

The financial gamble of cohabitation



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There is an increasing surge in couples choosing common law relationships over the formal and legally binding commitment of marriage. Many believe living together unmarried means a clean break if (or when) the relationship goes south.

You may have clients in this type of relationship. It's important that they understand the legal rules around what could become a complicated situation.

I recently asked Andrew Feldstein, principal of Feldstein Family Law Group, for his guidance in researching the intricacies of this topic as it applies to Canadian family law and for those living in Ontario.

Feldstein first explained that "common law relationships are not bulletproof against spousal support and property interests flowing from separation. Whatever your financial situation, whether or not you have a significant income or assets, you are making a risky financial and legal gamble when you move in with a romantic partner."

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Perhaps the answer is to provide some legal and financial protection. Ontario law allows for unmarried spouses to enter into contracts, known as cohabitation agreements. "These agreements set out their financial rights and obligations upon separation.

Cohabitation agreements are a smart precaution for unmarried couples already in or starting a common law relationship to ensure to forge an understanding and agreement on how finances, support and property will be dealt with at the end of the relationship. With a cohabitation agreement, you and your spouse can contract in or contract out of the rights and obligations imposed by the law," Feldstein said.

He continued to explain that in any conjugal relationship, the longer the two parties live together, the greater chance a spouse may have a right to spousal support. To qualify for spousal support in Ontario, a common law partner must fit the



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legal definition of "spouse" for support purposes under the *Family Law Act*. Simply living together for at least three continuous years or having a child together while cohabiting is sufficient to meet that first hurdle.

These milestones creep up on you before you realize. Life just works that way. A cohabitation agreement can help establish what rights your client or their

It may be common knowledge that unmarried couples lack the rights to Ontario's matrimonial property division regime for married spouses. Generally, unmarried spouses are only entitled to keep the property legally owned in their names when the relationship ends. Many think this means that if the house or car is only in their name, then their spouse has no

family venture, which allows a non-title holding spouse to share in the value of assets and wealth accumulated during cohabitation. The courts will look to the circumstances of the relationship to determine whether there is evidence of:

- Mutual effort of the parties to form a true partnership and jointly work towards mutual goals;

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spouse may have in the event that one becomes financially dependent.

Feldstein emphasized that if there is any chance that your client's partner is unemployed or becomes dependant on the client during the relationship, having a cohabitation agreement that sets out their rights to spousal support before having a child together or hitting the three-year mark can help prevent any unexpected claims in the future.

right to that property.

However, there are legal avenues through which a non-title holding spouse can acquire an interest in property they shared or contributed to during the cohabitation.

Sole-title holding spouses should be wary of two potential claims their common law spouse may use to gain a piece of their solely owned pie.

Something that your client should be mindful of is the joint

• Economic integration such as the co-mingling of finances and economic interests;

• The parties jointly deciding to prioritize the family rather than individual interests; and

• Any expression of intent by the parties suggesting a joint family venture.

In Feldstein's legal experience, he has witnessed that if the claimant spouse is successful, then the title-holding spouse may

be on the hook for a payout equal to half the value of the property the claim is against.

Another realistic threat to a title-holding spouse — let's assume this is your client — is the risk of an unjust enrichment. Such claims usually arise where the title holding spouse accumulated wealth or assets as a result of the other spouse's contributions, financial or otherwise such as domestic duties, repairs, maintenance, even child rearing in the right circumstances.

If the spouse successfully demonstrates unjust enrichment, then they may be granted a beneficial interest over your client's property via a resulting or constructive trust. Once a trust interest arises, they could have entitlement to income derived from the property and your client would not be able to sell or encumber the property without their consent.

Like the risks of spousal support, the circumstances giving rise to a joint family venture or unjust enrichment claim can happen simply by living your daily lives.

As my conversation drew to a close, Feldstein left me with the understanding that cohabitation agreements are practical as they can be used to guard against such surprises by clearly setting out what interests your client's spouse has to your property during and after the relationship.

You can love them, but the question should be, do you blindly trust them?

Waiting until the relationship ends to address these issues puts parties in the precarious position of disagreeing on what they are entitled to or obligated to provide. When the parties disagree as to what is fair, disputes get messy and costly. If they are unable to come to an agreement in the end, the court process will become a last resort and it will make the decision for them. Planning ahead for any feature outcome is just prudent financial planning.

So if you have a client contemplating entering into a common law relationship, advise them to sit down with a family law expert to work out a cohabitation agreement with their significant other. It might be a difficult discussion to start, but it will solve a lot of financial misunderstanding in the future.

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