCIAL STATEMENTS IN FAMILY LAW

- When you do a Financial Statement, think about how it appears as an optical whole.

- Follow the money.



- If your client is in a new relationship then he or she has every opportunity to bury income or assets in the new spouse's name and typically for family law purposes, that will not fly. There is no privacy.
- Think about inheritances.
- Sometimes inheritances can be kept out of the pot and sometimes not.

THE IMPORTANCE OF FINANCIAL STATEMENTS IN FAMILY LAW

- Think about equitable trusts.
- Match what you want to argue with what you say on the Financial Statement so your client's position is made clear.
- What you say in one place, you should say in another.
- There may be many constructs of what is a client's income: income for child support purposes; income for bank purposes; income for tax purposes; income for what I tell my girlfriend purposes; and even income for what I say to the car dealership when I want to finance the purchase of a Lamborghini purposes.
- With the *Spousal Support Advisory Guidelines* and *Child Support Guidelines*, clients wonder if there is a point to doing a budget anymore and we think the answer to this is "yes".



THE IMPORTANCE OF FINANCIAL STATEMENTS IN FAMILY LAW

- Going behind the *Guidelines* to the Statute law, spousal support is to be paid and received based on need and means.
- If you do a budget, cross-reference what you are told by your client with what shows up in his or her bank statements, credit card, and credit line statements.
- Our clients, like all of us, will first lie to themselves and then they lie to us.
- Splitting pensions is not done now as it was say 20 years ago.
- Parties can agree that the non-member spouse's pension share can be transferred to his or her own retirement account.
- There are forms and particular wording to achieve this goal.



- For the “older” client, a significant consideration is dealing with not only what happens on separation or death but also what happens if one of the spouses lacks capacity.
- Dealing with what happens on death seems not to be problematic.
- Dealing with what happens on lack of capacity is a big issue.
- In lack of capacity situations, there can be competing interests.
- With older clients, be alert especially to capacity issues and the tough discussions that need to be had.
- In Ontario, to determine whether a person lacks mental capacity, there are Capacity Assessors.
- To find a lack of capacity is a stringent test to meet.



THE USE OF PARALEGALS IN FAMILY LAW

- Justice Bonkalo was appointed to lead a review of the provision of family legal services in Ontario by persons other than lawyers such as paralegals, law clerk, and law students.
- She distinguishes between paralegals and law clerks.
- A law clerk is a person who is employed or retained by a lawyer or a law office or a government agency to perform administrative or managerial duties and/or specifically delegated substantive legal work under the supervision of a lawyer.
- A paralegal can run his/her own show. To be licenced in Ontario by the Law Society of Upper Canada, a paralegal must complete an approved paralegal program at a College, pass the good character requirement of the Law Society, and pass the Law Society's Paralegal licensing exam.



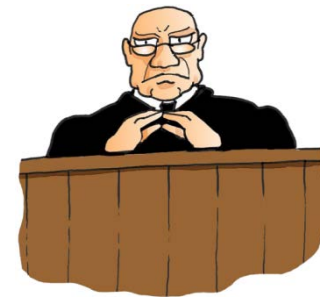
THE USE OF PARALEGALS IN FAMILY LAW

- A paralegal can do specific things in Ontario but is not presently permitted to appear or provide legal services in family law cases.
- It appears to me generally that there is a movement to allow and foster persons other than lawyers to deliver family law services.
- Justice Bonkalo recommends that in Ontario there be created a specialized license for paralegals to provide family law service for custody, access, simple child support, restraining Orders, enforcement, and simple and joint divorces without property, not for Hague Convention, child protection, property, spousal support, complex child support and relocation.



THE USE OF PARALEGALS IN FAMILY LAW

- She recommends there ought to be special training for paralegals who want to do family law with a practical experiential component in the licencing process, and the licenced paralegals with a specialization in family law would be subject to regulation and oversight by the Law Society of Upper Canada and be required to be insured for their services.



- Given the volume of family law work available and the necessity for both information and advice (which are not the same thing) to be provided, I think it is inevitable that in law as in medicine there will be significant growth of “para” professionals and in our complex world, that is likely a good thing.

CLOSING REMARKS

- With the ever changing landscape of: relationships, gender, who is a parent, what is a family, when does life start, when does life end, to what extent are we responsible for each other, is a dog like a child or a flower pot, family law is important to the fabric of our society.
- Those of us who toil in the family law vineyards have much rewarding work with no end in sight.

