

Overview: Family Law in Canada - Part 1

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Jurisdictions, grounds for divorce, marriage agreements, and getting ready to separate

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We're pleased to offer members of International Referral a short overview of Family Law in Canada. In this overview, we'll discuss five broad concepts.

If you are planning on moving to Canada yourself, are involved in transferring an employee to Canada, or have friends and relatives here, you'll find this overview informative.

Multiple jurisdictions

Canada has a federal government responsible for some of the laws in Canada, including some but not all divorce and separation law, relating to everyone in the country. Canada's 10 provincial governments and three territories each are responsible for other laws related to separation.

The Divorce Act is federal, and covers divorce, child custody, child support, and spousal support across Canada whereas in other countries, the term that people tend to hear the most is alimony.

Division of a divorcing couple's assets is the responsibility of the provinces and territories. The divorce process is set up so that the federal and provincial proceedings may take place in the same courthouse, before the same judge, and the lawyers for each of the divorcing parties handle both the federal and provincial aspects.

And if one of the parties is a resident of another province and wants to be represented by an out-of-province Canadian lawyer, arrangements can often be made. The provincial and territorial laws are similar to each other, based on common law, with the exception of Quebec, where the law is based on a civil code (similar to French law).

In family law cases where one or both of the parties wishes a non-Canadian lawyer, the normal procedure is for that foreign lawyer to team up with a Canadian lawyer who would appear in court on behalf of the client.

And while religious practices are sometimes taken into account at various stages during divorce proceedings, Canadian law is not religious, and parties are not represented in court by religious officials. A future overview article will go into more detail regarding how religion may become a factor in a separation or divorce.

My law firm, Feldstein Family Law Group, operates in Canada's largest province, Ontario, in our largest city, Toronto, and practices family law exclusively. Our lawyers are members of The Law Society of Upper Canada, which covers Ontario.

Our web site, www.separation.ca, is designed to provide a great deal of free information to anyone curious about Canadian family law, from the international community. We have many resources for those contemplating separation and divorce including: articles, videos, blogs, and our media archive.

Ground for divorce and the separation process

Canada, in contrast to Britain, has no-fault divorce, although divorces can also be granted based on adultery and on cruelty.

This spring, reporter Sarah Lyall, writing in The Sunday New York Times, brought American and Canadian readers of the newspaper up-to-speed on how the system works in Britain, concentrating her story on amusing anecdotes.

One British husband wanted his wife to dress in a Star Trek Klingon costume. Another husband wanted an end to tuna casserole tyranny, which was served far too often. Sleeping arrangements for Timmy the pet tarantula was an issue before a British judge: Timmy made the wife nervous and she would have preferred that his terrarium not be in the bedroom. And one wife was unhappy that her husband routinely wore her best clothes, his 6 ft. 3-inch frame stretching them out of shape and breaking seams.

In Canada, all these couples could have been divorced simply by living "separate and apart" somewhere in Canada for one calendar year, and agreeing to the divorce.

When the clock starts to run

In Canada, a couple may live together without being legally married. And depending on a number of factors, including years together, the way they manage their incomes (including joint

bank accounts and co-signing for loans), joint ownership of assets, whether there are children from the relationship, and more, they may be deemed to have a “common law marriage.” The Divorce Act (the Divorce Act will only apply if the parties were married) and various provincial laws, that govern division of assets may come into play when they split up.

Regardless of whether there is a formal marriage, it is necessary to have a starting date—a specific calendar date—for when the couple wants to separate. This specific calendar date is used for calculating the value of the respective assets that each brought to the relationship. For many couples, this is the wedding day.

Other couples may not live together before marriage, and for them the date of the wedding becomes the basis for any future calculations needed for division of assets.

Agreements before marriage, assets at marriage

Canada does have prenuptial agreements of the type found elsewhere in the world (and particularly favoured by those with high-net worth such as Hollywood film stars and sports celebrities), where people getting married often agree to not exercise some of their rights in the event a marriage does break up. However, the courts in Canada retain the discretion to set aside the Agreement for various reasons and, in fact, will often set aside these agreements. The division of property is governed by provincial laws and, as such, the laws vary from province to province.

However, the law in Canada says that the value of the assets attained during the marriage is to be divided evenly. That means it is important to know who brought what into the marriage. This means Canada does have marriage agreements written by the spouses, before or even after marriage, which spell out who brings what assets to a marriage, and the value of these assets.

For instance, the bride may bring a valuable art collection inherited from grandparents, and the groom may already own a vacation home. The values of these at the time of marriage may become a base line for valuation upon divorce.

Judges may take these agreements into account when dividing assets later.

When difficulties arise

When one or both spouses decide to end a marriage, the first formal step under Canadian family law is to arrange to separate.

One or both partners may just decide to move and live apart. In many cases, one or both will seek legal advice, often without telling their partner. I often get calls asking just how to go about separating so there are the fewest legal difficulties in future.

Breaking up is not always the best idea, of course. Problems can be worked out, and separation and divorce can cause more difficulties. I often urge people to pause and think a bit before going ahead.

Our site, www.Separation.ca, has an article I wrote under the Separation / Divorce tab entitled Things to Think About Before You Leave. Here I note divorce and separation are incredibly difficult experiences for any spouse, and I suggest that before anyone decides to divorce or separate from their spouse and terminate the relationship they should consider several things, which are listed in the article.

But if they decide to go ahead, the next step is to create a separation agreement. Separation agreements vary depending on the particular marriage, but generally cover, among other things, child custody, child access, child support, spousal support, possession and ownership of the matrimonial home and/or other properties, and more.

NEXT IN THE SERIES

Separation agreements, how to create one in Canada and what they cover, will be the topic of An overview of Family Law in Canada - Part 2.

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