

# What You Should Know BEFORE You Separate From Your Spouse\*



By Jennifer Jolly

*\*Information provided below does not constitute legal advice and is only applicable to those whose situations are covered by Ontario Family Law, as other provinces have their own laws governing these issues.*

The following responses are reflective of the standard case scenario, applicable in most cases. However, as each situation is unique and legal advice differs on the facts, you should contact a lawyer to know for certain your rights and responsibilities and what you can expect in your particular circumstances.

## ■ **How do I obtain custody of my children?**

If parents cannot agree on custody, the Courts will decide custody based on what appears to be in the children's best interests.

While it is difficult to determine what the children's "best interests" may be, it is important that you remain as involved in your children's lives as possible. An assessment of the children and parents may need to be conducted by a psychologist to assist the Court in determining custody.

## ■ **Should I leave the matrimonial home?**

Unless your safety is at risk, you should not leave the matrimonial home without first obtaining legal advice.

If you have children, you are not permitted to leave the home with the children without the consent of the other parent or a Court Order. However, if you leave without the children you may be prejudicing your rights to custody of the children.

Also, it can be difficult for you to gain access to the home later on to retrieve your belongings.

Unless there is a Court Order or Agreement that provides otherwise, both spouses have a right under the law to live in the matrimonial home, even if one of them is not a registered owner of the home.

## ■ **If I leave the family home and the children remain living with my spouse, do I have to pay child support?**

Yes. If the children reside with your spouse the majority of the time you will be required to pay child support.

If the children reside with you half of the time, you may still be required to pay child support to your spouse if your income is greater than your spouse's income, though the amount of child support may be at a reduced level.

## **How is child support calculated?**

Child support is determined pursuant to the Child Support Guidelines, which provide for a table amount to be payable based on the number of children and your income.

There are other factors that can affect the amount of child support payable, so individual advice is needed in each case.

## **Is my child support obligation limited to the table amount in the *Child Support Guidelines*?**

No. The Child Support Guidelines also require parents to share, in proportion to their income, special and extraordinary expenses that they incur on behalf of a child.

Special and extraordinary expenses typically include childcare, health related expenses and extracurricular activities (if extraordinary considering the talent of the child, the cost of the program and the amount of the expense considering the spouses' incomes and the amount of child support being paid).

## **Do I have to pay for my children's university education?**

Usually, yes. The Courts have determined that, for most children, tuition and living expenses while attending post-secondary education are an extraordinary expense for which both parents are responsible.

A Court will also consider the financial contribution the child can make towards his or her university expenses (in terms of scholarships, bursaries, trust funds, income earned, and student loans), and then divide the difference between the parents on a *pro-rata* basis, according to their incomes.

In some cases, in addition to sharing the child's university expenses, the payor parent may also have to continue monthly child support payments to the other. The amount of monthly support may be reduced, however, depending on the child's living circumstances, ability to contribute to his or her own support, and the type of university expenses being shared.

## **Do I have to pay spousal support to my spouse?**

If you earn more than your spouse and your spouse has the "need" for spousal support, you may be required to pay spousal support, unless you have a marriage contract that provides otherwise.

The longer your marriage and the greater the difference between your incomes, the more likely it is that you will have to pay spousal support.

## **How much spousal support will I have to pay?**

Predicting the amount of spousal support is more difficult than child support.

The Spousal Support Advisory Guidelines have recently been finalized and are increasingly being used by the Courts to set the amount of spousal support. These guidelines suggest a range for spousal support based on the gross income difference between the spouses, the length of the marriage, the age of the spouse at separation, and whether child support is being paid.

## **Can the amount of my child or spousal support obligation vary over time?**

The amount of child support you pay is directly tied to your income and the children's residence.

You are expected to disclose your annual income each year and vary the amount of support payable according to the *Child Support Guidelines*. If your income decreases, your child support will normally decrease.

Spousal support can also vary with changes in each spouse's income, but will often remain constant for a period of time subject to a Court review or a termination date. In some cases, spousal support may be indefinite, depending on the length of the marriage and the roles adopted during the marriage. This amount will not normally be changed without agreement of your spouse or a Court Order.

## **Is support tax deductible?**

Child support is normally not tax deductible by the payor, nor does the recipient include it as taxable income. Monthly spousal support is tax deductible by the payor and included as taxable income by the recipient.

## **What is the effect of a new relationship and new family obligations on my child and spousal support obligations to my first family?**

In general, they will not be taken into account.

Courts tend to respect the first set of family obligations you take on and will usually not reduce your support obligations (child and spousal support) to your first family because of responsibilities and obligations you have undertaken after separation.

## **Is there a difference between the rights of married spouses and spouses who live common-law?**

Not when it comes to custody, child support and access to the children, but there is a difference with regards to the division of property and spousal support.

Common-law spouses do not have the same property rights as married spouses, who are presumed to share the proceeds of all of the assets accumulated over the course of a marriage. In general, common-law spouses do not share property unless there is joint ownership or one spouse has made a substantial contribution, in the form of either effort or money, to an asset owned by the other spouse.

As for spousal support, common-law couples are entitled to spousal support after having lived together for three years, or if they have a child together, as long as the relationship was of some permanence. Married spouses are presumed to be immediately entitled to spousal support, if one spouse has the need for it.

## **Is the law different for same-sex couples?**

No. Same sex couples, whether married or common-law, have the same rights as opposite sex married or common-law couples.

**■ Does the fact that my spouse cheated and left me for another person affect my rights to a property settlement or a larger amount of spousal support?**

No. Conduct in and of itself, is not relevant in the determination of the amount of spousal support or the division of property.

**■ How is property for married spouses divided after separation?**

The Ontario Family Law Act requires each spouse to account for all of the assets the spouse accumulated over the course of the marriage.

In general, a snapshot will be taken of each spouse's assets and liabilities on the date of marriage and on the date of separation. The net value of assets minus liabilities on the date of separation will be compared to that on the date of marriage to determine a spouse's net family property. The law then requires this amount to be equalized so that both spouses leave the marriage with an equal value of the assets that have accumulated over the course of the marriage.

There are certain key exceptions. The matrimonial home, being the home where the spouses reside at the date of separation, is factored into the equation without a deduction for its value on the date of marriage. Also, certain items such as life insurance proceeds, gifts from third parties, inheritances, and personal injury awards may be excluded from the net family property calculations. The rules regarding these exceptions are fairly strict and each exception will have to be carefully reviewed before being accepted.

**■ In order to determine my property entitlement, what information do I need?**

The property a spouse owns on the date of marriage and on the date of separation is relevant to the calculation of Net Family Property.

You should secure evidence of the value of these assets at these two points in time. Some property, such as pensions, antiques and real property will need to be valued by a professional.

You should also be prepared to provide evidence of exclusions from the net family calculations, such as an inheritance or gifts.

**■ Is there a way I can protect my assets and ensure I have no obligation to pay spousal support?**

Yes. You can enter into a Marriage Contract, if you are married, or a Cohabitation Agreement if you are living together, that sets out each party's rights and obligations at the end of a relationship.

As long as the terms of the Contract or Agreement are fair, each party has independent legal advice and the financial situation of each party is fairly and accurately disclosed, the Courts will normally uphold such an agreement or contract. There is, however, no way to contract out of paying child support or determining custodial rights in advance. A Cohabitation Agreement can be drafted so that it becomes a Marriage Contract upon the date marriage.

## ■ **How long does it take to get a divorce?**

The most common ground for divorce is that the spouses have lived separate and apart for one year. As such, it normally takes a little over a year to be divorced.

In certain circumstances, a divorce can be obtained more quickly. Adultery and cruelty are grounds for a quicker divorce but are more difficult and costly to obtain than living separate and apart for one year because a party must prove cruelty or adultery, if the other spouse will not admit the same.

Courts will also ensure that adequate provisions for child support have been made before granting a divorce. Spouses may live "separate and apart" while under the same roof. Spouses are considered "separated" when one spouse has clearly indicated to the other that they consider the marriage to be over.

## ■ **Do I have to go to Court to settle all of my outstanding family law issues?**

No. Very few family law cases proceed to trial and increasingly couples are able to settle their differences through mediation.

You can avoid Court by reaching an agreement with your spouse on the issues arising from your separation. You may be able to achieve this by using Alternate Dispute Resolution techniques, such as negotiation through lawyers and with mediation.

Even if a Court action is started, settlement is often reached before trial.

It is always advisable, and in your best interest to obtain legal advice before commencing mediation or attempting to resolve family law issues on your own. Time spent in reaching a settlement that will not stand up in Court is a waste of effort and will only create bad feelings, which can be difficult to overcome.

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