The Finances of Divorce

Divorce Survival Strategies

FAMILY LAW CENTRE

Knowledge . Confidence . Save Time & Money

1-866-385-1129

www.flcdivorce.com
# Table of Contents

Acknowledgements.................................................................................................................2  
Notice to the Reader..................................................................................................................3  
Introduction...............................................................................................................................4  

**Chapter 1**
- Division of Assets..................................................................................................................6  
- What are Assets and Property...............................................................................................6  
- How are Property Valued.......................................................................................................8  
- What are Factors.....................................................................................................................12  

**Chapter 2**
- Division of Property..............................................................................................................14  
- Valuation Date.......................................................................................................................14  
- Date of Separation.................................................................................................................15  
- Common Law Spouses..........................................................................................................17  
- Same Sex Couples and Property Issues...............................................................................18  

**Chapter 3**
- Action Plan............................................................................................................................19  
- Joint Bank Accounts.............................................................................................................20  
- Business Interests................................................................................................................22  
- RRSP’s..................................................................................................................................23  
- Pensions.................................................................................................................................24  
- Real Estate.............................................................................................................................25  

**Chapter 4**
- Financial Tactics....................................................................................................................28  
- Finding Hidden income.........................................................................................................28  
- Tricks to Watch For...............................................................................................................29  
- Tax Implications....................................................................................................................32  

**Chapter 5**
- Division of Debt....................................................................................................................36  
- Family Necessities................................................................................................................39  

**Chapter 6**
- Spousal Support....................................................................................................................41  
- Income Taxes........................................................................................................................42  
- Can Men Get Spousal Support..............................................................................................46  

**Chapter 7**
- Child Support.......................................................................................................................48  
- Determining Child Support Payments...............................................................................49  
- When The Guidelines Don’t Apply......................................................................................51  
- Undue Hardship....................................................................................................................52  
- Special or Extraordinary Expenses.....................................................................................56  
- Split custody and Shared Custody.......................................................................................57  

**Appendix A**
- Documents Checklist............................................................................................................59
The Family Law Centre gratefully acknowledges and thanks Joel Miller for the preparation and writing of this booklet and Wayne Nesbeth for much of the original material upon which this series of booklets is based.

Joel Miller has been a practising family law lawyer for over 30 years and is currently a partner in the Toronto, Ontario, law firm of Ricketts, Harris and Chair of the Ricketts, Harris Family Law Practice Group. He has taught Family Law for many years in the Bar Admission Course of the Law Society of Upper Canada and is on the Executive and Steering Committee of the Collaborative Family Law Association of Ontario. He is a frequent speaker at various groups about family law issues and has been an invited speaker several times at the National Family Law Program, Canada’s premier family law conference for judges and practitioners. Mr. Miller is on the Advisory board of Divorce Magazine has often been interviewed on T.V. and radio as well as in newspapers and magazines. He can be reached at:

Joel Miller
181 University Avenue, Suite 806
Toronto, Ontario
Canada M5H 2X7
Tel: 416 361-9000 Fax: 416 364-1697
Email: jgm@rickettsbarris.com Toronto, ON

© 2001, Family Law Centre
All rights reserved
Notice to the reader: This booklet provides topical information of a general nature relating to family law matters in Canada and is not intended to provide legal advice. If legal advice or other expert assistance is required, the services of an experienced family law lawyer should be sought. The publishers, authors, and editors of the material in this booklet aren’t liable or responsible to any party for any loss or damage caused or alleged to be caused by the use of the information found here.

This booklet is to help people understand various aspects of family law in a general way without being specific to any particular person or fact situation. If you’ve got a family law problem – see an experienced family law lawyer.

If you’re thinking about separating or divorcing, or are already separated, we strongly recommend that you get proper legal advice from an experienced family law lawyer. That’s the only way you can be sure that the steps you take with the information you get here - and elsewhere - will be appropriate for you.

Knowledge is power – but information is only of value when you know how to use it. In family law, more than in most areas of law, the final decision reached by a court is dependant upon the particular facts of each case and how they are brought out. The law is very important, but it will affect different people differently because the facts of each case are unique.

So read the information here, check out other sources of information, become as familiar as you can with the law as it affects you – and then consult a family law lawyer in your own area of Canada. Many of the laws differ from province to province or are interpreted or dealt with differently across the country.

Throughout these booklets we will use the words “spouse” and “partner” as well as “relationship” and “marriage” interchangeably because most of what is set out deals with people whether or not they are in legal marriages or common law marriages. There are certain times when there is a clear distinction between these relationships and the context of the discussion will make that clear. We’ll also refer to “husband” and “wife” whether the parties are in a legal or common law marriage.
If you or your spouse is separated or divorced, or just thinking about it, you may be feeling any one or more of a range of emotions. It's not unusual to feel confused, hurt, angry, frustrated, revengeful, disappointed, lonely, excited or deprived. You may be feeling several of the above at the same time - or different ones at different times- and the list goes on.

These emotions are quite normal and natural. Separation and divorce is one of the most significant stressors experienced by people, right after experiencing a death of a loved one. This is human nature. How we react based on these feelings, is most vital. Don't let anger invade or clutter your better judgement. Don't give in to any irrational or cruel behaviour. This isn't the time to be arrogant or revengeful. Sometimes acting in this way feels good for the short term, but it usually results in you being worse off than if you had resisted. Acting on such thoughts and emotions may bring about serious repercussions, which may prove very costly to deal with. On occasions, you may not be able to repair the damage you've caused yourself. Always ask what you can do to help yourself – not what you can do to hurt or upset the other person.

Separation and divorce is a difficult life transition for anyone, even under the best of circumstances. Most of us like to think that the things that happen to us happen for a reason. Usually that's true, although we may not understand or know the reason at the time. Sometimes we never find out the reason, or we learn not to care, or we discover that there really wasn't much of a reason at all. But the key thing is to realize that what's happened has happened and then to figure out a way to deal with it. Whatever happens has a way of affecting us – the challenge is to control that effect and use it to help us grow.
Introduction

Whenever faced with these difficult situations, the best thing to do is STOP. Look carefully and honestly at where you are now. Think about how you got to there. Write it down, it will help you focus. Ask yourself. Are you happy with your current situation? If not, what would you like to change and how?

It's always helpful to talk to others who are going through or have been through a separation or divorce. This is one way to realize that you're not alone. As well, it's very helpful to see that others have gone through the experience and have found a way to get on with their lives and so can you.

Be sure to try all realistic ways to working things out first. Communicate with your spouse as much as possible. Seek outside assistance if necessary (marriage counsellor, pastor, friend, relative, lawyer) to help you. If all channels prove futile and you or your spouse decides to terminate your marriage, common law or same sex relationship it's important to know what you should or shouldn't do. Your path to ending your relationship should be well planned and carefully calculated just like your wedding plans.

This series of booklets is designed to assist people who are thinking about or going through a break-up. Remember that marriage is a legal, economic, and personal union. It's critical that you know what it means to dissolve it. Knowing your rights and options during this process will help you gain confidence, and save you time and money.
Financial Considerations

As a marriage travels down the road towards dissolution, many loose ends will need to be tied. It’s critical that you analyse the particulars of your current financial situation carefully so that all financial connections to your spouse are managed appropriately.

Think of the many ways a divorce can affect you financially: child support, spousal support, legal fees, division of assets, etc. For many families, a divorce can be enough to plunge them into financial ruin. Don’t let this happen to you. If it has already happened, you can find your way out.

The information provided by the Family Law Centre will help you through the economics of separation and divorce. Don’t wait or hesitate. Educate yourself using this booklet and our videos as a guide now. A little pre-divorce financial planning can go a long way towards making your divorce run smoothly.

Marriage is not only a union of two people who profess love for one another, it’s also a merger of two economic entities. Obviously, the dissolution of a marriage brings all of this to an end. The economic merger can be quite complex and difficult to sever. It’s a common misconception that each party receives half of what was shared during the marriage. It’s not that simple. To protect your assets and livelihood, don’t wait until it is too late, be prepared. Check out your situation now with an experienced family law lawyer so that you’ll know where you stand.

What Are Assets & Property?

When lawyers or legislation use the word “property” the word means more than just real estate. Anything and everything of actual economic value is an asset or “property”.

Web site www.flcdivorce.com                                                                               Family Law Centre
Chapter 1  Division of Assets

This may include cash, stocks, bonds, pensions, retirement savings plans, real estate, business interests, pieces of art, collectibles, racehorses. This will also include contingent assets - something you own, or to which you have a right, which doesn’t have any realisable value at the moment but could be valuable in the future such as stock options. And things such as employee benefits and termination benefits, as well as things like air travel points and air miles etc, are all “assets” or “property”.

When considering the value of your assets and your property, you also need to include consideration of your debts and contingent debts. This means that not only things like your car loan, credit card balances, mortgages and bank overdraft must be counted, but also the amount you’d be obliged to pay if you cancelled your car lease early.

An example of something which people often overlook when calculating the value of their assets and liabilities is their income taxes. Many of us have just the right amount of taxes deducted each pay period. But some of us will be entitled to an income tax rebate at the end of the year or will owe additional taxes above and beyond the amount already deducted. The rebate is an asset, even though you don’t yet have it and may not yet be able to figure it out. The eventual balance owing is a liability, even if you can’t yet calculate what that will be until the year is over.

All of this is considered one way or the other when married spouses separate or divorce. All of the property is looked at so that it or its value can be divided between you and your spouse according to the property division rules that apply to each province. At present common law spouses don’t qualify for any of the property division legislation in Canada, but there is a case now before the Supreme Court of Canada which may change that.
Chapter 1

How Is Property Valued?

The first step in any impending division of assets is to identify whatever either party owns at the relevant time. The next step is to give each piece of property a value. The final step is the actual distribution itself.

If both spouses are able to agree on the division of assets, then the arrangement will simply be documented in your Separation Agreement and accepted by the court when the final divorce is granted. This is true in most cases unless there is some reason to be concerned that proper arrangements haven’t been made for the children. (See Book Two for details on Separation Agreements).

Sometimes, the aid of a third party, such as a lawyer or mediator, can be used to help parties reach a mutually acceptable agreement. And even where both sides want to be reasonable, there may be problems in getting to a fair valuation.

In some provinces the law states that fair market value is to be applied, and in others it doesn’t. In one province the values are often at the date of the trial or final settlement. In other provinces, the key date is when the parties separate. Because this is such an important issue, be sure to ask this question in your first session with a lawyer, so you can understand what the law is and how it affects you.

Consider the difficulties in valuing certain assets. If you’re looking at the value of a bank account, or RRSP, or the cash surrender value of an insurance policy, you can simply ask the relevant institution to give you a statement showing the value as of the date you need. If you have a piece of art you may need to get the valuation of an art expert. Usually you don’t use the value you paid for the piece, but you might use the value you would get if you sold it at an art gallery, or auction.
That’s not the same as insured or replacement value. If you sold it through an art gallery, you’d have to pay certain commissions, so the value to you is the actual value of the piece less the cost to get that value. That is, you might be valuing it at what you could end up with if you tried to sell it rather than the cost to you if you went out to buy it.

Or consider the valuation problems for a family business. It may be thriving and bringing in a great income, but would anyone pay money to buy it if the person who has been running it for years was no longer involved? Maybe there might not really be any market for the purchase of the family business because of what it does, or where it’s located, or many other circumstances. What about the value of minority share holdings in companies with a limited number of investors? How do you value a 10% share in a company when you can’t sell the share without the approval of the other shareholders?

What about your employee benefits at the relevant valuation date? What’s the value for the number of sick days you have available but haven’t yet taken? Or the unused holiday time which needs to be used before the end of the year? Or the guarantee of one year of medical benefits if you are released from your job? All of these and more can become real valuation problems. And we haven’t even mentioned the difficulty of valuing your pension.

Despite potential valuation problems, you may very well find out that things can be worked out once you get down to trying to resolve matters in a meaningful way. Sometimes the parties can agree upon a value or will hire an agreed upon professional to provide an appraisal or valuation.
Chapter 1

Division of Assets

For example, you and your spouse may have different priorities and may well be able to sort things out more easily than you think once everyone knows what their rights and obligations are. Maybe the husband is very interested in keeping the family business and the wife may be quite anxious to keep the family home. But to do this the husband may need the wife’s co-operation in leaving a second mortgage on the home to help finance the business.

She may not want to have anything to do with him but, if she refuses to co-operate, they may need to sell both. In that case the husband ends up with a lower income and the wife doesn’t have the home. By co-operating, both parties can end up with what they want most. Experienced family law lawyers have creative ways to offer their clients to deal with specific situations.

So if you’re considering separating, be sure you know what all of the appropriate assets and property are. Remember to check with an experienced family law lawyer to see how they’ll be valued for you in your province and to see if there are options to consider to maximize your post-separation situation.

As much as you may not want to consider this, try to think about what your spouse’s interests and wishes are. Because often you can end up getting what you want more effectively and at less cost (both financially and emotionally) by finding creative ways to give the other person what he or she wants.

The object is not to show that you can prevent them from getting what they want – it’s for you to end up getting what you want at the least cost to you. Remember that when co-operation is not attainable.
It becomes necessary for this process to be completed in the court system, where a judge will decide how the various assets will be valued and divided. Usually a decision you’re part of through negotiation is better than one imposed by a judge who only knows what he or she has heard in the evidence given in court.

**So What Does This Mean In Practice?**

In each province there is different legislation governing how the court is to deal with the division of spouses’ assets and property. But there seems to be a general trend emerging across the country. To be realistic, one can expect that the division of assets will end up with a decision which will look pretty much the same from province to province. And that “look” will be close to equalization of the post-marriage growth in assets.

That is, the courts will see if there is a way that they can give to the less advantaged spouse assets or money awards which pretty much evens out the financial growth during the marriage. The courts don’t say that out loud, but that seems to be happening more and more across the country.

To do this the court may chose in some provinces to award lump sum spousal support payments, or ongoing spousal support payments, that might not be awarded in other provinces with the result that, one way or the other, there isn’t going to be much financial disparity across the country.

All of this highlights the importance of speaking with an experienced family law lawyer in your particular area with whom you can review your situation so that you can see just what you might be entitled to or what you may be obligated to pay.

Once you know that with greater clarity, you’ll be able to negotiate a settlement closer to what you are entitled to without having to get caught in the court system.
Chapter 1

Division of Assets

What's Not A Factor?

Conduct is not a factor for dealing with property issues. It doesn’t make a difference as to who did what to whom during the marriage as to who will get what.

Whether you’re the person who created the marriage breakdown, or are the innocent victim of it, won’t have any effect on how the assets and property will be divided. Things will be the same in these cases as in those marriages where no one was a bigger contributor to the breakdown. (Nor is conduct a factor for determining spousal support except in situations so rare that they hardly ever come up.)

As a result, issues such as adultery, mental or physical cruelty, and desertion, aren’t factors and don’t have any influence on the division of marital assets.

What Are Factors?

In some cases, a court can look at the result that would be in place if the basic rules applied and could decide if that may be “unconscionable” based on the circumstances. Although these cases are pretty rare, they do come up from time to time.

Usually, it’s much tougher to prove a result is “unconscionable” and this is a very fact-driven consideration. In some provinces the law takes into consideration whether or not the asset was an inheritance and may treat it differently. But if you think these may apply to give you a bigger share in the division of assets, or may serve to reduce the amount you’ll have to pay in that division, check with your lawyer to see if that applies to you.

There are times when tax consequences which arise because of the impending division of assets, or the sale of assets which are required to provide funds to pay for the settlement, will be taken into consideration. Often this is done when valuing the assets.
Chapter 1

Division of Assets

And there are times when the courts will look at how a party has managed the assets under his or her control prior to the break-up and decide that it won’t allow them to get away with it. Such things as transferring assets to other family members or friends to get them out of a spouse’s name will be regarded as not being done in good faith and the assets will be treated as if still owned by that spouse. Nor will the courts disregard the transferring of assets out of the jurisdiction.

There was a recent court decision where the court awarded punitive damages against a spouse who tried hard to conceal assets. The husband got other family members involved in his conspiracy so he could get away with paying his wife much less than he should have if the truth had been known. When this became known to the court he ended up paying more than if he had been honest from the beginning.

There are ways to trace asset transfers and to show that a person is living in a manner, which requires more funds than has been declared. Playing this game can have disastrous effects on the person trying to get away with it.

Often, when a court sees that this has been a spouse’s approach, it will find some way to express displeasure. Once the court finds the evidence that a person doesn’t have assets to be false, it’s inclined to believe that he or she has more assets than are eventually proven so the person trying to hide assets gets doubly burned.

Certainly this could include awarding costs against that person. Often the spouse also finds that he or she ends up with a higher than normal award of spousal support and adverse findings for other valuations, which end up costing him or her much more than it would have. Tell the truth.
Chapter 2

Valuation Date

Different provinces have different dates for valuing your assets. If you are in a situation where there will ultimately be assets to be valued, the actual Valuation Date (VD) can have a dramatic impact. Some provinces view the value of a specific asset as at the time of divorce, and others look at the date of the separation to fix the value of the assets in question. This can have very significant impact on what you may be entitled to receive or what you may be obliged to pay.

If the key date is that of the divorce or court hearing, any changes in values between separation and then will be shared – both up and down. In other words, if an investment’s value changes during the period of separation, both spouses in those provinces will ultimately gain or lose as a result of those changes. If this affects you, you may want to arrange to have certain assets sold at an early time after the separation to preserve their value. There could also be an issue as to how well the spouse in control of an asset managed it during that period and if it should be left to that spouse to manage.

If the key date is when the parties separated, there might be an issue as to just when that happened. For example, it might be that most of one spouse’s assets are in stocks or property which went down in value shortly before that spouse actually left the house, or went up shortly before moving out. Then one or the other spouse may want to say that they had actually been separated before that change in value.

In provinces where valuations are done as at the date of separation, there are times when you may have to look at whether or not you were separated at a date before one of you moved out of the home.
In these situations, parties can be living separate and apart even though they are residing in the same house and even if they are sleeping in the same bedroom and but or even had occasional sexual intercourse.

**Date of Separation**

The question of just when parties separate can be quite complex and is very dependent upon the facts of each case.

One party may say that after an argument at a family gathering in July they decided that the marriage was over and that they regarded themselves as separated from that date on - even though no one moved out until the following November. Maybe one believes that they’ve been separated since the time when one of the parties admitted to having an affair, or when one of them left for a holiday without the other after being told that if he or she went, the marriage was over, or when one moved out of the marriage bed, even though everything else remained the same.

In most situations, however, the parties agree on a date or event – usually when one actually moves out of the house - and there isn’t any dispute over the matter. However there are times when the values of the assets are sufficiently different for the different dates put forward by the parties that this becomes a big issue. In many provinces you value assets for the purposes of settling up who owes what to whom based upon the values at the date of separation and in those cases you need to determine just when the parties separated. In Ontario and some of the other provinces, the key date is the date of separation. In other provinces the date can be different like British Columbia.

Separation doesn’t always mean one party is out of the home, although that is usually pretty conclusive.
Chapter 2  Division of Property

The fact that one party refused having sex with the other doesn’t mean that they are separated. In fact, you might be separated yet still has occasional sex with your spouse. There are many factors to look at such as what the parties thought, what they told their friends and family, their social and financial interaction, where they ate and slept, who did whose laundry, etc.

Just because property is valued at the date of separation and the parties disagree when that was, that may not be a significant issue if there is no real change in values between the dates each party is putting forward.

Keep in mind, that while you may begin your divorce proceeding, whether you’re separated or not. The marriage breakdown you’re relying upon is one year’s separation. You can’t finalize the divorce until after one year has passed from the date of separation, so you’ll need to be able to set out a specific date. (While there is only one ground for divorce in Canada – breakdown of the marriage – that can be established in a variety of ways including adultery, cruelty, and one year of separation. One-year separation is by far the most common reason used in divorce proceedings across the country.)

So we suggest you look carefully at your situation in your province and consult with an experienced family law lawyer to see if this is a matter of significance to you before you agree to any particular separation date. As with so many aspects of family law, it is necessary to find out what specific laws apply to you to be sure that you’re acting wisely on your own behalf.
Chapter 2

Division of Property

Common Law Spouses

There’s is a major misconception which many people have that common law spouses are treated the same as married spouses when it comes to the division of assets. That may change in the future, but it hasn’t changed yet.

In a common law relationship, there is no automatic “pooling” of property. The laws that apply to married couples, don’t apply to common law marriages. Any property that was yours before the relationship, or acquired by you during the relationship, stays yours, and the same applies to your common law spouse. But normal laws of property apply to common law relationships and there might still be some sharing of assets that could take place.

For example, items purchased or acquired by you jointly will be regarded as owned by you, jointly. And there might be an argument raised that, even though you bought assets with your money from your bank account or on your credit card so should be treated by law as being owned jointly, because of a constructive or resulting trust.

These are complex legal arguments and can become quite complicated. By looking carefully at any particular fact situation a common law spouse might well discover that he or she actually has some property rights or obligations they may not have thought of. (This also applies to married spouses although generally it’s not as significant for them.)

Consider the case where a common law spouse used all of her money for feeding and clothing the family, including the common law husband and his children, while he used his money to buy investments in his name. Or where after they moved in together it was the common law wife who looked after the rental house the common law husband owned, or worked on his farm.
Chapter 2

Division of Property

It may well be in these situations that the common law wife could successfully argue that she has acquired an ownership interest in the asset, even though it was owned in the common law husband’s name. She might be able to argue that her spouse only had the money to invest because all of her money went into living money for the family and that just as he shared in the food and clothing she bought, she should share in the investments.

Or she might be able to argue that he received an unjust enrichment because of her work to preserve the investment rental home or because of the “free” work she did on the farm. Trust arguments are complex, but common for family law lawyers to deal with.

The issue here is not that the parties lived together as husband and wife or that there may or may not have been a common law relationship, but that the basic law of trusts and basic property laws deal with the ownership of property in these situations. This holds true regardless of the length of the common-law union and also applies to married couples where who owns what becomes an issue.

If you’re in a common law relationship you should know that there is a case working its way to the Supreme Court of Canada in which the Nova Scotia Court of Appeal gave the common law wife the same rights as a married wife. So property rights for common law spouses may soon be about to change. It is expected that this case (Walsh v Bano) will be argued before the Supreme Court of Canada in 2002. If this affects you, be sure to check with an experienced family law lawyer.

Same Sex Couples and Property Issues

The laws applying to property are the same for same sex couples as for heterosexual common law couples. If the law changes for common law couples it will likely change for gay and lesbian couples, but this is not yet clear.
Take Inventory

♦ Prepare a complete list of all of the assets in your name and your spouse’s name and make a note of the current value. Do the same for all debts. Note whose name the debts or assets are in.

♦ Note the source of the assets, whether purchased, inherited, received as gifts, etc.

♦ Note if the asset was acquired or accumulated prior to, or during the marriage.

♦ Next to each asset, note who has actual possession of item or the ownership papers, if any, or where it is physically located.

♦ Note whom you need to contact to get information about each asset and debt.

♦ Photocopy all relevant paperwork and store it in a safe place, perhaps a personal safety deposit box, away from the home. (See the Appendix for a list of some of the relevant documents that you’ll want to collect in preparation for dealing with the distribution of assets and property or their value).

♦ Review all pertinent mail coming into your house and make a list of the return addresses. It is very important to know the addresses of banks, insurance companies, etc.

It’s certainly best if you and your spouse can do this together, as there are likely things one of you have forgotten about or don’t know about. Doing it together tends to reduce arguments later, but if your spouse proves uncooperative in preparing this material, you may need to enlist the assistance of a lawyer.
Joint Bank Accounts

Obviously, all joint bank accounts will have to be dealt with in some fashion before the divorce is final. However, during the separation period, there are some ways to protect your accounts.

It’s a good idea, at the time of separation, to open a new chequing or savings account in your name only, if you haven’t already done so. Use that account as the one into which your regular pay is automatically deposited. If you’re in a province where the key final date is that of your separation, you may not need to disclose what’s in that account if it was opened after the separation. But at least you’ll be segregating any post-separation income.

Another advantage to working with a separate account is that you’ll have more control over how expenses will be paid for during that early separation period. You can use this account to transfer money into the family account as needed, but you won’t have to worry that money will be withdrawn or used without your knowledge.

Contact your bank manager to see how your impending separation or divorce will affect your banking. Make sure you contact all financial institutions where you have accounts. You may have joint accounts that are not used, perhaps even forgotten, that must also be dealt with.

If you and your spouse have several joint accounts, it may be wise to collapse all of these accounts into one joint account that requires both signatures for cheques and withdrawals. This way it will be easier to manage and control the payment of any shared expenses, if necessary, during the separation period.
Remember that if your joint accounts are left open and either spouse can withdraw funds, you’re leaving yourself in a potentially difficult position if your spouse decides to take out all of the funds.

**Joint Investments**

To protect any joint investments, promptly contact your broker or other financial officer and inform him or her of the impending separation or divorce. Ask that no stocks, bonds, mutual funds or other type of joint holdings be removed or traded unless authorized by both parties.

**Joint Safety Deposit Boxes**

There is perhaps no asset quite like the safety deposit box in terms of its ability to be emptied with little effort. Quite literally, whoever gets there first has the opportunity to grab the contents and run. If a box is cleaned out, there is often little chance that the contents will ever be recovered and it’s highly likely that there’ll be an argument over what was in the box and removed.

The ideal option is to empty the contents of the box together and close it if you are in agreement on the division of its contents. However, if distrust is an issue, then make sure you have someone with you when you go to open the box and make an inventory. Perhaps you might also want to take a photograph of its contents. If so, take the photograph in the presence of the other person, try to get part of that person in the picture and put the date it was taken on the back along with the name of the witness. The best other person to have present with you is an officer of the bank. Have them sign-off on your inventory so that if anything is later removed, you’ll have proof of what was taken.
Chapter 3

Action Plan

If you’re concerned about your spouse taking and spending, or using, the contents of the safety deposit box, merely noting what was there is of little value. Either you take the contents and immediately, in the presence of the bank officer transfer them into a box in your own name, or consider obtaining a restraining order from the court.

The order would prevent either spouse from access to the box until such time as a final settlement is reached or the order is rescinded. This is particularly needed if the safety deposit box is in the name of the other spouse and you can’t get to it to take an inventory. Remember that time could be of the essence.

Businesses Interests

If you are a sole proprietor or partner in a business, or a shareholder in a company, you may have to produce the details of that interest. Just as with other assets and investments, different valuation dates may affect the value. Valuing a business interest can be quite complex if it’s not something easily traded. You’ll certainly start with looking at the business’s financial statements and tax returns for the past few years and may want to get the opinion of the business’s accountant.

Sometimes a partnership has a formula the partners have agreed upon to value it each year. Or maybe a partner or shareholder has recently sold his or her interest. But these values, just as the net worth seen on the financial statement, may not be truly representative of the real worth of the business. In these cases you may need to have the formal opinion of an independent, accredited business valuator. As to whether or not that’s worthwhile is something you have to decide with your lawyer at the time.
Chapter 3

Action Plan

Registered Retirement Savings Plans (RRSPs)

Generally, the division of RRSPs will not come about until after separation. The Income Tax Act provides that there are circumstances when you can transfer RRSPs from one spouse to the other as part of a separation settlement after the separation without any tax being withheld. The full value is received by the recipient spouse in his or her own RRSP without any tax consequences until he or she cashes in the RRSP.

If that spouse has no earned income, or very little, this may be a very useful settlement option because the RRSPs can then be cashed for full value, or with very little taxes to pay, by the recipient even though high taxes would have been paid if cashed by the transferor. This may also be an option if the recipient wants to have some form of retirement fund available for later and isn’t planning to cash in the RRSPs right away.

Pensions/Profit Sharing Plans

To fully understand and protect your interest in any particular pension fund, profit sharing program, or other type of employee benefit plan you must first get a copy of the benefit plan brochure or actual retirement plan issued by the company for scrutiny. Contact the Human Resources Department at your or your spouse’s place of employment. These are not easy documents for most of us to read or understand.

To get a proper value of a pension or other employee benefit plan you’ll need to have it reviewed by a professional actuary who will be able to give you a value for the purposes of your settlement. That value may not be the same as shown by the pension administrator, or as the values shown on any annual reports from the plan. This is a very complex issue and you should be sure to realize that the value of these plans for separation purposes is usually much higher than it appears at first glance.
Even though these plans may have very significant values, it is likely the case that the value cannot be accessed until the plan holder retires. So one spouse may be sitting with an asset of considerable value but be unable to use it. In that case the value needs to be discounted to a “present value” figure. (Let’s say there is a plan with a value of $100,000 when the holder retires in 12 years. Its present value is how much would someone pay today to own an asset worth $100,000 in 12 years.) In valuing this sort of asset you also need to take into consideration that when the value is eventually realized, there will be taxes paid on it.

So you can be in a position where one of the spouses has an asset worth a lot more than either party realizes, but that the value has to be present valued and discounted for tax consequences. Actuaries trained in this sort of expert valuation are the people who best do these things. Your lawyer will, in most cases, enlist their help.

In these cases, separating spouses can often be quite creative and trade assets around to reach a settlement. Often, the person with the pension may decide to trade off his or her interest in the family home to the other person so that the other spouse ends up with the home, which can be lived in now and then be sold for a retirement fund without any tax consequences later, and the first spouse ends up with the pension as his or her retirement fund.

**Federal vs. Provincial Pension Regulations**

Some pensions in Canada are under federal jurisdiction and some are under provincial jurisdiction. Federally administered pensions can be divided so that upon separation the pension can be split into two plans.
Chapter 3

The employee continues to keep the plan with what he or she was entitled to from before the marriage plus receiving the full benefit of what is earned after the settlement date. The other spouse gets a pension in his or her name, which can be accessed at the retirement dates provided for by the plan, which is for half the value accumulated during the period of the marriage. That means you don’t have to worry about valuing the pension, because you can just divide it. But there are some provinces, which don’t allow pensions under their administration to be split in this way. In those cases they have to be valued and discounted as mentioned above. Find out how your, or your spouse’s pension, is dealt with so you can plan accordingly.

Real Estate

Many married couples own real estate property and they most often hold title in a manner known as joint tenancy. Joint tenancy means that whenever one joint owner passes away, the other owner automatically inherits the deceased’s portion of the property, without having to go through the long and costly probate process. Joint tenancy is referred to as “a poor man’s will”.

While this may be what you and your spouse wanted when you acquired the property, it may not be what you want if you become separated. This is usually a concern to people who are thinking about separating, or are now separated. If this is a concern to you and you don’t want your share to automatically go to your spouse, you can change your ownership status to reflect a tenancy in common. Tenancy in common, like joint tenancy, provides for equal shares, however, if you pass away, your share will be passed to whomever you’ve designated in your will or estate planning document. This is a step people often take to protect themselves until a more formal separation agreement or court order takes effect.
Chapter 3

Action Plan

One of the first things you should do when you speak with your lawyer is to go over this and decide how best to deal with it. Don’t overlook this because it could have a serious impact on you. It’s not always the case that you should change the way title is held, but you should always give the matter thought at the earliest stage of your separation.

The Family Home and Children

In dealing with real estate, you’ll want to see if there are any issues about who will have the primary care and control of the children. Sometimes it becomes a driving factor in how assets are dealt with. For example, if the parties agree that the mother will have the children they may also feel it’s best for the children and mother to be able to remain in the family home. This might then dictate how the other assets will be divided so that the transfer of the father’s interest in the home to the mother can be done.

Sometimes it may require real co-operation for this to happen because the mother may not be able to qualify for a mortgage on her own but can afford to make the mortgage payments. In that case there may be a separation agreement which gives the wife the husband’s interest in the home but provides that transfer of title not be registered.

This will help the mother keep or obtain financing, but it doesn’t put title into her name to deal with as she wishes and may impair the husband’s credit, as he will still be shown as owing the mortgage. Even so, this may be the only way the family can keep the house for the wife and children.

Sometimes the house will be transferred to the wife but the husband may require that a second mortgage be kept on it to help finance the business transferred to the husband. In those cases, he would agree to making that mortgage payment in addition to any other support arrangement.
Nevertheless there are times when the house has to be sold, no matter how creative the parties try to be. In those cases, it is still best to be realistic and co-operative so that the parties can choose the best time to sell the home and get the highest value for each party.

This may mean holding off the sale for a while. If this means that the husband, for example, needs to carry both a mortgage and his own rent for a while, the wife may agree to have his rent costs taken out of the proceeds of the sale of the house when it eventually gets sold to pay him back then, or she may agree to a reduced support until the sale.

What we learn from all of this is that where the parties put their minds together to try to work out what is best for the family, there are usually ways to accomplish that. But if their energy is devoted to fighting each other, they will tend to overlook solutions which better serve their needs.
Chapter 4

Financial Tactics

Quite often it seems impossible to avoid emotional issues such as resentment and anger when going through a separation or divorce. Many times, these emotions fuel attempts to hurt the other spouse. The two obvious ways people do this is through the children and through money.

One spouse might attempt to undervalue, disguise, or hide an asset in order to keep it for their use. While suspicion and proof of this kind of activity are two very different things, there are ways to protect yourself against this sort of thing. One effective step is to compile detailed financial records complete with accurate assessments or valuations from the moment the decision to separate is made.

Finding Hidden Income & Assets

Document the family’s living expenses and patterns. It may be that things like vacations, recreational vehicles, entertainment, gambling, etc., are typically paid for by cash. You may not be able to document how the other spouse gets the cash, but you may be able to document spending patterns which can only be explained by having undeclared income. Showing that your spouse spends more than he or she earns goes a long way to prove there is undisclosed income around. It’s a lot easier to record this sort of thing while you and your spouse are still together by saving receipts, taking photos of the things purchased, and by keeping copies of credit card statements.

Maybe you can show that your spouse was able to pay for a family vacation costing $7,500, buy an all terrain vehicle for the kids to use at the cottage, do repairs to the home, purchase expensive jewellery, computers, and video equipment all costing about $45,000, during the course of a year when he declared an official income of only $37,009 before taxes and didn’t have any savings which went down by that amount. That’s not possible, especially since maybe only $25,000 was left after paying income taxes. This might really require a legitimate income of $100,000.
Chapter 4

Financial Tactics

You may not be able to prove that you always ate take out food at a cost of $200 a week, but you might well be able to prove other things by taking photographs, keeping brochures, holding onto credit card charges, etc. Many times these extra items are purchased using a credit card and the monthly statement may show higher expenses than could be afforded on the declared income or money shown in savings. That suggests payment was in cash or from some undeclared account.

Tricks To Watch For

Examples of financial tactics people sometimes use include:

♦ A spouse may try to persuade as employer to delay delivery of a bonus, stock option, retirement benefit, or pay raise until after the divorce is final.

♦ Money may be paid from a business account to someone with close personal ties such as a father, sister, or new life partner for services never actually performed, to be returned after the divorce is final.

♦ A spouse may make phoney “debt repayments” to a friend or relative for an alleged outstanding obligation.

♦ There could be delays in signing lucrative business contracts until after the divorce is final.

♦ A spouse may establish fresh accounts which are not declared in which to deposit money without showing that it exists.
Whenever these things are discovered, the court will be comfortable concluding that the deceiving spouse has no credibility and the argument that there really aren’t any other undisclosed assets won’t likely be believed.

What Can You Do

If there are children, the deceiving spouse will likely have to produce income tax returns for past and future years. Then things like bonuses or sudden raises of income will become apparent. Interest income will show up on accounts that weren’t declared or RRSP payments may be seen for purchases with money that wasn’t supposed to exist. Capital gains taxes might be seen for assets not previously declared. Sometimes a person who knows what happened (a former employee or lover) may have a falling out with the deceiving spouse and tell the other spouse what went on.

Where necessary, you may need the services of a forensic accountant. A forensic accountant is an expert at tracing properties, evaluating financial reports, and assessing values for businesses and investments. Sort of like a financial detective. Not every accountant is trained to do this kind of investigation.

Many times just knowing that you are seeking a court appointment of a forensic accountant will go a long way to resolving matters. Sometimes just getting and revealing the report will solve matters. Should things get really ugly, the expert can be a very good witness in court. They obviously don’t work for free, but the money spent on his or her fee may be well worth it.

Although in some cases there is nothing inherently illegal about the kinds of activities mentioned above, if the intent is to hide or reduce the value of an asset, in the eyes of the court, this is wrong. Where deliberately incorrect values are sworn to be true, that may be perjury.
Be sure to have any sworn statement of property and value updated before reaching a final settlement. Or have your final settlement state clearly that it is based upon the figures shown in the last sworn statement or a schedule to the agreement and that you’re relying upon those figures as remaining true.

This puts the deceiving spouse into a spot in which he or she is swearing a false statement if they leave out certain assets or deliberately conceal or misrepresent the values. That exposes them to perjury as well as to having any settlement re-opened. A person’s credibility is blown if they go about trying to deceive the other spouse and then only “confess” once they are found out.

In the opinion of a court of law, it is one thing to put assets into safekeeping or to use them for the necessities of life, but quite another to hide them and not admit that they exist as we have just discussed.

Taking money from a joint bank account to transfer into an individual account, for example, may be acceptable as long as the existence of such an account is disclosed. In this manner, the judge will still be able to include the value of the asset in a fair and equitable distribution of the marital property.

However, if the judge concludes that you are not telling the truth and are attempting to hide assets, there is a very good chance that he or she will base any eventual award on that fact. Your deception builds up the credibility of the other party’s suspicions, even though they may not be able to “prove” all of their suspicions.

If you’re the one accused of hiding assets which you say never existed, you may be able to show that you went into debt to pay for the various things your spouse is referring to.
Look at your credit card balances or the fact that you may have cashed in an investment, or used an inheritance, or sold an asset, to substantiate that certain assets were used to pay for a particular asset. Perhaps you’ll be able to show that to maintain a certain life-style and family expenses beyond your actual income you went into debt, borrowed money from family or others, increased your credit card debt or bank line of credit, added to your mortgage, got behind in paying your income taxes, etc.

If this was the case you’ll be able to show that the RRSP your spouse says you cashed and swore the proceeds was really used to pay off a debt, buy a particular item or cover certain family expenses.

Tax Implications
It is inopportune to consider the tax implications of the financial transactions about to be undertaken in conjunction with your divorce or separation. Keep in mind that there are potential tax liabilities for many transactions which are part of a financial settlement between you and your spouse. Also, decisions with respect to how to file tax returns can be of great significance. For example, how will any tax refund or tax payable be divided?

There are no taxable capital gains on the sale or transfer of your matrimonial home, but transferring certain other kinds of assets could trigger a capital gains for the person transferring them. If you agree to transfer the stocks you hold in some investment to your spouse that could mean that you’ll have to pay taxes on the deemed profit (the difference in value between the stocks at the time of the transfer and the cost to you when you first got them).

You’d want to factor that cost in figuring out the amount of the settlement. Of course, the stocks might have gone down so far, that upon the transfer you would trigger a capital loss, which you could deduct from your income to reduce your income taxes.
Chapter 4

Financial Tactics

That might be an advantage to you. As well, there are ways of transferring items for which there would be a capital gains and pass the entire profit onto the person getting the item.

That involves both parties filing a document with their income tax returns for the year of the transfer. If you don’t watch yourself carefully you can end up transferring property and you having to pay taxes on the profit made when your spouse sells it. The person who transferred it doesn’t get the profit but does get the taxes to pay. That hurts if this wasn’t something you actually planned on or intended.

The best way to protect yourself is to consult with a tax accountant or related professional who can advise you regarding any property and asset division and the resulting tax liabilities incurred.

Bankruptcy as A Tactic

Bankruptcy may well be a useful option for you or your spouse to consider as a means to protect your family or wipe out your debts, but don’t go about this on your own. Consult with a professional before taking steps towards bankruptcy.

Often a support payor says he or she can’t afford to make the support payments because of the other debts to be paid and proposes that the support payments be reduced or he or she will become bankrupt. Most times this is said as a threat without realizing that this might actually be a good idea for the support recipient. Bankruptcy doesn’t wipe out support obligations, but it may wipe out other heavy debt payments (such as credit card debts, etc.) which make paying support such a burden.
Chapter 4

Financial Tactics

If you’re the support payor you should consult with your lawyer because declaring bankruptcy – or making a proposal in bankruptcy, which has the same effect but isn’t quite as serious – might actually be a solution to many of your problems. Transfers or debt payments made within the past year to non-arms length persons (such as repayments of loans from your family, or transfers of property to your spouse as a divorce settlement) can be set aside. So you’d want to be sure you were going about things to achieve the result you wanted. Sometimes this is best accomplished by co-operation with your spouse who might be able to benefit if you go about things in a co-ordinated manner consistent with the bankruptcy laws.

If you’re the support recipient you might want to suggest that the paying spouse consider declaring bankruptcy – or making a proposal – as part of a solution to his or her other financial problems so that the payment of support will become more secure.

Too often people don’t appreciate that declaring bankruptcy – or making a proposal – may be just the thing to do. So it’s not such a wise thing to waive a “threat” of bankruptcy unless you’ve given the matter thought, have received proper advice, and are clear as to whether or not it’s a good idea.

Remember, if you declare bankruptcy or make a proposal there’ll be a trustee appointed by your creditors to manage matters and the trustee will be empowered to look into all of your transactions for the past year as well as deal with any fraud. You could discover that transfers you made to get assets out of your creditors’ hands into your family’s hands will be set aside and the result you intended won’t occur. That’s why, if you are in a position where bankruptcy may make sense, you should consult with a family law lawyer and an accountant to be sure that you do things in the most advantageous manner.
Chapter 4

Financial Tactics

If you’re going to be declaring bankruptcy anyway, you may want to organize your affairs so that your family will benefit rather than your creditors. It doesn’t prove anything to lose the family home to satisfy creditors if that could have been avoided by proper planning.

The Good Sense of Being Sensible

Invest your valuable time and energy preparing yourself for your separation and divorce and attempt to work through the various issues as amicably as possible. Remember, if you and your spouse can’t decide how to divide the family assets, a big portion of those assets will be used to pay for lawyers and you may end up in a court battle where a judge will impose a decision on you.

Use the services of professionals such as accountants, financial planners, mediators, and lawyers to protect yourself. And keep in mind that the cost of fighting to prove that you’re “right” may often be more than the cost of settling the matter and getting on with your life. No one “wins” if you can’t get good sense to prevail and resolve matters without going to court.
Chapter 5  Division of Debt

Who Is Responsible For What?
Each spouse is legally responsible to meet any financial obligations they take on in their own names during a marriage. If there is a debt for a car loan, or a credit card or a line of credit in your name alone – you’re the person liable for that debt and the person to be sued if it isn’t paid.

However, when people negotiate a separation agreement, or end up getting a court order, a fair and equitable distribution of the family debt will usually go hand in hand with the division of the family property, or any equalization payment so that these debts will get evened out during any final resolution. That’s why it’s important to remember all of the debts when entering any settlement discussion and to be a careful to list accurately all of the debts as much as it is to do that for your assets.

But many spouses have joint debts (bank loans, lines of credit, mortgages) and joint credit cards for which liability can continue even after they have separated. This is something to watch out for. Sometimes a settlement has one or the other spouse paying off these joint debts in exchange for receiving extra assets. But if that’s your situation, you need to be sure that the debts are actually paid or you’ll remain responsible, even though you’ve given up certain assets so the other party will look after those debts.

Keep in mind that from the moment the decision to separate is made, it’s very important to understand the effect this will have on your debts and credit rating.

The First Step - Know Where You Stand
Earlier we suggested that you prepare a complete listing of all of your assets and liabilities. Make sure that contains a complete list of all your outstanding debts and obligations.
Mark these into categories showing who is liable: you alone, your spouse alone, or the two of you jointly. This includes mortgages, credit cards, home equity loans, personal loans, student loans, car leases, etc. Include when the debt was incurred, the reason for the debt, and the monthly or annual payments. Ensure you have copies of any promissory notes, loan documents, mortgage charges, etc. It's also a good idea to obtain a copy of your individual credit report. That will give you an accurate report of all outstanding debts as well as your previous credit history.

Make sure all credit facilities reflected on your credit report are included on your list. There are two major credit-reporting agencies in Canada. They are Equifax and Trans Union Consumer Relations. If you find any errors on your credit report, there are avenues available to make the corrections through these credit-reporting agencies. For more information, you can contact EQUIFAX at 1-800-465-7166 or TRANS UNION CONSUMER RELATIONS at 1-800-663-9980.

It is a good idea to decide along with your spouse exactly who will be responsible for paying the joint debts as well as the debts in the names of one or the other of you. Letters can be written to the creditors asking that the liabilities be transferred solely to the name of the party that agreed to accept them. Be sure you retain written confirmation of this change from the creditor. This can't always be done, but you should try to do it as much as possible.

In some cases, creditors won't agree to this change and will continue to hold each spouse liable until the debt is paid in full. If this is the case, there's still a way to protect yourself from any future debt incurred by your spouse.
Chapter 5

Division of Debt

Ask the creditor to provide a current statement of account and send a letter stating that you won’t be responsible for any debt accumulated after the date of the written letter. Ask that the account be placed on an inactive status so that no new charges may be added. Stipulate in your letter that once the balance is paid in full, the account is to be closed completely and forever. It’s always wise to send these letters by both regular and certified mail and retain proof of receipt by the creditors.

Also ask that you be notified immediately in the event of any default of payment. Follow this same procedure for credit cards, lines of credit, security margin accounts, and mortgages. Remember, it’s possible, and there have been many instances, where a creditor will attempt to collect an outstanding bill from you which was accumulated by your spouse after you thought none of this was to be happening.

Between separation and settling matters it’s best to not create any additional debts and to avoid making large purchases such as a new car. Keep your assets as liquid as possible. Also, derogatory credit remarks accumulated by one spouse may be transferred to the other’s credit report, often without that spouse’s knowledge. If that’s a concern, it is wise to consider closing all joint credit cards, etc., just after the decision to split is reached.

And keep in mind that because of the way your family’s finances were arranged, one of you may not have any credit history. You’ll need to establish one swiftly and it is reasonable for the other spouse to help out in that regard. In some instances, one spouse may have assumed all the financial liabilities for one reason or another (i.e. one spouse did not have steady income or good credit at the time, whereas the other did). Obviously, in the event of a separation or divorce, the spouse that did not have good or perhaps any credit rating will undoubtedly need to establish one pretty quickly.
Family Necessities

As a rule of thumb, debts incurred after the separation date are the responsibility of the party who generated them. However, the one notable exception is debt created for family necessities. In other words, one spouse may run up a tab for items such as food, clothing, shelter, or medical care and may rightfully expect the other spouse to assume a portion of that obligation.

In some cases, it might be necessary to keep a joint line of credit or joint bank account open to pay for various items such as child expenses, mortgage, insurance, or property maintenance payments during the separation. In this case we strongly recommend that you document in detail exactly what the account is being used for and what amount each spouse is expected to contribute towards that account. It’s possible to arrange things so that neither spouse can withdraw money from the joint bank account or line of credit without the other’s signature. Contact your financial institution for more information.

Getting Help with Credit Problems

Your credit history is very important. It’s a major means by which a particular creditor can judge whether or not you are a good risk for a loan, mortgage, line of credit, credit card, etc. Your history reflects how you handled previous credit and your willingness to repay borrowed monies.

The length of time at your present job, how long you’ve lived at your current address, and your current income are all factors that help to determine your credit worthiness. It’s your credit worthiness that will ultimately determine whether or not you will be granted the credit you apply for.

The Consumer Credit Counselling Service (CCCS) is a non-profit organization dedicated to helping people understand, prevent, and solve credit issues.
For people with severe debt problems, there's a Debt Management Program through CCCS that can help to manage and repay debts by restructuring your budget and negotiating on your behalf with creditors. There are more than 1,000 CCCS offices throughout Canada and the United States providing low-cost, or even free, services. It's their policy to help everyone regardless of ability to pay their debts. To contact the nearest location, refer to your local telephone directory or call 1-800-388-CCCS.
What is Spousal Support and Who Can Get It?

If you're a spouse – you have a right to claim spousal support. For married couples this is available under the provisions of the Divorce Act and for common law couples this is available through your provincial legislation. (Married couples generally have the option of using either piece of legislation, although there isn't likely much difference in result.) But just because you're entitled to claim it doesn't mean you'll get it.

Spousal support is based on a variety of factors and no one factor governs the approach for every case. The Divorce Act sets out several criteria to follow and the Supreme Court of Canada has made it clear that one needs to look at all of the considerations, not just one. If you and your spouse are able to negotiate suitable support arrangements without going to court, you'll save money on legal fees and have a financial relationship in which you'll each have confidence.

Although one of the advantages of reaching an out-of-court settlement is that legal fees will be saved, we don't at all suggest that you settle your spousal support arrangements without retaining the services of an experienced family law lawyer. In fact, the best way to save fees is to spend them wisely at the beginning.

For example: it's more costly to try and "save on legal fees" by working out a spousal support arrangement without a lawyer. You could find out later that your spouse is taking you to court to have it set aside because he or she entered into the agreement without proper legal advice at the time. Or you could find the court setting aside your agreement because the release clause you used isn't effective, or because the settlement, which seemed fair to you, doesn't meet what the court regards as being appropriate. The cost to fix things up will be much more than the cost of getting proper legal advice at the beginning.
Income Taxes

Before getting into what factors you need to look at in dealing with the amount and duration of spousal support, we want to point out that in Canada the Income Tax Act provides that the spouse making spousal support payments may deduct them from taxable income while the recipient must include the payments as income and pay income tax on them. (Child support payments, are neither deductible nor includible for Income Tax purposes.) However, there are certain conditions that must be met.

Some of these conditions include:

♦ The payments must be made pursuant to a court order or written agreement.

♦ The payments must be periodic (i.e. weekly, bi-weekly, monthly), not a lump sum.

♦ The payments must be for a fixed amount.

♦ Arrangements can be made to treat payments made to a third party for the benefit of a spouse as spousal support payments to be deductible for the payor and includible for the spouse for whose benefit it is paid. (i.e. mortgage payments, telephone bills, etc.

♦ Any payments made on a voluntary basis before an agreement was signed or a court order made can be treated as retroactively covered for purposes of deduction and inclusion for income tax purposes if made during the year in which the agreement was signed or court order made - or the year before.
Chapter 6

Spousal Support

As long as both sides are aware of the tax considerations involved things should even out in any agreement or court order. When the support payor is in a higher tax category than the recipient this could have some creative possibilities. The thing to keep in mind is the amount of money you want the recipient to have after she or he pays taxes on that income. And the support payor needs to keep in mind that an agreement or order to pay support of a particular amount isn’t quite as bad as it seems because the amount is tax deductible.

If you’re paying taxes with a top rate of 45% and are paying support of $1,000 per month, you’re saving $450 in taxes so the actual cost to you of support isn’t $1,000 but only $550. You can decide to claim the credit at the end of the year when you file your tax return and get it back as a tax refund or you can file your agreement and arrange for your employer to deduct income taxes from you as if your income is the amount you earn less the amount you pay in spousal support.

All of these factors will need to be covered in any separation agreement you enter into or court order you obtain so be sure that you’ve consulted with an experienced family law lawyer to be sure things will be handled properly. You’ll also want to be sure that the agreement sets out when and under what circumstances the payments will be varied and when they will terminate. For more details, consult with your lawyer or accountant.

Factors Which Won’t Be Considered

Regardless of the conduct of either spouse, the obligation of one spouse to provide support to the other still exists. However, except in the most unusual of circumstances, conduct won’t be a consideration in fixing the amount of spousal support. (Adultery and cruelty are not, in the usual circumstances, factors which will affect spousal support.)
In very rare circumstances the court can determine that a spouse’s conduct is so unconscionable that it can’t be overlooked, and in that unusual situation conduct can be considered in determining the amount of support that is ordered.

Don’t think that you won’t have to pay any spousal support if your spouse is the one who wanted, or was responsible for, the separation. Just because the marriage broke up because your spouse had an affair, or is continuing to have one, or you don’t want the marriage to end, doesn’t mean that he or she won’t be entitled to obtain spousal support. And just because the dependant spouse is living with someone or has remarried doesn’t automatically mean spousal support will come to an end.

Factors Which Will Be Considered
However, if spousal support is in dispute and unresolved, you may have to go to court. Keeping in mind the factors the courts consider will often make it easier to reach a settlement without actually having to go to court.

Some of the factors the courts consider in determining spousal support include:

♦ The needs of the dependant spouse based upon the lifestyle enjoyed during the relationship.

♦ The ability of the payor to pay the support,

♦ The child support payments already being made.
♦ The length of the marriage, often including time lived together before marriage.

♦ The age and the physical and mental health of both spouses.

♦ The dependant’s capacity to contribute to his or her own support.

♦ The standard of living enjoyed during the marriage.

♦ The economic advantages and disadvantages arising out of the breakdown of the marriage.

♦ The career sacrifice of the dependant spouse for the career advancement of the other spouse.

♦ The result of the asset division or equalization payment being made or ordered.

**The Divorce Act states that an order for spousal support should:**

♦ Recognize any economic advantages or disadvantages to spouses arising from the marriage or its breakdown.

♦ Relieve economic hardship of spouses arising from the breakdown in marriage.

♦ Promote the economic self-sufficiency of each spouse within a reasonable period of time.
Chapter 6  Spousal Support

While these exact principles don’t appear in provincial legislation, the courts generally apply the same basic approach whether one is claiming support under federal or provincial legislation. The Supreme Court of Canada has made it clear that in deciding the amount and duration of spousal support in any particular situation you must look at all of the factors and not at any one factor in particular. (There was a while a few years ago in Canada when the courts used to look heavily at the obligation of parties to become self-sufficient, but that’s not the prime consideration now, and the other factors are now also looked at before any conclusion is reached.)

Therefore, in theory, spousal support is most often meant to give each divorcing spouse an opportunity to make the financial transition from the marriage relationship to independence and self-support. This will take into consideration a number of factors, as set out above, but self-sufficiency is not the only objective.

Not all of these factors are considered in every case. A combination of considerations usually applies and it is safe to assume that the court is more likely today to order spousal support than it was several years ago. In long term marriages where the wife stayed home to raise the children, there is considerable likelihood that support will be paid on an indefinite basis.

Spousal support is a very fact driven matter and you need to go over the facts of your situation with an experienced family law lawyer in your area to be sure of what your rights and obligations are in your particular circumstances.

Can Men Get Spousal Support?

Absolutely! The legislation refers to “spouses”, not “wives”. The same considerations apply to men being entitled to support as women.
Chapter 6  Spousal Support

Typically, however, we find that men don’t claim support as often as women, even though a woman in the same situation would be entitled to get it and would be claiming it.

There may be many reasons for this and this isn’t the place for that kind of examination. However, if you are a divorcing or separating husband in a situation where your wife earns more than you, it is wise for you to check out your rights with an experienced family law lawyer. If you’re the wife in this situation, you might want to be sure that the question of spousal support is clearly dealt with in any separation agreement rather than leaving this an unresolved matter which may come up later.
Here are some basic points to be realized about child support payments:

- Child support is for the support of children and is paid to the person with whom the children primarily reside.

- For married parents who are divorcing, child support is paid in accordance with the provisions of the Child Support Guidelines and the basic payment is set out in a Table for each province. While these are federal Child Support Guidelines, which cover child support to be paid when married couples divorce, each of the provinces have enacted their own child support legislation for non-married parents. In most cases it's identical to the federal legislation so that the same basic provisions cover children in common law relationships and marriages in the same way. There are some cases where a province has enacted its own Guidelines rather than just copying the federal Guidelines, but the principles are the same.

- Child support is not tax deductible from the income of the payor nor includible in the income of the recipient for income tax purposes.

- It's paid whether or not the payor sees the children and is payable if the payor has decided to have nothing to do with the children or if the recipient is blocking contact with the children. Child support and access are two separate and different issues and one doesn't affect the other.

- In addition to the table amount of child support, the payor is also responsible to contribute to certain special expenses for the children although this is to be shared with the residential parent such as day-care and uninsured medical expenses.
Child Support

- You don’t have to be a biological parent to be responsible for paying child support.

- You’ll be responsible for paying child support even if you had - or have - no real social relationship with either the mother or the child.

- You’re just as responsible for child support if the child is born following a one night stand or a casual short-term relationship, as though it was born during a long-term relationship or a marriage.

- Child support is to be paid in the same amount whether or not you want any ongoing relationship with the child or whether or not the child or the mother wants you to have any relationship.

- The amount set out in the Guidelines will need to be paid even though it is more than the actual cost to raise the child or children.

- Basically the court has no option but to follow the Guidelines unless it can be proven that to do so would be unjust or inappropriate, in which case some other arrangements are made for the benefit of the children such that a payment different from the Guideline amount is appropriate. (See below for the 3 specific instances when the Table amount of the Guidelines won’t apply.)

**Determining Income for Child Support Payments**

The Child Support Guidelines are based on the total income of the payor and the number of children to be supported. They were enacted so that anyone could look at the Table for their province and see how much is to be paid for the number of children they’re supporting based upon their particular income.
If your situation is clear, you can save a lot of expense by paying the appropriate amount without requiring the recipient parent to go to court. Because the Guidelines are based upon the payor's total income, the amount of child support paid may be reviewed each year and the payor should provide the recipient with his or her income tax return so everyone knows the right amount to be paid.

If you have to go to court, the payor will be required to produce his or her most recent tax returns and notices of assessment for the last three years, so it may as well be done voluntarily at the outset. You aren't subject to the cost of living or consumer price index changes for child support, but the amount should change yearly based upon the changes in the payor's total income if the parties agree to an annual review. Otherwise the recipient must show a change in circumstances to obtain an increase in support.

For practical purposes, and in the vast majority of cases, the amount of income is determined by looking at line 150 of the payor's income tax return, which is his or her Total Income for tax purposes. There is a Schedule in the Guidelines which allows for various items to be adjusted from that figure, such as employment expenses and other Income Tax Act items. As well, the Guidelines are clear that you only use the Total Income figure as a starting point and aren't restricted to the income as declared on the income tax return. Just because your proper income for tax purposes is $35,000, the court can set your income at a higher or lower figure if that is more appropriate.

The issue is to set the payor's income at the amount that would be available for the family, if it was still together. In those cases the court will look at the real income available. If the payor has a stream of non-declared income of, for example, $10,000 from a part-time job on weekends, the court would add that to the declared income and also add a "gross-up" figure. This is because the Guidelines are set at before-tax income levels and assume that taxes will have to be paid.
Chapter 7

Child Support

If you have an income upon which you’re not paying taxes, you need to figure out what total declared income you’d need to end up with the after-tax amount you have.

There are cases when the court will “deem” a person to have an income, which may be quite different from the declared income on the income tax return. A parent, for example, might have substantial assets which are cashed in and used to supplement the employment income so that they can live a much fancier life than would be the case of someone with only the same employment income.

A person could be cash rich and income poor and the court might hold that they are underutilizing their assets. Or a person might be underemployed, deliberately working fewer hours or at a lesser paying job than the court finds appropriate. In these cases the support payor will be ordered to pay support in an amount which the courts will “impute” to the payor, or “deem” the payor to have.

When The Guidelines Don’t Apply

The Guidelines are presumptive – that is, they are presumed to apply unless you fall within one of 3 circumstances. In those cases the court can order that the payments be more or less than the Guidelines state. The 3 possible exceptions are:

- If the child is over the age of majority (usually 18 years old) and the Guidelines amount aren’t appropriate. This generally deals with older children taking post-secondary education.

- If the support payor earns over $150,000 per year and sticking with the Table amount would be inappropriate.
The courts have held that incomes of up to, and over, $1,000,000 per year aren't far enough over $150,000 to allow the payor to get off the Table payments so this really isn't an issue for most people. (Only 1% of Canadians declare an income of over $1,000,000 per year.)

Cases decided by the courts have made it clear that the amount of child support shown by the Tables won't be reduced even if the amount ordered is more than the actual cost of raising the children. Cases have ordered payments of $20,000 per month, non-taxable, even though this is more than most people would consider necessary or appropriate to support a single infant child.

Undue Hardship

The payor can claim to have the payment reduced because paying the Table amount results in an undue hardship to him or her or the recipient can claim to have the Table amount increased because receiving only that amount creates an undue hardship for him or her. The cases on this are pretty clear that it is very difficult to convince the court that there is an undue hardship such that the child support will be varied.

One of the things the Guidelines require when dealing with undue hardship cases is to look at the total number of adults and children in the household of each parent and the total incomes in each family. The courts also look at the standard of living in each household and compare the two. This is not something you should lightly raise and certainly not without consulting with an experienced family law lawyer.

Special or Extraordinary Expenses

The Guidelines set out a variety of special or extraordinary expenses which the court has the discretion to order to be paid in addition to the amount of child support set out in the Tables.
Chapter 7

Child Support

These expenses aren’t automatic but when ordered by the court they are to be shared between the parents and the child, as discussed in the next section. These payments are often referred to as “add-ons”, “s. 7 expenses”, or “extraordinary expenses”.

Section 7 of the Guidelines begins by stating that when a court orders child support it

“may, on either spouse’s request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child’s best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and the family’s spending pattern prior to the separation:

(a) child care expenses incurred as a result of the custodial parent’s employment, illness, disability or education or training for employment;
(b) that portion of the medical and dental insurance premiums attributable to the child;
(c) health-related expenses that exceed insurance reimbursement by at least $100 annually per illness or event, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
(d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child’s particular needs;
(e) expenses for post-secondary education; and
(f) extraordinary expenses for extracurricular activities.
Chapter 7

Child Support

Some of the expenses in section 7 are pretty straightforward, and others aren’t. The courts are still having difficulty figuring out just what sort of expenses are “extraordinary expenses for extracurricular activities” as compared with “ordinary expenses for extracurricular activities”. Most residential parents feel that the hockey expenses or other sport-related expenses for the children should be regarded as an add-on because these can become quite expensive and shouldn’t have to be covered by the basic child support payment.

But there are courts, which have said that expenses for house leagues are “ordinary” and should be included as part of the basic Table contribution, although expenses for being on a rep team might be regarded as “extraordinary” and should be treated as an add-on. Pizza day and regular school trips might not be treated as “extraordinary expenses for primary or secondary school education” but maybe a special school trip out of town for overnight might be regarded as an add-on. Indeed, depending upon the province in which you live the courts may look at the nature of the expense itself to see if it is “extraordinary” or might look at the incomes of the family and decide if it is “extraordinary” for that family with their resources.

In the first case the expense would be an add-on regardless as to the income and financial situation of the parents and in the second case an expense might be an add-on for parents at a lower economic income level but not for parents with a higher income. If you find this confusing, so do lawyers and you are strongly advised to see an experienced family law lawyer in your particular area to see how all of this applies to you.

Separate from the whole question of whether the particular expense is one covered by the list set out in section 7, is the first question people should ask – does section 7 even apply to me? To figure that out you need to look at the introduction to the list. It states a number of things, which have to be established before the court gets to make the order.
(a) First, the court making a child support order *may* provide for an amount. It’s discretionary and a court has the choice not to make an order for contribution to one of the listed items.

(b) Then the wording goes on to say that the order can be for all “or any portion” of the expense. If the court’s going to make an order, it might only be for a part of the expense.

(c) Before an order will be made the court then has to take into account the “necessity of the expense in relation to the child’s best interests”. What’s in the best interests of one child may not be in the best interests of another child. This is a very wide reaching concern for which the court may require considerable evidence if the parties aren’t agreed.

(d) The court must then look at “the reasonableness” of the expense in relation to “the means of the spouses and those of the child”. Maybe it is in the best interests of this child to take special gymnastic lessons, but it might not be “reasonable” to hire an Olympic coach. Maybe the expense can be said to be more “reasonable” if the child is able to contribute to the expense himself or herself through fundraising, etc. Again, what’s reasonable for one family might not be for another family.

(e) Lastly, the court must look at all of these considerations in light “of the family’s spending pattern prior to the separation.” This might mean that if the family scraped together enough money each summer to send the child to summer camp, or for hockey or soccer equipment, before they separated, the payor might be ordered to contribute towards that expenses after the separation.
Chapter 6  
Child Support

Special or Extraordinary Expenses – How Are They Paid For?
The guiding principle with respect to section 7 add-on expenses is that it’s to be shared by the spouses in proportion to their respective incomes after deducting the contribution, if any, from the child.

Once you’ve got a special or extraordinary expense, you need to establish the income of both the payor and the recipient and then figure out the proportion which each person’s income bears to their combined incomes. That gives you the percentage, which the payor will pay to the recipient. If the payor earns $60,000 and the recipient earns $40,000 then the payor has 60% of the combined incomes and will pay for 60% of the add-ons, unless, the child can or should be contributing.

This may mean that a child attending post-secondary school should be applying for student grants or loans so that he or she is contributing to the expense. Or it may mean that if the high school band is planning a trip the child should not expect the parents to cover the full cost but should be working to help raise money. (There are cases which say that a university student receiving support should be working to help out with the expense and other cases which say that he or she shouldn’t.)

There’s also a provision which states that in working out the share of the parties towards one of these expenses, you must take into consideration any “subsidies, benefits or income tax deductions or credits relating to the expense”. That means that if the mother is claiming the full cost of day-care as a deduction in her income taxes, the amount of the taxes she saves needs to be calculated and deducted from the day-care cost to be shared by the father. In that way, he’s only paying his share of the actual, after-tax, cost to the mother.
Split Custody

Split custody doesn’t really have anything to do with custody. It describes the situation where one or more of the children are with each parent. In that case there is normally a set-off in child support payments.

You calculate how much the Table says the mother would pay the father for the number of children living with him based upon her income, and then how much the father would pay the mother for the number of children living with her based upon his income. Then you set off the lesser amount from the larger amount and the person who would be paying more pays the difference to the other parent. In split custody cases you stick with the Guidelines but do a set-off calculation.

Shared Custody

Shared custody also doesn’t have anything to do with actual custody. This is a term in the Guidelines dealing with the situation in which the child is with each parent for 40% of the time or more. In this situation you don’t do a set-off, but try to calculate the proper payment as set out in the Guidelines.

This is not as simple as it seems. Many courts are going through the exercise of setting out the relevant principles and then coming up with a figure that is around what would otherwise be paid if the child was with the one parent for over 60% of the time with something deducted because that’s not the case. The law here is not yet clear and the results will differ from province to province and area to area within a province. In one case the court reached a conclusion by looking at what the father would have had to pay if the child was with him for just 39% of the time (the full Table amount) and then deducted a small amount saying for the extra time.
For example if the child was within for 45% of the time it was only for 5% more than 40% and therefore the Table amount should only be reduced by 5%.

What If You’re Not The Biological Parent?
You can still be liable for child support even though you’re not the biological parent if, at any time, you stepped into, or accepted being regarded as, a parent for a child or stood in the place of a parent. This can happen even though the child knows there is a biological parent around and may even occur while that parent is seeing the child. In this case the court can order child support to be paid in an amount which the court regards as appropriate, having regard to the Guidelines and any other parent’s legal duty to support a child. There have been cases of a mother obtaining an order for child support from someone with whom she had lived on the grounds that he stood in the place of a parent for the child and at the same time obtained child support from the biological father.

Children Over the Age of Majority
This is the one area where the courts frequently make orders different from the table amount. Usually this involves a child in a post-secondary educational or training institution. Different courts in various provinces have taken different approaches. Sometimes there will be an order of the table amounts for the months the child isn’t in school and the parents split the costs of the schooling (including tuition, books, supplies, room and board, travel etc.) in accordance with their respective incomes. Other times the court will make a different sort of order. This is an area of the Guidelines still awaiting clarity and predictability.
The following is a list of some relevant documents that you will want to collect and maintain for use in dealing with the financial aspects of your separation or divorce. The more material you gather the easier it will be for your lawyer to assist you in determining your obligations and your rights. This is extremely important when it comes to the division of your assets or their value. (See Chapter 1). Depending on your particular situation, not all of the items listed will be required.

**Assets and Liabilities**
- A list of all assets and liabilities owned and owed by you and your spouse showing whether the items were acquired prior to or during the marriage

**Personal Income Tax Returns**
- For the past three years with Notice of Assessment and all attachments.

**Business Income Tax Returns**
- Note that partnership and sole proprietorship business information is declared in your personal income tax return but corporations file separate income tax returns.

**Business Financial Statements**
- Balance Sheets
- Income Statements

**Records Regarding any Income Received**
- Your regular employment income
- Investment properties - rental/lease agreements
- Stock dividends etc.
Records Regarding Monthly Living Expenses
- Rental Lease
- Mortgage and property tax payment receipts
- Grocery receipts
- Entertainment expenses
- Utility bills such as, telephone, television cable bills
- Medical and dental expenses
- Laundry and cleaning
- Clothes
- Insurance premiums
- Miscellaneous household items
- Incidents

Documents Relating to Previous Divorce Settlements
- Divorce judgements
- Court orders for support or access arrangements

Statements or Documents Pertaining to:
- Savings and/or Chequing accounts
- Certificates of Deposit
- Mutual Funds
- Stock Certificates
- Safety Deposit Box inventory
- Brokerage Firm accounts
- Collections (gold, coins, stamps, etc.)
- Titles (cars, trucks, motorcycles, boats, etc.)
Appendix

Documents Checklist

Insurance Policies
♦ Life, Automobile, Homeowner's
♦ Liability, Disability, Renters, Health (parents & children)

Employee/Group Insurance Benefits
♦ Medical, Life, Disability

Documents Relating to Other Benefits
♦ Expense accounts
♦ Automobile allowance
♦ Sick pay
♦ Stock options
♦ Travel allowances
♦ Bonuses, Deferred compensation
♦ Severance pay
♦ Vacation pay

Registered Retirement Savings Plans, etc., Records
♦ RRSPs
♦ Money purchase plans
♦ Employee Stock Option plans
♦ Tax Sheltered Annuities
♦ Profit sharing plans
♦ Defined benefit plans
Appendix

Real Estate Records (For all properties owned)
- Original Deed and Mortgage
- Purchase Agreement
- Residential / Commercial Appraisal Reports
- Rentel / Lease Agreements

Information on Debts and Liabilities
- Promissory notes
- Personal loan documents
- Secured loan documents
- Credit Card accounts
- Equity Credit Line accounts
- Attorney fees

Household Furniture and Antiques - Any Special Item Not Covered Above

If you can't produce the required documentation, do the best you can. Everything needs to be listed even if you can't locate specific information about that item. Sometimes this is covered in an affidavit in which you set out your information to the best of your knowledge and swear it to be true.

The Point: Your quality of life after separation or divorce will be determined by your understanding of the issues and processes.
# Table of Contents

Acknowledgements.................................................................................................................. 2  
Notice to the Reader.................................................................................................................... 3  
**Chapter 1**  
Case Studies................................................................................................................................. 4  
Mike’s Story.................................................................................................................................. 5  
Case Study Summaries.................................................................................................................. 7  
**Chapter 2**  
Identify the Challenges................................................................................................................. 10  
Acting on Knowledge.................................................................................................................... 11  
Knowing Who to Trust.................................................................................................................. 12  
Self-help Groups.......................................................................................................................... 14  
What Are My Options.................................................................................................................. 17  
Develop an Action Plan................................................................................................................. 18  
**Chapter 4**  
Be Proactive – Take Action.......................................................................................................... 22  
**Chapter 5**  
Leaving Home............................................................................................................................... 24  
Planning What You’re Going To Do............................................................................................... 25  
Setting Out Your Intentions In Writing......................................................................................... 25  
**Chapter 6**  
Separation..................................................................................................................................... 28  
Separation For the Purpose of Divorce......................................................................................... 29  
Separation For Common Law Relationships.............................................................................. 30  
The Separation Agreement............................................................................................................ 33  
Negotiating the Separation Agreement.......................................................................................... 35  
Negotiating With A “Bully”.............................................................................................................. 37  
How To Get Ready to Negotiate Your Separation Agreement...................................................... 42  
Getting On With Your Life............................................................................................................. 45  
**Chapter 7**  
Mediation.................................................................................................................................... 47  
Why Mediate................................................................................................................................ 47  
Working Through The Issues....................................................................................................... 53  
Choosing A Mediator.................................................................................................................... 56  
**Chapter 8**  
Arbitration................................................................................................................................... 60
Acknowledgement

The Family Law Centre gratefully acknowledges and thanks Joel Miller for the preparation and writing of this booklet and Wayne Nesbeth for much of the original material upon which this series of booklets is based.

Joel Miller has been a practising family law lawyer for over 30 years and is currently a partner in the Toronto, Ontario, law firm of Ricketts, Harris and Chair of the Ricketts, Harris Family Law Practice Group. He has taught Family Law for many years in the Bar Admission Course of the Law Society of Upper Canada and is on the Executive and Steering Committee of the Collaborative Family Law Association of Ontario. He is a frequent speaker at various groups about family law issues and has been an invited speaker several times at the National Family Law Program, Canada's premier family law conference for judges and practitioners. Mr. Miller is on the Advisory Board of Divorce Magazine has been often interviewed on TV and radio as well as in newspapers and magazines. He can be reached at:

Joel Miller
181 University Avenue, Suite 806
Toronto, Ontario
Canada M5H 2X7
Tel: 416 361-9000  Fax: 416 364-1657
Email: jgm@rickettsandharris.com

© 2001, Family law centre
All rights reserved
Notice to the reader: This booklet provides topical information of a general nature relating to family law matters in Canada and is not intended to provide legal advice. If legal advice or other expert assistance is required, the services of an experienced family law lawyer should be sought. The publishers, authors, and editors of the material in this booklet aren’t liable or responsible to any party for any loss or damage caused or alleged to be caused by the use of the information found here. This booklet is to help people understand various aspects of family law in a general way without being specific to any particular person or fact situation. If you’ve got a family law problem – see an experienced family law lawyer.

If you’re thinking about separating or divorcing, or are already separated, we strongly recommend that you get proper legal advice from an experienced family law lawyer. That’s the only way you can be sure that the steps you take with the information you get here - and elsewhere - will be appropriate for you.

Knowledge is power – but information is only of value when you know how to use it. In family law, more than in most areas of law, the final decision reached by a court is dependant upon the particular facts of each case and how they are brought out. The law is very important, but it will affect different people differently because the facts of each case are unique.

So read the information here, check out other sources of information, become as familiar as you can with the law as it affects you – and then consult a family law lawyer in your own area of Canada. Many of the laws differ from province to province or are interpreted or dealt with differently across the country.

Throughout these booklets we will use the words “spouse” and “partner” as well as “relationship” and “marriage” interchangeably because most of what is set out deals with people whether or not they are in legal marriages or common law marriages. There are certain times when there is a clear distinction between these relationships and the context of the discussion will make that clear. We’ll also refer to “husband” and “wife” whether the parties are in a legal or common law marriage.
Chapter 1

Case Studies

Tom’s Story
Tom spent the night at a male friend’s home after a disagreement with his wife, Joanne. When he arrived home the next day the locks were changed. Joanne was inside but would not answer the door or phone.

Tom called the police. Once they arrived, they convinced Joanne to open the door. A heated discussion between Tom and Joanne ensued but there were no threats made by either party and it was clear that there were people committed to act reasonably, although Joanne definitely didn’t want Tom back into the house. The officers, one male the other female, stated that he (Tom) should stay with a friend for a while. The intent was noble, but Tom was out in the cold with only a duffel bag. Tom unknowingly gave up his rights to remain in the home by acting on the suggestion of the officers.

Tom later found out that he didn’t have to leave home. Had he known that at the time, he could have thanked the officers, and calmly asked them to leave. The officers were only trying to help and Tom believed he was doing the right thing. Since Tom had called the police and there was no fear of harm, he didn’t have to leave his home.

One thing led to another. The way this situation was handled cost Tom more than he could ever have imagined. Joanne refused him his belongings. More importantly, she destroyed all of his identification and his financial records for a small home based business. And what was most hurtful to Tom, was the fact that he was effectively cut out of his 2-year-old daughter’s life for a number of years.
Chapter 1

Mike's Story
Mike and Pamela have been married for 7 years. They have a son and a daughter, ages 6 and 3. Five years into the marriage, both spouses discussed the fact that there were serious problems in their relationship. However, they decided to stay together for the sake of the children and even tried marriage counselling.

Mike was now convinced that separation would be the best option for everyone involved but was reluctant to talk with Pamela about this until he had some more information. He felt that since she was a law clerk, he would be at a disadvantage if he remained unaware of his rights. Mike contacted Family Law Centre and took advantage of the free consultation service offered by one of the lawyers on the referral list they gave him. As well, he checked around on the internet and spoke with people he knew who had gone through separation and divorce. He went to a talk offered by the Family Services Agency in his area so he could get a better understanding of how all of this could affect his children.

Then Mike drew up a list of the things he was concerned about and how he wanted to deal with them - as well, lists showing the family's assets and liabilities and a budget for how he, Pamela, and the children would be able to live if they separated. He made sure he was organized and had assembled all of the relevant information.

Now that he had a basic understanding of his rights and obligations, or at least had a list of questions to clarify his situation, he retained an experienced family law lawyer for a preliminary interview.
Chapter 1

He felt he was at the point where he would be better able to understand the information he would be getting and to make effective decisions about the options available to him. He was right.

By the time Mike met with his lawyer he had a pretty good idea of the questions to ask and was able to focus more clearly on the information he received and the options the lawyer gave to him.

Because he was organized, and able to give the lawyer a list of the concerns he had, the lawyer was able to go directly to the main matters without having to take time to get the details first. She even looked at the information provided by Mike and pointed out an area he had entirely overlooked. She zeroed in on the key issues and was able to provide meaningful information and advise within a short period of time.

As a result, the time spent with the lawyer to get to the information Mike needed was significantly reduced and the meeting was more productive and valuable than might otherwise have been the case. This cost Mike less money in legal fees and gave him greater value. More than that, Mike was able to develop confidence in the lawyer as he saw how effectively she was able to deal with matters based upon the summaries and information he was providing.

One of the things Mike saw, once he had a good understanding of all of the matters involved, was that some of his objectives weren’t realistic and that he’d have to compromise in certain areas if he wanted to resolve matters. As he went over the options available to him he began to look at each of them from Pamela’s perspective as well as from his own, and from the perspective of what would be best for the children.
Chapter 1

By looking at Pamela’s interests as well as his own, he saw that there were ways to allow each of them to work out their separation so they could each benefit. He realized that they each needed to get past the idea of who was at fault for what and what each needed to do to “win” so that they could establish solutions that accommodated each party’s interests and concerns.

He was able to take the next step towards separation with confidence that he and Pamela could work things out reasonably if he made it clear that they could separate without having to fight and go to court.

The separation between Mike and Pamela was amicable. Pamela was relieved that Mike was offering a way to deal with their situation which wasn’t confrontational and she appreciated that he came to the discussions with some understanding of her concerns and interests and how they could be fairly dealt with. She saw that he was able to put much of his hurt and frustration aside and address the issues they needed to resolve with respect for her and her position. This made it easier for Pamela to compromise on certain issues as part of the mutual process they were engaged in.

The approach taken by Mike and accepted by Pamela created an environment in which the two of them were able to negotiate fair and appropriate arrangements regarding child support, shared parenting, and division of assets. In addition, they avoided the costly aggravation of a bitter court battle.

Case Study Summaries

The difference between Tom’s story and Mike’s is knowledge! Mike was aware of his personal situation and had the wisdom to ask for help.
Chapter 1  Case Studies

By taking advantage of the resources available and by taking the time to organize his thoughts and his information, Mike saved himself a lot of money in legal fees and opened himself to understand - and appreciate - a wider range of options when he got the information and advice he needed.

When we know what we're doing and where we're going, when we learn how to distinguish between our first reactions and our true interests, and when we're able to identify realistic objectives, we're much better able to move towards a resolution of the issues we are facing and get on with the rest of our life.

And when we can also realistically identify and understand the concerns and interests of the other person in our relationship so that we aren't making plans in a vacuum, we're even that much more better able to move towards a resolution of a family law problem.

Tom was not proactive, and he let circumstances carry him along until his situation became a crisis before seeking help. Mike realized that the relationship wasn't working and that he needed to understand more about his situation before beginning to work it out. Mike strengthened himself by acquiring knowledge and ended up creating a better solution for him, his wife and their children.

The "stories" set out above are fictional, but they represent situations experienced in some form or other by thousands of separating couples. While we used stories from the male's point of view, the situation is really gender neutral and similar examples could easily have been created reversing the roles.
The key thing is to appreciate that whether you are the husband or the wife, whether you start with a men’s rights or women’s rights perspective, the advice set out above applies equally: don’t sit back and let events dictate the course of your life – invest in your future now by getting the information you need to understand where you are and how you can best get to where you want to be.

Getting the knowledge and experience you need so you can make informed decisions isn’t a “male” thing or a “female” thing. It’s what any of us should do to protect ourselves and our children, regardless as to whether we’re a man or a woman.
Chapter 2

Identify the Challenges

The Three Challenges – To Watch Out For

Challenge 1: Focussing on your true interests and realistic objectives

Firstly you need to realize that acting out of anger or revenge only brings short term satisfaction, if any, and may seriously damage your position.

This presents the challenge of getting past that initial emotional reaction to a place where you’re looking at what your true interests are, what you most seriously want to achieve, and the realistic objectives you can set for yourself to get them. The key question to ask yourself at all stages of the family law process is – what do I most want out of this and how can I best help myself get it.

Allowing yourself to get involved in the game of not giving up something because that’s what the other side wants - or insisting on something because it will annoy or upset the other person - just takes you off your target and puts you into playing the other person’s game. In identifying your true objectives, there’s little point if you aren’t being realistic. You can ask yourself how realistic your objectives are by considering these things:

Whatever the reason, the relationship between you and your partner or spouse hasn’t worked out and you need to get on with your life. Set goals or objectives which allow that to happen. Don’t go about setting goals which you know won’t be acceptable to the other side because maybe that’s just a way of you keeping some sort of relationship going between you and them – even if it’s an unhealthy and unproductive relationship. It’s just like the child so anxious to get his or her parents’, or teacher’s, attention that they break a window or do something bad.
Chapter 2  Identify the Challenges

At least they’ve created a situation in which their parents or teacher knows they’re around, even if the reaction is negative. So be sure you aren’t doing the same thing. Don’t set goals you know are designed primarily to keep a relationship, no matter how hostile, going.

We live in the real world and money is important. Sometimes the other person has the resources to resist or oppose us getting the goals we want and we don’t. so accept that and don’t blow your budget in a game of who can outspend the other. If this is a battle you can’t fund, don’t allow yourself to get caught in it.

We also live in a world where we aren’t always the person making the decisions which affect our lives. Ask yourself – in as objective a manner as possible – how might a judge dealing with a busy and crowded court list see the situation you’re in if he or she only has a very short amount of time to deal with it. Will the judge see you as being greedy or generous? Will you seem to be the person seeking to cut the other parent out of your child’s life or the one trying to be as sensitive as possible to the fact that children basically love each of their parents even though the parents no longer love each other. And what’s the law dealing with your situation. Maybe you think your position seems fair and just to you, but is it something seen that way by the courts in your area and as the way they interpret and apply the law.

**Challenge 2: Acting On Knowledge – Not Emotion**

The second challenge to deal with is to be sure you equip yourself with appropriate information as to your legal rights and obligations so that you can act in a way most designed to get you want you want. With realistic knowledge, you don’t go about waking out positions that are destined to fail.
With knowledge you can avoid setting yourself up for defeat. Keep in mind that if you and your spouse can’t resolve matters on your own – or with the help of outside professionals – you may end up in court. Judges are stuck with applying the law as set out in legislation and as interpreted by higher courts and the judges in your area. If you want some result which simply isn’t what a court can – or will – grant, then insisting upon it is simply unrealistic and gives the other side a tool by which to manipulate you.

Being aware of this helps you avoid frustration and anger at your spouse, your lawyer, the legal system, and the world at large. It avoids creating huge legal fees for you and your spouse when the money could be better spent on other things. And it prevents you getting so angry and focused on the wrong things that you miss the legitimate opportunities for success in your particular circumstances.

This challenge is to know when you are within your legal rights and how to conduct yourself accordingly. Act in the way most helpful to bringing you the success you deserve.

**Challenge 3: Knowing Whom To Trust**

You may or may not have close family or friends who know about your situation. They may be concerned about you – even love you. But be careful about the advice you accept from them. Often we give our friends the advice we think they want to hear, rather than the advice they should hear. It takes courage and skill to tell someone you know (or love) advice which you know they don’t want to hear or which suggests that they’re wrong in the way they see things. We want to commiserate with our friends, not criticise them.
Chapter 2

Identify the Challenges

Why would you want to tell your friend unpleasant things, especially at a time when he or she is already hurting? If you feel this way about your friends, why aren’t they just as likely to feel that way towards you? As a result, the advice received from this “inner circle”, while very well-meaning, is often the worst advice you can get.

Sometimes this advice fuels the negative things you’re feeling and only serves to increase the level of hostility between you and the other party. It gets you upset and angry or questions why you aren’t angry enough. It focuses on the wrongs done to you and how you can “get back”.

That kind of advice can put you into a fighting mood without asking if that’s really the best way for you to get the results you want. It makes compromise look like “weakness” or “giving in” so when you meet with your lawyer you may end up giving certain instructions without considering all of your options.

In other cases the advice may be designed to soothe your troubled spirit and be intended to get you out of the legal hassles as swiftly as possible. There are times when the advice requires that you give up things to which you or your children may be entitled and may cause you to back down from pressing for what’s right. Sometimes your friends want to protect you and to help you heal swiftly such that their advice may result in you accepting less (or giving up more) access with the children than is reasonable or offering more (or accepting less) spousal support than is appropriate.

The challenge here is to be objective and filter out the advice given to make you feel good or feel angry from the advice which is designed to help you get a better understanding of the core issues.
Chapter 2

Identify the Challenges

Self-help Groups

Sometimes we seek advice from self-help groups. There are usually more of these available for women in our communities than for men. But if you look hard enough, there’s usually a self-help group for you in or near where you live. These groups gather together people who are experiencing, or have already gone through, the same situation we’re experiencing. There are difficulties here and the challenge is not to assume that your situation is the same as those of the others.

Often these groups attract people whose experience is at the more extreme end of the range and your situation may be more typical. The trick is to be able to distinguish your situation from theirs. Remember that just because this particular group may have several people with a shared experience, you may be seeing people in the 5% of separating couples who have that situation. Often these groups can become quite militant because of the injustices their members have experienced. But your situation may not be best resolved by becoming militant about a “cause”.

This isn’t to say that these groups don’t have value, but it is to say that you and your situation might not be suited for the responses that more extreme situations call for. Listen and learn from the experiences of these people. But decide for yourself if your particular situation will be improved by following the paths of those in the group or if their experience shows you things you should avoid rather than adopt. The challenge here is not to allow yourself to become a statistic for someone else’s cause but to draw lessons from their experience.
Local professionals

There are times when you can seek the advice of professionals who may be available to you in your area. That may be the family doctor or a clergy person you know or who has been recommended to you. Sometimes your health insurance plan at work provides for consultations with a psychologist or family therapist. Maybe there’s a person you know (who may or may not know the people involved) whose views you respect. Always be open to seeing who in your community can offer you some wise advice.

Other Separated People

Sometimes there are people you know, or know of, who have gone through separation and divorce and it might be helpful to speak with them. It’s likely that when you look and ask around there are more people you know who are separated than you thought. They have experiences and information relevant to their situation, but often you can learn a lot by asking them to share it with you. Sometimes they are the very best people to talk with about certain things which may be embarrassing to raise with your friends and family, or your clergyman. When is it okay to begin dating? How to spend time at the other person’s place without upsetting your children or your separated spouse? How they introduced their children to a new person in their lives and how they helped their new partner accept the frustrations still being caused by their former partner, etc., etc.

An Experienced Family Law Lawyer

In looking around for people whose advice to trust, don’t overlook the advice you can get from an experienced family law lawyer whose professional life includes dealing with people in the same – or similar – situation as you. Be careful to choose a lawyer with experience in this field and then be frank and candid with him or her. You’re paying for their time so you may as well get the benefit of their experience.
Chapter 2

Identify the Challenges

The challenge in finding advice to follow is that you must be able to describe your situation honestly and candidly, without trying to make yourself look like the good guy or your former spouse as the bad guy. That way the advice will be directed to your actual situation, and you’ll be sufficiently objective to see if the advice given fits your situation and will move you towards or away from a reasonable resolution.

At all times you must keep in mind the interests of the other person as well as your own and be look to see how the advice given, if followed, will provide for a resolution both parties can live with.

And lastly the challenge here is to be suspicious of advice that pushes you to court. Most people involved in the field of separation and divorce, including family law lawyers, recognize that any solution which the parties reach on their own through negotiation will likely be better than one imposed on them by the court.

Going to court is an expensive process in many ways. It’s expensive emotionally as well as financially. It has an obvious impact on your wallet. But it also impacts your relationship with the people you love, your children, and the people you work with. There are lots of cases where people find that a court case affects the way they sleep and eat and can bring about depression. Going to court may be the only option available to you, but it is rarely the best option.

Unique to You

The options that make sense for you, depends on your particular case. Each relationship and marriage is unique and only you know what it will take to allow that relationship to end on a civilized note.
Chapter 3

What Are My Options?

We've talked about the advantage of joining support groups and talking with people who have gone through their own separation experience, but you must always remember that their stories and experiences are different from yours. While you should listen to them in order to learn from their experience, you shouldn't think that duplicating their conduct is wise for you.

I'm Tapped Out

If you're financially strapped, there may be places to turn to for assistance. Consider using a paralegal service if there is one in your area and you don't have any issues dealing with children, child or spousal support, or division of property. Question these people to see what experience they have. For the most part, they're able to take care of the paperwork and process a straightforward divorce. As well, experienced paralegals may also be able to help you in non-complicated issues relating to custody, access or child support and spousal support, whether you're the person seeking it or opposing it.

But you need to be really careful not to think that you're serving yourself best by seeking the lowest cost representation. A good paralegal will tell you when the situation is a bit more complicated than he or she should be handling. It's much like a nurse and a doctor. There are lots of things that doctors do that nurses can also do. But there's a point at which you need a qualified doctor, no matter how well intentioned the nurse is. Even if your situation is a simple one, consult with a lawyer – even if it's only to be sure that you're not harming yourself by staying win the para-legal.

Most law societies and legal information services have a free service available for you to call to get in touch with a lawyer who will offer you a free consultation.
Check with them if this is what you’re looking for. As well, most areas have some form of legal aid or government sponsored legal assistance plan to help people with legal issues. Be sure to look into this and see if you qualify for that kind of aid.

If you’re going to be retaining the services of a lawyer, you’ll need to pay her or him. You don’t help yourself by getting started with a lawyer you can’t afford for the long haul just because you can scrape together the initial retainer. So ask the lawyer about fees and how it works before you get started. See if there may be family members or friends who will advance you money for a lawyer to be paid out of the proceeds you receive at the end of the process. If you aren’t going to be getting any proceeds, see if these people will trust you enough to lend you the money to be paid back later. See if any of these people will act as guarantors at the bank so that you can borrow money and then pay back the bank.

If you can’t afford a lawyer, check out the variety of free information on the Family Law Centre web site at http://www.familylawcentre.com which might offer you assistance and the other sections there which might offer basic information. This can provide quick information regarding your situation.

**Develop an Action Plan**

Men and women have the same rights under the Divorce Act and other provincial legislation, although there certainly are men’s and women’s groups who each feel the set-up is unfair to them. Don’t settle for complaining about the system. Use it to work for you. You have the right to a fair and timely separation and divorce. And you have a right in the way your post-separation life will work and the upbringing of your children. Exercise your rights or lose them.
Chapter 3

What Are My Options?

They say, all is fair in love and war. So be careful. Some people regard a separation or divorce as a sort of war and wage warfare over almost every point. That's not a smart thing to do, but not everyone acts in the smartest way in these situations.

The better you know your legal rights and obligations, the better off you are to protect yourself in this situation. And the more you know about separating after the breakdown of your relationship, the better able you are to find a way to do it sensibly. If everything you try to work things out reasonably fails, at least you'll have the knowledge that you did what you could to avoid going to court and a record to show the court how reasonable you were.

Developing a plan and organizing yourself to support that plan is important. In many cases your spouse already has a plan, so you should too. You'll need to focus on what you can do, despite what your spouse has done. Your main concern will be to survive the breakup without losing everything you have. Plus you'll want a say in the upbringing of your children. Make a list of questions and concerns so that you can either research things for yourself or get the necessary legal advice you need to become more aware of your rights and options.

Consider the following:

♦ What if your ex-spouse was to remarry?
♦ What if the children want to live with you? ?
♦ What if your ex-spouse wants to relocate to another town, city or country with the children?
If you plan to make your separation or divorce as amicable as possible, decide what you’re willing to do to create that situation. You should also decide and plan for your immediate and future living arrangements.

Let’s say you move out of the matrimonial home and there are children involved. If you want them to visit you, get a decent place, something appropriate for them. Set up a workable parenting plan. Be flexible and be open to new ideas in case the circumstances change. Include in your plan, any other issues that are unique to your situation. Use your plan as a guide to help keep you focused and on track.

Make sure you create a financial plan to help you make concrete decisions about the future. Don’t waste your money on lawyers, unless you know what you’re getting for your buck. Do the things you can do for yourself to save money and fees. Look at your resources and look at your needs. Set yourself up to have a good idea of what you need for support or what you can afford to pay for support. Be well prepared when it comes to protecting the rights of your children. You need to be proactive and persistent at each stage.

To Act or Not To Act? - Do What’s Best For You

It’s never wise to raise your voice or hand in anger against your spouse or children. Try to stay calm and not be overwhelmed by the emotionally charged nature of your situation. This is much easier said than done, but only you can protect your rights. So don’t be a sucker and do something which gives you a disadvantage to start with. Remember whose team you’re on.

Sometimes being proactive means not acting at all by walking away from, or avoiding, a situation.
Don’t do something that helps the other side and hurts you just because you acted without thinking. There are times when not reacting, and not winning the argument, is the best thing you can do to help yourself.

Remember that your circumstances will play a big role in all your decisions from here on in. When you sense things are beginning to slide out of control, step back and get the information and knowledge you need to help yourself before you act. Being proactive means acting only when you have the relevant knowledge to act effectively.

Stay Put
Leaving home will likely create a situation that can rapidly become a new “status quo” to your disadvantage, particularly if there are children. Unless there’s a situation involving the police or abuse, it’s generally the best advice to stay put until you’ve had the chance to obtain good legal advice. As a result you should be getting proper legal advice sooner rather than later so you can be sure to know what the best thing is for you to do.
Chapter 4  
Be Proactive - Take Action

Remember that by staying in the house you won’t be giving up a “bargaining chip” which might be useful to you later. Usually a person’s bargaining position is weakened if they’re already out of the house. Knowing this is useful for those spouses who are planning to remain in the house and may want to do what they can to get the other spouse out before he or she gets legal advice.

However staying in the home isn’t always possible. Even where there aren’t children, it’s not good to perpetuate a potentially explosive or at least a very stressful situation by staying where you’re not wanted. If staying in the house is impossible, document what led to the break up and report your actions to the police where that’s appropriate. Plan ahead and be ready to take the things you need from the house when you leave because it’s usually difficult to get things afterwards. (Often people in this situation come home during the day when the other party is at work so there’s no one there to prevent the leaving party from taking what they want). If you’re the one leaving be sure you have a place to stay, preferably for more than just a few nights.

If there are children it doesn’t matter whether or not you’re planning to take them with you. The best advice is for you to discuss your situation with your lawyer before moving out. If you’ll be moving out and leaving the children in the home, you may feel the need for a court order preventing your spouse from leaving with the kids once you’re no longer there. Or if you think your spouse may be leaving, you might need a court order that he or she can’t remove the children from the home.

Take Stock
Take inventory of all assets and liabilities, sole or joint. Photocopy all relevant paperwork, prepare a financial statement and a projection of new living expenses.
Chapter 4  Be Proactive - Take Action

Contact your bank manager and creditors to see how these developments will affect your credit rating. It may be necessary to separate existing accounts and/or open a new one.

Take Stock
Take inventory of all assets and liabilities, sole or joint. Photocopy all relevant paperwork, prepare a financial statement and a projection of new living expenses. Contact your bank manager and creditors to see how these developments will affect your credit rating. It may be necessary to separate existing accounts and/or open a new one.

Develop a Support Structure
Enlist support from family and friends who can be a sounding board. If children are involved, get your relatives involved. In some cases they might apply for access. Don’t burn bridges because of anger or frustration. Be as straight as possible.

There are lots of benefits to having people in your corner in these situations. For example, you can strengthen your chances of getting frequent access to the children if your parents and family are actively involved with you and them. You might want to consider the unusual step of encouraging your parents to apply for their own access along with you.
Chapter 5

Leaving Home

As mentioned above, there are many times when leaving home is not the best choice. It may work against you if a court battle ensues. Once out, it is very difficult to get back in, even after things settle down. However, this is a very personal decision that only you can make and you should be sure you have proper legal advice before making any choice and that you have considered all of the factors involved.

Consider the effect that you leaving the home will have on the rest of the family. Is your spouse vindictive? If so, will that be taken out on you or on the children left in the home? Is there a history of conflict or abuse? If so, will you be leaving the children in a potentially harmful position? How will the rent or mortgage be paid and the household expenses be covered if you leave the house if you’ve always been the person who paid those expenses? What child support or spousal support proposal should be made immediately without waiting for your spouse’s lawyer to write or start legal proceedings?

In the most common situation the parties agree at an early stage that one of them will be moving out and they proceed to negotiate a separation agreement while arrangements are being made. But if you are the person leaving and you’ll also be expected to pay child or spousal support, you’ll need to have a pretty clear idea of what assets you’ll have and your after-separation budget in order to make rental arrangements for your new accommodation.

And you’ll want to have a good idea of the kind of continuing contact you’ll have with the children once you leave. So do what you can to stay with the family unit until you have a legal agreement in place. Perhaps moving into an extra room or the basement can be alternatives for you.
Chapter 5

Leaving Home

Maybe the situation is unbearable for you or the family and staying in the house is no longer an option. In this case, there are things you should do before leaving. These include planning what you’re going to do, setting out your intentions in writing and possibly involving the police as a defensive measure.

Planning What You’re Going To Do
Certainly you’d want to be sure you have a place to go and will be taking your clothing and other portable personal effects with you. Moving out means that you need some other place to call “home” for the next while and people need to know how to contact you. Especially the children if that’s an issue. Be sure you’ve already removed all important personal and business documents from the home and have made copies of those you’ll be leaving. Set up a fresh bank account and decide what you want to do with existing joint accounts.

Setting Out Your Intentions In Writing
If you’re not able to work out a brief negotiated agreement, at least have your lawyer write your spouse setting out when you plan to leave and stating your suggestions for the immediate future. That should include a statement that you’ll begin making child support payments right away or continue to pay the mortgage or rent if those are factors, and what you’ll be doing with respect to the family’s expenses.

You might also have the letter state when you’ll be seeing the children and set out, for example, that you’ll be picking them up from school on Wednesday for dinner and returning them at 7:30 in time for them to do their homework and get to bed.
Consider having the letter set out the names of a family counselling service or some family therapists you suggest should be contacted so the family as a whole can deal with the situation most effectively.

If you haven’t yet retained a lawyer, you can do all of this in a letter from you. But it’s strongly recommended that you go over what to say with a family law lawyer before handing it to your spouse so it won’t contain things you'll later regret.

Whatever you do, don’t get into discussions of blame or fault. Write the letter on the assumption that it will eventually be seen by a lawyer acting for your spouse or by a judge and you want it to present your situation in the best light. If you don’t have a lawyer to go over the letter, review it with a trusted, and level-headed, advisor.

It may be best to give the letter to your spouse as you’re leaving rather than before. If he or she isn’t around, leave a copy with a third party to hand deliver. If there aren’t any witnesses to giving the letter, also mail a true copy so your spouse can’t deny getting it. (There are people who feel that these kinds of letters should be sent by registered mail, but a person may choose not to accept such a letter. It’s always wise to mail a letter to the normal address by regular mail if you can have some other person swear that he or she saw it posted, or to have a courier deliver the letter. Certainly, sending the letter by more than one means ensures there won’t be any dispute that it was received.)

**Calling The Police As A Defensive Measure**

There’s another step you should take if you feel you have no choice but to leave the home. Prior to moving, contact your local police authorities and tell them of your plan.
Tell them that you don’t expect any problem but you want to have someone there to be sure that the situation won’t get out of hand and so that your spouse won’t provoke a situation and prevent you from leaving with your possessions. Both the letter from your lawyer and the presence of the police are important to show your resolve in seeking a non-adversarial separation.
Chapter 6

Separation

Grounds For Divorce

In Canada there is only one ground for divorce: breakdown of the marriage. That’s established in one of three ways:

1. Committing adultery

2. Treating the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation intolerable, or

3. Living separate and apart for at least one year immediately before the final divorce decision.

Of these, it’s now extremely rare for anyone to claim a divorce for a reason other than separation unless there’s some urgent reason for remarriage such as a pregnancy or some family member about to leave the country or die. Since it usually takes a while for the parties to work out the final details of the separation agreement and to process the divorce itself, most people find that waiting the year is no problem.

The one-year separation doesn’t mean you need to wait a year before beginning proceedings. You can begin the divorce right away - it just can’t be finalized until you have been separated for a year.

To calculate the one year period of separation it needs to be for a continuous period, although parties can get back together for a period of up to 90 days without interrupting the count if it’s for the purposes of reconciliation.
Chapter 6

Separation For The Purposes Of Divorce

The Divorce Act states that parties "shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other."

It also states that the period of separation is not deemed to have been interrupted or terminated if the spouses "resumed cohabitation during a period of, or periods totaling, not more then ninety days with reconciliation as its primary purpose." That means that the parties can get back together to try to work things out and if they separate again before ninety days is up they don't have to start counting the year over again.

The problem is that it isn't always clear as to what "separate and apart" means or what "cohabitation" means in any particular situation. Generally speaking there needs to be a physical separation coupled with the recognition by at least one of the parties that the marriage is at an end. Sexual activity between the parties doesn't mean they have resumed the marital relationship. Sometimes the parties may be separated even though they are living under the same roof, or even sleeping in the same bedroom or bed.

In these cases the court will look at such things as the sleeping arrangements for the parties and whether or not they're having sexual intercourse, if one is performing household duties for the other, whether they share the same food in the kitchen and eat meals together, go to social events or family gatherings together, as well as whatever else can help the court determine that one of the parties saw the marriage as over and there was a real sense of separation. Merely having a stormy relationship with one of the parties leaving and returning doesn't mean the marriage has ended.
Chapter 6

Separation

Separation For Common Law Relationships

If you’re in a common law relationship it isn’t quite as important to know just when you became separated. However, various provinces have legislation entitling separated common law spouses to claim spousal support depending upon how long they were living together.

While the details vary from province to province, a separated common law spouse is usually entitled to support based upon the number of years of cohabitation. In these cases it becomes necessary to know how long the parties lived together. You need to check your province’s legislation to see what provisions apply to you because even though you’re not married and the Divorce Act doesn’t apply, you may still need to be able to calculate the period of cohabitation.

Acting Responsibly

Separation and divorce are tough times for most people. Make it your responsibility to be reasonable and sensitive to the needs of your spouse. If you’re dealing with someone who needs to be right all the time, this can be a challenge. Usually it helps to remember that there are two people going through the separation/divorce experience and looking at things exclusively through your eyes won’t help the two of you work out the things you need to deal with.

Consequently, you may be required to persevere and exercise a lot of patience. Bad things happen to good people - you’ve heard it before. Whatever your reasons for the break-up, it’s not the most pleasant set of circumstances. Don’t let your initial reaction provoke you into doing something that will be to your disadvantage.
Chapter 6

Separation

Taking the “high road” isn’t always easy to do – but it’s usually the wisest thing and the best way to advance your genuine interests, even if it doesn’t let you get out the steam right away. Use the support systems available for you and act on your common sense rather than let your anger or frustrations take over.

Take Control of the Situation

You’re not in control if you let other people or events move things along. That’s being reactive – you’re reacting to the circumstances. To be in control you need to be proactive – taking the steps necessary to help your situation before being forced to respond to steps other people have taken before you.

So the first thing to do is to accept that you’re in a situation which requires some outside help. If you’re reading this material you’re obviously not an experienced family law lawyer. Ask yourself if you’re going to be better off checking with someone who knows what he or she is talking about or better off taking the advice of people who really don’t know what they’re talking about. There’s an old saying that a lawyer who acts for himself has a fool for a client.

That means that it’s not a smart idea, even if you are an experienced family law lawyer, to act for yourself. But the other side of the coin is even more sensible. A client who acts as his or her own lawyer is a fool too. So don’t help out the other side and make your situation worse than necessary – decide to help out yourself by hiring a lawyer who can be of assistance to you.

Too many people don’t know how the legal system works for them. This lack of knowledge makes it easy for people receiving legal advice to get confused if they don’t consult the right kind of lawyer.
Chapter 6  

Separation

Not every lawyer practices family law or is familiar with the legislation and the practice in your province and your area.

Your strongest position is to have the best legal advice. This may well mean that you’ll have to pay more for the services of an experienced family law lawyer than if you hire a generalist or a lawyer who usually does something else but has agreed to take this case to do you a favour.

Just because the hourly rate or initial retainer is more doesn’t mean the eventual cost will be more. That’s because experienced family law lawyers can generally help you focus more clearly on how to settle matters. And an experienced family law lawyer will likely be able to help the other side focus on realistic expectations so that everyone will be on the same page as a judge is likely to be. Too often people end up spending a lot more money than necessary because they need to hire an experienced family law lawyer to dig them out of a hole they might not otherwise have been in. Remember, it costs more to patch things up than to do it right the first time.

Being an informed client also helps you stay in control of your case. By educating yourself on the issues of separation and divorce, support and custody issues, and your legal rights you can be better able to help your lawyer and be sure your case is going the way it should. You’ll be better able to understand various options and will be able to make better choices about the steps to take to help accomplish your objectives. The more knowledge you have – the more control you can have over the way your case is handled.

Think of what is important to you. Identify your chief interest in all of this. Maybe it’s the children, the bank account, or the house.
Focus on the chief issues of concern to you - the children or protecting your assets or both. Don't let irrelevant issues or legal maneuvering distract you from the goals you set. The more focused you are, the more clearly you can define your objectives and choose amongst your options.

The more focused you are, the more reasonable you're likely to be regarding your expectations. All of these things give you greater control over what happens and allows you to better influence how things develop.

This doesn't mean everything will go your own way. You'll have to deal with your spouse and often make compromises in one area to get what you want in another area. But don't let yourself be suckered into every argument just because you don't want your spouse to think he or she has "won" that issue. If you identify clearly your key interests in the separation/divorce process, and try to learn what your spouse's key interests are, you may well find that there is more room for compromise than originally appeared when everyone was looking at how to "win".

If you're not sure how to resolve the problem, then an experienced family law lawyer can provide some options as to your legal footing. Once you've identified your options, focus on the ones you can realistically accomplish with your budget and take action immediately.

The Separation Agreement

This is the legal document arrangements in which a couple sets out their arrangement to live apart. This doesn't end the marriage but it can spell out when the parties agree that they began - or plan to begin - living separate and apart.
Chapter 6  
Separation

This is the legal document, which sets out the framework for your separation or divorce. Custody and access, child and spousal support, and the division of assets are usually dealt with in the separation agreement as well as a wide variety of other things.

Whatever matters need to be dealt with to govern the relationship between you and your spouse are covered in this sort of agreement. Often people think they’ve worked out all of the terms that they need and discover that when they take the agreement to a lawyer there are a number of other issues raised.

This is because any of us can only know what we know, and unless you’re an experienced family law lawyer, the odds are that there may be some things, which should be discussed in a separation agreement that you never thought of. That’s why it can be dangerous to design your own separation agreement and think that ends matters. The same applies for taking some standard form and using it or copying the agreement someone you know has a lawyer prepare. Often this just gives you a bit of time under a sense of false security until one of the parties gets proper legal advice and moves to set the agreement aside.

Be very careful about what you agree to. Your situation and your views may change as you go through this process so be careful that you’ve covered all the matters of concern to you before you sign. The agreement, if properly drawn, may bind you for the rest of your life.

In many cases an agreement may be set aside if there is no proper, independent, legal advice. That’s not always the case, but if you want the agreement to be as strong as possible, make sure that both parties have received full and informed legal advice and that you are fully aware of your options before you sign the agreement.
Be sure you fully understand the commitments involved in this agreement. This agreement can affect the rest of your life, so be extremely careful. Almost anything both of you agree to is permissible, so don’t cut corners here, specify all details.

As a last note, keep in mind that courts across the country are looking at separation agreements more closely now than in the past. To make an agreement which will last you need to be sure that it’s fair in all the circumstances. Drawing up an agreement that gives one party what he or she wants and gives very little to the other party may well be the formula for having that agreement set aside later on, even after you may have taken steps relying upon it remaining in force. So remember that the more fair the agreement is, the more likely it will be upheld.

Negotiating The Separation Agreement

Don’t hold out for a position or for a certain matter if it isn’t really fundamental to your true interests. You could end up with failed negotiations and litigation just because you were too stubborn to "give in" on something which didn’t really mean much other than to get the other side to back down. By keeping your eye on the key things you want, you can "give in" on other things without actually losing anything.

Negotiation is an acquired skill that we use everyday. Some are better at it than others. You know your spouse, and should know better than anyone else which of you generally gives into the other and which is the better negotiator. If you realize that your spouse is the better negotiator, then be sure not to let yourself be drawn into doing any of the negotiations. Tell him or her that they should have their lawyer call yours. Don’t get suckered into agreeing to something just because you’re being intimidated away from checking with your lawyer.
Sometimes 2 person can be more successful negotiating an agreement for himself or herself than by letting someone else do the negotiating. Keep in mind that in most cases of separation and divorce the best person to look to for assistance in negotiating a settlement for you is an experienced family law lawyer.

Your objective is to reach an agreement on all of the issues concerning both you and your spouse, which will set out the nature of your legal relationship for the rest of your life. While most of us want to be the key negotiators for this kind of agreement, it must be kept in mind that there are many aspects to a separation that most people simply don’t know about. In this situation, the best way to serve yourself and protect your interests is to use the services of a family law lawyer whenever possible.

This is the most common way, by far, for separation agreements to be negotiated. Contrary to what many people think, the vast majority of family law lawyers are oriented towards working out a resolution, without having to go to court. Be sure the lawyer you have understands your key interests and has your interests at heart and be sure that you understand each of the proposals that are being discussed. If you’re happy with your family law lawyer and he or she has your best interests at heart, you should be fine.

Remember that the choices to be made as you work out an agreement are yours and you can make them better if you start our informed as to your rights and obligations. Set realistic expectations, and take on the assistance of people who are more familiar with this sort of negotiation - such as an experienced family law lawyer.

Changing Lawyers
If you don’t like the way things are going, and have given the matter thought and discussed your concerns with your lawyer.
Chapter 6

If you still don’t like the advice you’re getting – get a second opinion or change lawyers. Once the agreement is signed it may be difficult and costly for you to get it changed. Don’t allow yourself to be stampeded into an agreement. Having a firm grasp of the issues before hand is the wisest step you can take.

While it’s usually best to stick with one lawyer throughout the process, you should remember that the separation agreement may have very far reaching implications and you’re always best to be confident that the lawyer you’re paying is doing the best job possible for your money.

Negotiating With A Bully

Sometimes a person is successful in their negotiations because they are very unreasonable and stubborn and prepared to lose everything if they don't get what they want. That's the approach a bully takes.

If You're The "Bully"

Usually bullies can show a pretty good track record of success. Since they don't fight fairly and tend to push things to extremes knowing that other people will be too "reasonable" to force the issue, they end up scaring a lot of people out of their way. But bullies don't have much stamina. They're like boxers who come on very strong for the first few rounds trying to get an early win without actually having enough energy to last the later rounds. If you can stay in the fight, even after losing the first few rounds, your chances of eventually winning against a bully get better and better. While bullies do a good job of scaring away people who are already afraid of them, they don't do such a good job of scaring away people who are prepared to stay in the fight until the final rounds.
Chapter 5

Separation

Since bullies expect that the people who have always backed down in the past will do so again. It often comes as a serious shock when they discover that the mouse who used to be afraid of confrontation with them has hired an experienced lawyer who is standing up on their behalf.

It is a pretty common observation amongst experienced family law lawyers that courts don’t like bullies and that bullies have a higher than average failure rate if a matter goes so far as to be heard by a judge.

If you’re the bully in the relationship with your spouse, you know this. Your experience is in wearing your spouse down and of winning most of the time. So you tend to carry that experience into the family law issue. And you’ll likely “win” if your spouse doesn’t get outside legal representation. But what do you “win”?

A triumph over your spouse! Your “victory” isn’t necessarily related to the best interests of the children and it’s likely to disappear if your spouse ever gets good legal representation later on. If that should happen, the approach you took will come back to haunt you. Judges look upon this sort of thing most unfavourably and you’ll discover the eventual cost of that “victory” could be disastrous.

So what’s a good approach if this is you, but you want to get positive result from your family law dispute? Be the leopard which changes its spots. Make a 180-degree turn and put your former behaviour aside for this process. Seek out fair, but firm, advice, and act on it even if it means “giving in” on things you wouldn’t ordinary give up on. Refocus your objective from triumphing over your spouse to identifying your real interests.
Chapter 6  Separation

Often, if you can bring yourself to this point, you'll find the other spouse becomes much more co-operative than you thought. This is because they'll appreciate the kind of pressure that you've removed from the process and the fact that you're prepared to look at and consider their needs. This will result in a much less costly situation than backing your spouse into a corner where she or he feels there is no choice but to take the matter to court.

And you'll begin to remove your previously unreasonable positions as impediments from resolving matters effectively. If you can do this you'll have changed the entire environment of the negotiations. Whatever result you accomplish with this new approach will be more lasting and more effective than what you could have achieved through intimidation.

There are times, however, that your track record as a bully has been so well established that your spouse simply won't believe that you've changed or are serious about the change. The deep sense of betrayal and mistrust, coupled with your history of showing your spouse no real respect, may have driven him or her into a position of complete hostility. That may mean he or she is determined to have a full, fair fight with you now that they have a competent lawyer, and perhaps a new support network, backing them up.

In that case you should give serious consideration to your minimum settlement conditions and go there directly. If you're the one who has awakened a sleeping tiger and nothing but victory will satisfy your spouse now because of all the mistreatment she or he feels they've suffered in the past, you might find it wiser and cheaper to just walk away from the battle. It may be cheaper than fighting an enraged and newly empowered spouse determined to get back at you for all he or she feels you've gotten away with before.
If You’re Dealing With A "Bully"

If that’s your situation, you may have only three choices:

♦ Giving in / walking away
♦ Seeking a change of approach for this one issue
♦ Going to court

1. Giving in / Walking Away

There are times when the unreasonable position of the other side is so strongly held that you have to decide what’s worse: giving in or going to court to force the issue with the affect that will have on everyone, including the children if there are any.

There’s a theory expounded by some child experts called "beyond the best interests of the child". This says that while the rule most courts follow is "the best interests of the child", there are times when insisting on what is obviously best for the child simply won’t work. That may be because the other parent is so insistent on their approach, and puts so much pressure and tension onto the child, that pressing for what’s "right" will cause more damage than leaving the existing "wrong" in place.

An example would be the widely held conclusion that conflict between their parents is the worst thing for a child involved in a separation to experience. It’s clearly in the best interests of the child to avoid such conflict and also in the child’s best interests to have contact with both parents. But if the residential parent always creates a scene at the transition periods (when the child is being picked up and returned) that there are fights and screaming matches at the door, it may be best to avoid the terrible conflict by cutting out the access, even when the access parent isn’t the one creating the problems.
In some of these cases, where the access parent can’t realistically propose a change of residence, the safest thing for the child might be to close off the access for a while.

Sometimes, where there are children involved you’ll discover what happens quite frequently – that eventually most children will come to realize the truth. If not, you'll know that you backed away because that was better than the damage which would have been caused if you hadn't.

This is often the position in which an access parent finds himself or herself. The example set out above deals with children, but there are lots of other situations when you may have to consider whether, as the saying goes, discretion is the better part of valour and you should give thought to just walking away to cut your losses and start your life over again. That may not be very fair, but it might be the most sensible thing to do. Life isn’t always fair and it’s up to us to make the best of the situations in which we find ourselves.

There are times when giving in, or walking away from a situation, is one of the positive options available to you and you shouldn’t overlook it because it seems as though you’ll be allowing the bully to get away with things.

2. Seeking A Change Of Approach For This One Issue

This is where you try to get the other party to see the advantages to changing his or her "spots", as discussed above, for this one situation. Usually, the victimized party isn't very successful in getting this change to happen, but it may be that your lawyer can try to have the other party's lawyer urge this on them.
Chapter 6

Separation

That’s certainly an approach which works from time to time because the bully can be made to feel that he or she has been generous or magnanimous and they can tell the world what a great person they are. You’ll never know if this won’t work until you’ve tried it.

3. Going To Court

This is certainly always an option you should keep in mind, although it should be your last resort. As mentioned above, this is where the bully is most likely to lose. Just because a person is a bully and used to getting his or her way all the time doesn’t mean they’re dumb. And since bullies don’t like to lose - it is embarrassing in front of their “admirers” and causes others to begin to challenge them - they often see the wisdom of striking a deal so as not to let you push the matter to a judge.

In this situation you may begin to get the “change of spots” which you couldn’t get when you asked for it. If the bully sees that you are actually going to go ahead and take the matter to a judge and aren’t backing down from intimidation as you have done so often in the past, he or she may begin to re-think through the issues in dispute. The fact that you’ve broken your mould of acquiescence and “going along” may be sufficient to cause the bully to break his or her mould of unreasonable stubbornness. And if this isn’t what happens, at least you’ll be on your way to getting a hearing in front of a judge.

How To Get Ready To Negotiate Your Separation Agreement

Before you begin any negotiations you should know the answer to the following questions:

1. What do you want out of the negotiations, and why? Identify your key interests.

2. What does the other party want out of the negotiations, and why?
3. If you can only get the top 2 or 3 items on your wish list, what are they? Put your objectives into a priority listing.

4. If the negotiations break down, what will your next move be? Don't make a threat to do anything if you aren't prepared to keep it.

Let's consider each of these points.

1. **What do you want out of the negotiations, and why? Identify your key interests.**

Be sure you have set out clearly for you and your lawyer the things you want out of the negotiations. Go over with your friends and family, as well as with your lawyer, just why you want these things. There may be other ways to get what you want if your lawyer knows why you want them. It's only if you know what you want, and why, that you'll be able to be successful in negotiating an acceptable agreement.

2. **What does the other party want out of the negotiations, and why? Try to understand what things you'll need to give up to make a deal.**

It's just as important to give thought to what your spouse wants, and why, as it is to know what you want and why. Then you'll be able to see where there can be compromise and trade-offs without giving up anything important to you.

You should be able to use this knowledge to obtain things, which you want in exchange for giving up things your spouse wants, without actually having to give up much of what you most want. Often, understanding why your spouse wants something will give you an idea of how to satisfy their concerns in a different, creative way, which doesn't call for much sacrifice on your part. That's how to get to a win-win situation.
3. *If you can only get the top 2 or 3 items on your wish list, what are they? Put your objectives into a priority listing.*

Put the things you want onto a list with the most important thing first and listing the rest in descending order of priority to you. Then you'll be able to keep your most important objectives in mind as you go through the negotiating process. Both you and your lawyer will be able to see what things which are lower on your list you might have to give up to get and preserve the things higher on your list.

Your spouse's list of items may be the same as yours but his or her priorities may be different. It's knowing what each party wants and why, along with knowing the priority each item has for each party which enables a negotiation to bring positive results to everyone.

4. *If the negotiations break down, what will your next move be? Don't make a threat if you aren't prepared to keep it.*

Be sure you know what you really intend to do if a stalemate arises so that you can react clearly and swiftly. But don't fake it. This isn't a poker game - it's your life. Bluffing may be fun, but don't do it unless you can afford to lose.

In the family law situation this means that you need to know whether or not you'll go to court rather than give in on a certain point. How really important is that particular point to you? Can you afford to go to court? Can you trade this for some other item you want a bit more in the negotiations? Think these through in advance and then you'll be able to respond to any development in the negotiations much more effectively.
Keep in mind that if you have a pretty good idea of the things the other party wants and their priority, it will be easier for you to figure out when you should and shouldn’t take too strong a position. It’s not much of an effective threat to say you’ll go to court over an issue if that’s also something the other side is prepared to litigate. So hold off any threat until you’re sure it will be effective. And never make a threat if you aren’t prepared to act on it. Because, if you’re called on it and then don’t act on it, no one will believe you when you take a firm stand again and you’ll have lost a great deal of credibility and bargaining strength.

Gettig On With Your Life

If you’re married, once your separation agreement has been finalized you should proceed to process your divorce so that the marriage is over and you and your spouse are legally free from each other.

If you’re in a common law relationship, the finishing of the separation agreement ends the relationship. Now it’s critical that you tie up loose ends. Check with your lawyer and make a clear note of the things you or your ex needs to do to follow up on the terms of the agreement or court order.

Are there insurance arrangements to be made? Do you have to contact any credit card company or mortgagee about changing names? Is there any property document to be registered? Are there any details to clean up at the bank? Ensure that you tie up loose ends involving your financial situation. Make sure bank and investment accounts, debts, personal property, real estate, etc., are separated and handled according to your separation agreement or divorce judgment.
Chapter 6

Prepare for any upcoming child support or spousal support payments. If you are unsure of any details following your divorce, make sure you ask your lawyer. Keep important dates in a diary.

During this hectic time it’s easy to forget your own well being. Take the time to look after yourself - your own mental, emotional, and physical health. You deserve it. Consider joining a support group and maintain contact with other people that you can talk to and get support from.

Keep active and social. However, if you are feeling disconnected, depressed, or suicidal, see your doctor immediately. Don’t be afraid to seek help. It’s important to be able to come to terms with your divorce, to accept that it has happened, and to move on with your life.

Very often in a separation or divorce people end up thinking of things from their own perspective and overlooking that there are other people upon whom all of this is having an impact. The most obvious, of course, are the children. But if you’ve begun a new relationship and are with someone you really care for, why make their life miserable by always focusing on what you’ve “lost” or how rotten the other side is. Your new partner deserves to spend quality time with you and that won’t happen if you’re moping around thinking of things you could have done or should have done to finalize the separation agreement.

So get on with your life – enjoy who you are and accept the fact that remaining in the past situation wouldn’t have lasted anyway.
Chapter 7

Mediation

What is Mediation?

Divorces that are mediated take the process of sorting things out from the bitter-cold courtroom setting to a more comfortable environment, refereed by a neutral third party (a mediator) to discuss the issues. Mediation is a relatively new practice, but is now widely available.

While many mediators come from the ranks of social workers, psychologists or lawyers, mediation is neither marriage counseling nor therapy. If both spouses are looking for ways to avoid separation altogether, you should not be in mediation. Ask yourself honestly if you are holding out hope. If that’s the case, then you need a marriage counselor.

Mediation works best when both spouses agree that a separation or divorce is necessary, and each is past the stage of trying to fix blame or responsibility for the break-up on the other. If one spouse is reluctant or resistant to separation or divorce, it’s plain they’re not going to be gung-ho for something that furthers this process.

But if both of you are interested in working out the details of your separation sensibly, and don’t want to blow your life savings arguing in court, then mediation is your best alternative. If you want solutions you can live with, and that are good for the kids too, your best chance is mediation.

Why Mediate?

By its very nature, mediation is cooperative. It’s two people working toward the mutual goal of a fair settlement. It is a win-win situation. You, your spouse, and your mediator can reach a compromise in a civilized manner.
Chapter 7

Mediation

Compare this scenario to a court battle. In mediation, you're in the same room as your spouse. You know what has been said and can respond and act on it then and there. No lawyer or judge is there to get in the way. You can express your emotions and feelings all in a controlled environment. The process is faster and cheaper than litigating the issue in court. And the two of you get to choose who the mediator will be.

In mediation, you and your partner design the solution. You can choose options that will be beneficial to your children, such as ensuring that they get to attend the same summer camp they've been attending for years or stay in the same extra-curricular activities. Since there is no limit to what can be decided, you end up with an agreement tailor-made for your circumstances.

Other details may be important to you, such as extra-curricular activities you feel your child should attend and for which your spouse is reluctant to pay, or keeping your child in the same school. The legal process is not designed to deal with these subtle issues in a cost-effective way. But mediation can help work out anything you feel needs to be addressed.

However, mediation is generally not appropriate where there is a power imbalance or physical or verbal imbalance. If you're always intimidated into clamping up, or "going along", you may be better off with a lawyer to present your case for you in a more formal setting.

If you and your spouse have children, you'll need to relate to one another in some way long after the separation. The better the relationship between the parents, the better the environment will be for your children.
Chapter 7

Because the two of you are personally involved in developing your mediated agreement, it will undoubtedly more accurately reflect your desires, and therefore is less likely to be broken. If you do decide to change something in a mediated agreement, you can do it without having to go to court.

Mediation is Faster and Less Expensive
A disputed divorce can sometimes take years. The adversarial nature of litigation can seriously bog down the process, and couples taking this route learn quickly that delays are the norm. Even if it never reaches court, you can expect at least a year for even the most straightforward cases.

Most couples using mediation find a workable arrangement within a few months from start to finish. When it’s finished, a Memorandum of Understanding (the document lawyers use to draft the Separation Agreement) is drawn up.

You can expect to pay between $50 to $100 an hour in rural areas and up to $75 to $200 an hour or more in urban areas for the mediator. Based on an average of 10 hours for mediation sessions, you’re looking at approximately $2,000 for the mediation. In addition to this, there are legal fees to pay a lawyer for consultations and for the drafting of the Separation Agreement.

Lawyers fees range from $150 to $300 an hour or more and a lawyer should not need more than eight hours from the first consultation to the completion of the Separation Agreement, where there is a Memorandum of Understanding from an experienced mediator.
Chapter 7

Mediation

Usually, the lawyer will need less time when most matters are agreed upon. By comparison, some lawyers estimate that heavily disputed family law matters will cost from $10,000 to $15,000 or a lot more. This is the cost for one spouse!

Legal Aid for mediation may be available in your province, so check out that avenue. In Ontario, Legal Aid may cover two-and-a-half hours of mediation if your lawyer hired the mediator. As mediation becomes more popular and associations lobby for increased recognition of the practice, this could change.

Interests Over Rights

It is important that you know your rights. But mediation is a process which focuses on your interests – not your rights. You need to be clear about what issues are your top priorities and what your primary interests are. Focus on them, not on your rights.

How Mediation Works

Expect to attend between 10 to 12 hours in mediation. This might occur during a number of 90-minute sessions over the course of a few months.

Your mediator might try to put you at ease by asking you what you fear most about separation and what you see as the worst possible outcome. This gets unspoken fears out in the open where they can often be dealt with quickly. For example, one spouse might say, “I’m afraid I’en not going to see my kids again.” The other spouse might respond with surprise saying, “Of course you will!” Each spouse will then quickly understand the other’s overwhelming concerns. It can also give the mediator a clearer idea of the issues you’ll need to discuss, or whether you should be in mediation at all.
Chapter 7

Mediation

The whole benefit of mediation is that the mediator will not decide for you - you and your spouse create the solution. So prepare for the first session by writing down the issues you feel are important and your ideas on possible solutions. (You should have already done this when assessing your needs, before choosing a mediator.)

For example, have you considered your wishes regarding custody and child support? Have you thought about where the kids will stay, where you would like them to spend holidays and vacations? Does it matter to you where they go to school? Will that change if your spouse remarries?

The mediator should help you brainstorm these and other issues by the end of the first full session. You and your spouse can save time and help the process by each preparing a 1 or 2 page synopsis of your view of the situation and faxing it to the mediator and each other. This allows the mediator to begin to focus on key issues earlier and lets each of you see the issues of concern to the other. Sometimes what you see isn’t what you expect.

At or before the first session you’ll be presented with the mediation contract or agreement. It should be written in plain language and easy to understand. Take the time to look over it and ask any questions you may have so you’ll be comfortable with what’s going on.

Be prepared to disclose all financial information, including income (your tax returns from the last three years, recent pay stubs, etc), credit card statements, assets and liabilities, insurance plans, etc. You may also need to obtain a house appraisal, an actuary’s report on your pension plan.
Chapter 7

Mediation

The point is that you can’t effectively mediate a resolution to a problem if there are material facts withheld or there isn’t full disclosure of anything a reasonable person would require to make an informed decision concerning themselves.

Throughout the process will suggest times when it might be prudent to talk to your lawyer. Do so. Getting information about your rights doesn’t mean you aren’t participating fully in the mediation. It means that you’re looking at all of the matters being discussed in light of your legal rights and obligations and that you’re informed as to the rights and obligations of your spouse.

The mediator’s job is to get enough information out on the table so that the two of you can make a decision both of you can live with. While the mediator’s concern is to find a resolution agreeable to both of you, that isn’t the same thing as reaching a solution you could expect to receive in court. That’s why you need to check with your lawyer to see if you’re being pressured to give up too much just to “make a deal”. It’s up to you what you decide to give up to settle matters, but it’s always wise to be informed about your situation before you make that final choice.

Open or Closed Mediation

Mediation can be either open or closed. In closed mediation nothing the parties say or do can be referred to in court. If the mediator doesn’t reach any agreement, no matter why, he or she simply reports that no agreement was reached. The parties are then back to square one and neither party can call the mediator as a witness to testify about what was said by either party or who it was who refused to compromise. The reason this is the most popular form of mediation is because each party can speak candidly, knowing that what they say won’t be used against them.
When people know this, they have no reason to take false positions or to play politics. They may as well be frank and candid because they won’t look bad. For example a mother might make it clear in mediation that the reason she won’t allow any more access to the father is because of her concern that this might result in a reduction of child support. By knowing what’s really in her mind, the father may choose to say he’ll agree not to reduce the child support if he gets additional time with the kids. If the mother knew what she said could be repeated to a judge, she’d be foolish to mention it, but the father might then never have realized that there was a way to get additional time with the children without getting involved in some real litigation.

In open mediation the mediator can be called as a witness in court if the process fails and nothing said is in confidence – it can all be referred to later. The mediator generally will prepare a report saying what issues were dealt with and the positions taken by the parties. Each mediator doing open mediation will produce a different type of report, but the purpose of open mediation is to have a record of what happened so the parties can tell it to the court if appropriate.

It’s fair to say that most mediators prefer closed mediation and that the general experience is that closed mediation works better for most people.

**Working Through the Issues**

The mediator may try to devote each session to a specific issue such as child support, property division or spousal support, so you deal with one issue at a time. He or she may use a flip chart, props, and other visual aids, or just take notes during these brainstorming sessions. You may take notes as well, or ask to use a tape recorder so you’ll have your own record of what’s been going on.
Chapter 7

Mediation

Often, mediators will write up the various points agreed to at a particular session or put something on paper for the two of you to review and to give you an idea of where the mediator thinks things stand.

**You will spend time:**

- Identifying the individual issues
- Developing options and choices
- Coming to a verbal agreement
- Outlining your agreement on paper for the Memorandum of Understanding

When discussing an issue, you can expect an opportunity to state your position, with no interruptions from your spouse. Your spouse will then get the same opportunity. The mediator will ask questions of you individually, attempting to clarify and move the discussion toward an agreement.

Raised voices, name-calling and violent body language are not allowed, and if these ground rules are broken, the mediator will temporarily stop the session until things have calmed down. If the behaviour continues, the session will end until the next meeting, and if it continues into the next session, the mediator may terminate the entire mediation.

**Memorandum of Understanding**

When you have reached an agreement on all the issues, the mediator will prepare the Memorandum of Understanding. This is written in plain English and will serve as a very rough draft for your Separation Agreement. You’ll go over the memorandum with the mediator, but you shouldn’t sign it before showing it to your lawyer. This may seem silly, however, the memorandum itself is not intended to be a legally binding contract.
Chapter 7

Mediation

However, it is a statement of intention on your part and there are lots of cases where the person signed the Memorandum of Understanding thinking that there wasn’t any need to involve, or pay for, their lawyer’s advice only to end up discovering that they’ve given up something they shouldn’t have, or agreed to give something they needn’t have. It becomes very difficult to take back something you’ve agreed upon and trying to do so after you show the Memorandum to your lawyer makes for a very difficult situation.

If a mediator offers to draft the Separation Agreement, make sure:

♦ the mediator is a lawyer
♦ you should still seek independent legal advice

Legal Advice

Mediators shouldn’t be giving legal advice – no good one will even try to. The mediator’s job is to be neutral and to try to help the parties come to an agreement. The lawyer’s job is to represent his or her client and advise the client on the law regarding any particular situation. The client’s job is to understand the legal advice and then make the decision he or she feels would be best for them once they appreciate the implications of the various possible steps. The Memorandum of Understanding that you draft with the mediator is not a binding legal agreement; it is only a framework for the lawyers to draft the Separation Agreement. Most Memorandums of Understanding state clearly that they aren’t to be regarded as binding agreements until after reviewed with a lawyer.

To take the process to the stage of reflecting the agreement reached with the mediator into a full, binding, document you and your spouse should obtain legal advice from your own separate lawyers (independent legal advice).
There are times when your lawyer will draw something to your attention about the legal consequences of the position reached which you may not have understood at the time, or don’t want to apply, or that hadn’t even been discussed during the mediation. Then it’s wise to either return to the mediator or to see if your lawyer can discuss it with your partner’s lawyer. Usually, people who are at this stage can work pretty well together to resolve these last minute items.

Choosing a Mediator

Knowing what you want will simplify the process of working out the issues. Prioritize the top four or five issues, and be sure to ask potential mediators what special qualifications they have in these areas. When you have done this, you can try and choose a mediator who has experience and expertise in the areas you need. Remember that you’re not just choosing a mediator but a family law mediator. There’s a difference between doing general mediation and doing family law mediation. Because the person may have good mediation skills doesn’t necessarily mean he or she knows what’s appropriate in a family law context. You’re not interested in making a deal for the sake of making a deal – it has to be a deal which makes sense for the family law problem you’re facing.

For example, if you have both custody and access issues, a home that you may want to buy out, or assets to divide, you might look for a mediator with both a background in child development, a familiarity with various custody plans.

You also want a familiarity with the laws of your jurisdiction dealing with property and asset division. Such a person might be impossible to find. So you might choose to mediate one aspect of the matter and have your lawyers work on the other aspect.
There are a growing number of lawyers who are doing mediation, so it’s becoming easier to find someone with a legal background to help you out on property and money issues. Although, most mediators bring a social work or psychology background to the process and are more skilled at developing parenting plans or helping you resolve non-money issues. Don’t hesitate to ask the mediator about his or her background and for a copy of her or his resume.

Once you look at the mediator’s affiliations, education, experience, impartiality, and special qualifications, ask yourself if the chemistry is right for mediation. If you’re not comfortable – choose someone else.

Some mediators are home-based, and you could find yourself meeting in a basement office with the kids playing a game of hockey outside the door. Visit the mediator’s office. See if this is a comfortable place to meet. Are there separate rooms available in case you need to caucus or meet with your lawyer or other advisors?

Some mediators may suggest house calls, coming to your home to hold a mediation session. At first glance this can seem convenient, saving you travel time, hassle and even babysitters. However, it can hinder mediation. At home you may be interrupted by calls on the phone, knocks at the door, or children requiring your attention. And usually you’re paying for the mediator’s travel time.

Other Considerations
People who are not familiar with mediation often denounce it. While these reactions are unfounded, there are some things you should be aware of:
Chapter 7

Mediation

1. Mediation is voluntary. However more and more courts may require couples to attempt mediation first.

2. Because mediation is such a young field, good experienced mediators are still somewhat rare. Standards are still being developed and are less stringent than they might be in comparable fields. But there are many organizations of mediators. Check out what's available in your community.

3. Different mediators practice by different standards, and in many cases will choose techniques they are comfortable with, rather than what is most recommended. See if you can speak with someone who has been through mediation with that person.

4. If domestic violence exists, or there is any form of abuse, or a clear power imbalance, many mediators will not take on your mediation, and you'll have to look hard to ensure you get a mediator with proper training in this difficult area.

5. Most people feel that mediation isn't appropriate in the circumstances where there's any form of abuse.

6. While there are certificate programs in mediation recognized by organizations such as the Academy of Family Mediators, many governments are still inching toward some sort of regulation of practitioners. Because your mediator may or may not be accredited, check references to see how well he or she has done in other cases.

Mediation: Key Points

♦ Be sure you aren't using mediation to seek reconciliation with your spouse.
Chapter 7

◆ Understand the obstacles to mediation, and determine whether you’re a good candidate. Mediation isn’t wise if there’s a situation of domestic violence or one person is irrationally stubborn or insistent on “winning”.

◆ Make sure you get legal advice during the mediation process. You need to know your rights and obligations to appreciate the compromises you will likely be asked to deal with.

◆ Start with a list of 5 or 6 potential mediators and pre-screen them over the telephone and by checking their references.

◆ Ask about a free introductory session with the mediator to determine how mediation will proceed, where it will be held, all the costs involved, and whether you feel comfortable with the mediator.

◆ Be sure you are clear about what your key concerns are and what issues are your highest priorities.

◆ Free yourself to focus on your interests — not your rights.

◆ Insist on a mediation contract or agreement and read it carefully before signing.

◆ Prepare a rough-draft financial statement ahead of time if money will be a factor.

◆ Be sure the mediator will be preparing a Memorandum of Understanding.
Arbitration

In arbitration, the two parties jointly hire an arbitrator (usually an experienced lawyer or a retired judge) to hear your case and render a binding judgment. It’s like creating your own, private, court. The key difference between arbitration and mediation is that the arbitrator’s job is to make a decision based upon the information the two parties give him and the mediator’s job is to help the two parties understand the issues concerning them each and then bring them to an agreement. In arbitration you’re concerned about the decision the arbitrator is going to reach. In mediation the mediator’s concerned to help bring the parties to an agreement.

Since you have selected the arbitrator, or, in effect, hired the judge, you can be sure to get someone who is truly interested in family law and understands what’s involved in your situation. In the public courts, you can end up with a randomly assigned judge who may have no desire to hear a family law case. Although the parties have to pay the arbitrator’s fee as well as the fee for their own lawyer, the cost of an arbitration is usually much less than taking the matter through the courts. It’s also much faster and much less public.

Unlike mediation, which can be as informal as the parties want, arbitration is more formal. Both sides usually have lawyers who present their case. But you don’t have to pay your lawyer while he or she is waiting in court and you can set your own hours. You won’t be caught in the delays of a backlogged court system. Arbitration is a lot like court but with the parties in charge of the process, rather than subject to it.

Couples choosing this course are leaving all the tough decisions to the arbitrator. This can be extremely risky when the stakes are high. So, be sure you have a good understanding of the process and the issues.
Chapter 8

Arbitration

The key thing to remember is that while the most widely known way for disputing parties to get a resolution to their problem is through the courts, there are other dispute resolution techniques available for parties to use to settle matters. The most common of these are negotiation (by yourself or through using lawyers), mediation (which should end up in having an agreement drawn up for you by lawyers), and mediation (in which you are usually represented by lawyers).

When you’re involved in a family law problem, the lawyer you should be using is an experienced family law lawyer or else you might be short changing yourself. While you’re going to be best served if you involve the services of a family law lawyer somewhere along the line, you’ll find that you can help keep your legal fees down by being informed about the situation you’re facing and have done the work necessary to make the lawyer’s job easier and more straightforward. If you do that right, you’ll not only save money, but get a better resolution to matters.
<table>
<thead>
<tr>
<th>Table of Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgement</td>
</tr>
<tr>
<td>Notice to the Reader</td>
</tr>
<tr>
<td>Chapter 1</td>
</tr>
<tr>
<td>Custody and Access Issues</td>
</tr>
<tr>
<td>Parenting Plan</td>
</tr>
<tr>
<td>Father's Concerns</td>
</tr>
<tr>
<td>For the Sake of The Children</td>
</tr>
<tr>
<td>Chapter 2</td>
</tr>
<tr>
<td>Shared Parenting</td>
</tr>
<tr>
<td>Getting Past The Anger and Blame</td>
</tr>
<tr>
<td>Include The Children</td>
</tr>
<tr>
<td>Chapter 3</td>
</tr>
<tr>
<td>14 Things To Do When You Have Kids</td>
</tr>
<tr>
<td>Chapter 4</td>
</tr>
<tr>
<td>11 Things To Do When You Don't Have Kids</td>
</tr>
<tr>
<td>Chapter 5</td>
</tr>
<tr>
<td>Getting The Results You Want</td>
</tr>
<tr>
<td>Starting At The End</td>
</tr>
<tr>
<td>Chapter 6</td>
</tr>
<tr>
<td>Lawyers</td>
</tr>
<tr>
<td>Getting FREE Legal Advice</td>
</tr>
<tr>
<td>Face to Face</td>
</tr>
<tr>
<td>Your Legal Bill</td>
</tr>
<tr>
<td>Chapter 7</td>
</tr>
<tr>
<td>Choosing The Right Lawyer</td>
</tr>
<tr>
<td>Chapter 8</td>
</tr>
<tr>
<td>The Courts</td>
</tr>
<tr>
<td>The Discovery Process</td>
</tr>
<tr>
<td>Settlement Negotiations</td>
</tr>
<tr>
<td>What to Expect</td>
</tr>
<tr>
<td>Chapter 9</td>
</tr>
<tr>
<td>When Should I Represent Myself?</td>
</tr>
<tr>
<td>Chapter 10</td>
</tr>
<tr>
<td>Filing Papers</td>
</tr>
</tbody>
</table>
The Family Law Centre gratefully acknowledges and thanks Joel Miller for the preparation and writing of this booklet and Wayne Nestbeth for much of the original material upon which this series of booklets is based.

Joel Miller has been a practicing family law lawyer for over 30 years and is currently a partner in the Toronto, Ontario, law firm of Ricketts, Harris and Chair of the Ricketts, Harris Family Law Practice Group. He has taught Family Law for many years in the Bar Admission Course of the Law Society of Upper Canada and is on the Executive and Steering Committee of the Collaborative Family Law Association of Ontario. He is a frequent speaker at various groups about family law issues and has been an invited speaker several times at the National Family Law Program, Canada's premier family law conference for judges and practitioners. Mr. Miller is on the Advisory Board of Divorce Magazine has been often interviewed on TV and radio as well as in newspapers and magazines. He can be reached at:

Joel Miller
181 University Avenue, Suite 806
Toronto, Ontario
Canada M5H 2X7
Tel: 416 361-9000 Fax: 416 364-1697
Email: jgm@ricketts-harris.com

© 2001, Family Law Centre
All rights reserved
Notice to the Reader

This booklet provides topical information of a general nature relating to family law matters in Canada and is not intended to provide legal advice. If legal advice or other expert assistance is required, the services of an experienced family law lawyer should be sought. The publishers, authors, and editors of the material in this booklet aren’t liable or responsible to any party for any loss or damage caused or alleged to be caused by the use of the information found here.

This booklet is to help people understand various aspects of family law in a general way without being specific to any particular person or fact situation. If you’ve got a family law problem – see an experienced family law lawyer.

If you’re thinking about separating or divorcing, or are already separated, we strongly recommend that you get proper legal advice from an experienced family law lawyer. That’s the only way you can be sure that the steps you take with the information you get here - and elsewhere - will be appropriate for you.

Knowledge is power – but information is only of value when you know how to use it. In family law, more than in most areas of law, the final decision reached by a court is dependant upon the particular facts of each case and how they are brought out. The law is very important, but it will affect different people differently because the facts of each case are unique.

So read the information here, check out other sources of information, become as familiar as you can with the law as it affects you – and then consult a family law lawyer in your own area of Canada. Many of the laws differ from province to province or are interpreted or dealt with differently across the country.

Throughout these booklets we will use the words “spouse” and “partner” as well as “relationship” and “marriage” interchangeably because most of what is set out deals with people whether or not they are in legal marriages or common law marriages. There are certain times when there is a clear distinction between these relationships and the context of the discussion will make that clear. We’ll also refer to “husband” and “wife” whether the parties are in a legal or common law marriage.
Chapter 1  Custody and Access Issues

Lots of people fight over money. They can do a “cost-effectiveness” analysis to decide how much to spend in order to get what you're fighting over. You can make a business decision about how much of a fight you want to wage depending upon the reward at the end of the day. But things are different when it comes to custody and access. Here people will often spend huge amounts of money because they can't put a dollar value on custody and access issues. Custody and access fights can easily get out of control and cost thousands of dollars.

What's the Key Principle? The Best Interest of the Children

The over-all principle which governs custody and access issues, whether under the Divorce Act or any of the provincial legislation, is that the court must do what's in the best interests of the child. While everyone understands that this is the banner under which all custody and access decisions are made, matters don't get to court unless the two parents interpret that phrase differently.

Too often, they each discover that the judge thinks what’s in the children’s best interest means something different from what either of them thinks, and neither of them ends up happy. Even experienced family law lawyers can't realistically predict just how any particular judge will react to the particular set of facts in each case. Different judges may make different orders on the same set of facts, and the same judge may also make different orders on similar facts, depending upon specific pieces of evidence in any particular case.

More and more today the courts are trying to move parents away from fighting over custody and access and get them into looking at creating a parenting plan which doesn't worry about the terminology used but does try to make an arrangement for the children which is the most sensible for them given their ages and stages in life.
Chapter 1  Custody and Access Issues

This movement is based upon recognizing that many of the old concepts no longer apply as general rules.

Out-Dated Principles

Courts no longer regard the following as over-riding principles upon which to decide questions of custody and access:

♣ That children should be with mothers rather than with fathers

♣ That girls should be with their mothers and boys should be with their fathers

♣ That access should be limited to alternate weekends

♣ That access parents shouldn’t be involved in school events and extra-curricular activities just because they occur when they don’t have access

Today each of these things will be looked at against the background of how they relate to the best interests of the children and not as a starting point.

Parenting Plans

One of the ways you can help yourself in any custody or access dispute is to develop a comprehensive parenting plan. There’s no formal set up for such a plan. It’s nothing more than what you propose for the parenting of your children. But it should be carefully thought through so that if some judge asks what you are proposing, and why it makes sense, you can point to your plan and explain it.
Chapter 1

Custody and Access Issues

Your Parenting Plan Should Include These Elements:

♦ Where the children will have their primary residence. (How far apart will the homes of the parents be?)

♦ Who else will be living in the home with the children?

♦ Day care arrangements. (Can you use the same arrangements as before the separation?)

♦ Schooling arrangements. (The same or a different school? Advantages of the proposed school.)

♦ Participation of each parent in school events and responsibilities.

♦ Health arrangements.

♦ Extra-curricular plans for things like piano or skating lessons, hockey or soccer team, Cubs or Scouts, etc.

♦ How often the other parent will see the children and when. (Any visits during the week? Does a weekend begin after school Friday, or Friday at 6:00 p.m. or Saturday morning? Does it end Sunday night or Monday morning with delivery to school? Etc.)

♦ How the access will be carried out. (Who will do the driving?)
Chapter 1  Custody and Access Issues

♦ Contact with extended family on both sides.

♦ Financial arrangements.

The parenting plan can be created by either parent and may deal only with access or with custody as well. The thing to remember, of course, is that if you’re seeking custody and offering only restricted access to the other parent, the judge may award the custody to your ex and give you only the limited access you were prepared to give to him or her. So it’s best to be generous in your parenting plan, in case the result goes the other way. Courts generally prefer plans that include the active participation of both parents in the lives of the children.

Fathers' Concerns

There are many fathers groups claiming that fathers don't get a fair deal in custody and access fights. From their perspective, the history of the courts seems to bear that out. There are certainly many men in this country that feel the system is prejudiced against them and they have many examples to point to.

But history is a strange thing. If you go back far enough, children were regarded by the courts as chattels or possessions of their father. Married women had very few rights and custody was the absolute right of the father. Then things changed, and the courts became heavily in favour of awarding children to mothers in almost all cases. More recently the courts have been in a process of further change on this issue. For quite some time now the courts have been awarding custody to fathers in increasing numbers - or ordering joint custody even where the parents don’t get along all that well. As a result the allegation of bias against fathers isn’t as meaningful as it used to be.
Chapter 1

Custody and Access Issues

In fact, a well prepared father who can show the court how his parenting plan is better for the children than the one put forward by the mother is much more likely to obtain custody of the children now than in the past. The point is to focus on the best interests of the child and show the court how one plan accomplishes that better than the other plan.

As courts are trying to find ways to make orders relating to children without using terms like custody and access, we’re seeing orders that provide for primary residency to one parent with substantial time spent with the other parent. This is a trend, which enlarges the role of the access parent (typically the father), while still offering security and predictability to the residential parent (typically the mother). As a result both parents are best advised to be generous and co-operative in their access proposals so that the issue won't be taken to court. A routine the parties work out themselves is usually better than one imposed by a court.

For the Sake of the Children – The Joint Committee Report

November, 1997, the federal government created the Special Joint Committee on Child Custody and Access consisting of members of the Senate and House of Commons. This came about as part of the process of obtaining approval from the Senate to the changes in legislation necessary to enact the Child Support Guidelines. The committee's report, For the Sake of the Children, was released on Wednesday, December 8th, 1998, and makes for very interesting reading.

On Monday, May 16th, 1999, the then Justice Minister Anne McLellan announced government plans to propose changes to the current legislation regarding custody, access and child support.
Chapter 1

Custody and Access Issues

The government will consult with the provinces and then receive public input in the year 2001 with a view to presenting proposed legislative changes to Parliament by May 1st, 2002. She said that the discussions to reform the system will be held alongside the government's review of the child support guidelines.

"The vast majority of divorcing parents are able to resolve issues concerning their children outside the legal system. The Committee's review has shown that those who must turn to the system would be better served by a less adversarial approach that encourages parental responsibilities and provides both parents with opportunities to guide and nurture their children. In most cases, children and youth benefit from meaningful relationships with both mothers and fathers."

The Government's strategy defines key directions for reform and supports the Committee's recommendations for a child-centred approach to custody and access issues. But it's not yet law and we don't know how the government's expressed support for these principles will be translated into legislation.

What The Report Highlights Include:

♦ Shifting the current focus of the family law system away from parental rights and concepts that tend to promote discussions about ownership of a child to parental responsibilities and principles that emphasize the best interests of the child.

♦ Replacing existing terms and concepts like custody and access with new, clearly defined, language that promotes a focus on the best interests of the child and helps to maintain meaningful family relationships for the child after divorce.
Supporting the development of a co-operative, holistic, and flexible approach to custody and access issues that is less adversarial and more effective in responding to the needs of children and families.

Developing a specific framework for managing disputes between parents that recognizes and responds to different levels of conflict.

The Government's strategy also recognizes that family law is an area of joint federal/provincial-territorial responsibility. Broader, more effective measures to support families going through separation and divorce require collaboration between these governments as well as with a variety of disciplines and professional groups.

The Special Joint Committee's review provided valuable insight into some of the concerns of Canadian families with respect to the family law system and the need to improve it. The Committee hearings also revealed widely divergent views among Canadians on what's wrong with the system and how to fix it. There was a clear consensus that the best interests of children must be the highest priority of the family law system, but the various presentations before the committee showed a wide division of views as to how that should be enforced.
Chapter 2

Shared Parenting

What's Shared Parenting?
Too often their parents’ separation and divorce is the most devastating event in a child’s life. In many cases, children harbour thoughts that they may have actually been responsible for the breakup of their family. Sometimes they think that one or both of the parents don’t love them because one parent has left the family. Very often children fantasize about their parents getting back together. No matter what happens, children are victims of separation and divorce. The key thing is to try to minimize the effect this will have.

There are ways to help your children through your separation and divorce. Study after study has shown that children of divorced parents fare best when both mother and father work together to promote and maximize the involvement of each other in all aspects of the child’s life. Increasingly, this is being referred to as ‘shared parenting’.

Whatever the formal name given to the arrangement - sole custody with liberal access, joint custody, etc. - some form of shared parenting is increasingly being sought by parents trying to put their child’s interests first. Shared parenting isn’t about the number of hours or days a child spends with each parent – it’s about how separated parents can share the functions of child care and child management to provide as much involvement as possible for each of them in their child’s life.

Most people think that shared parenting can only succeed where the parties are getting along with each other and both want it – or that the courts only award it where it’s on consent. But that’s no longer universally so. We’re beginning to see more cases where judges are looking at shared parenting proposals as a child centered solution to custody disputes, whether the proposal is on consent or not.
Chapter 2  

Shared Parenting

Where sound shared parenting plans are put forward and the general circumstances merit it, the courts are no longer automatically rejecting the idea just because one of the parties, usually the one with primary care and control of the child, doesn't consent. There's less acceptance by the courts of that parent's "second best" solution for the child just because he or she doesn't want the other one to have so much participation in the child's life. So if you want to be the parent with the primary residence of your child, or extensive access, design a thoughtful parenting plan which includes the things set out below.

**Six Things To Do If Your Ex Isn't Cooperating: How To Walk The Talk**

Is there anything you can do if you're the non-custodial parent and believe that it's your child's right to have the fullest involvement of both parents in his or her life but your ex doesn't agree? There certainly is. There are various strategies and techniques you can use to help the court reach the decision you want. The steps listed below include recommendations arising from comments made by judges in cases considering whether or not to accept the shared parenting proposal of one parent when the other parent was opposed to the idea.

1. **Get Past the Anger and the Blame**

So long as you hold on to feelings of anger and blame they'll seep through and sabotage your effort to spend more time with your children. Often seeking to be more involved in your children's lives will look to be (and may actually be) an effort to be intrusive into your former spouse's life. Courts will be suspicious of your motives and your ex will be resistant and hostile to any suggestion from you. Nobody "wins" in this situation and the children certainly "lose". So get past the anger and blame stage. If you don't, it will be obvious to others and will colour the way they interpret what you do and say.
2. Don't Be Negative - Be Positive

Develop the practice of never expressing anything negative about your ex. Not by spoken word and not by conduct or body language. Not to your child and not to anyone else. You never know what will get back to your ex and the court and you never know who might be called as a witness against you. Make it so your mother-in-law or your ex's new partner will have to agree in court that you never badmouth or undermine the other parent. Don't give other people a weapon to use against you.

No matter what you may now think about your ex, and no matter how justified you are, always remember that there was a time you actually liked or loved him or her. At one time you thought your ex had some good qualities and he or she may still have them today, despite everything else which has occurred.

Don't put yourself into the position of thinking that a judge will increase your contact with your child if you throw enough "dirt" at, or prove enough criticisms about, your ex. The court certainly needs to know what kind of people both of you are, but judges are primarily interested in what kind of parenting you each propose to offer and can actually provide.

At the end of the day, the issue is not which of you is the best or worse person, but whether or not increasing your child's contact with you will be putting the child in the presence of a positive - not negative - person. Judges will look at whether contact with you better enhances the child's best interests. Generally speaking, you don't build this sort of case on the weaknesses of the other party. In custody and access matters, this tends to make you look like a bully from whom the child and the other spouse needs to be protected. The negative approach is too often counter-productive. So resist it wherever possible.
3. Make the "Sacrifice"
Mean it when you say "I love my child so much that there is no sacrifice I wouldn't make." Sacrifice your feelings about what caused the break up of your family. Sacrifice your distaste for the life style, or new partner, chosen by your ex. Sacrifice the natural instinct to "prove" you are the "better" parent. Sacrifice the temptation to express your frustration at how "unfair" the situation may be.

Making these "sacrifices" improves your chances of getting a court to order that you have more involvement in your child's life.

4. Acknowledge Out Loud That Your Ex Also Loves the Child
This isn't always easy to do, but just because you and your ex aren't agreeing on how often you can see your child doesn't mean that he or she doesn't love the child. Judges look to see if you're big enough to acknowledge that the other parent loves your child as well. You're asking that his or her plan for the child be rejected. Don't require that a court find they don't love the child before agreeing with your plan. It's possible to love a child and still be wrong about what's best for him or her. Nothing is gained by trying to convince the judge that the other parent doesn't love the child. The issue is what's the best arrangement for the child, not who loves the child more.

5. Watch the Buttons
By now you should know which of your "buttons" your ex is an expert at pushing to get you riled up and upset. Learn to control yourself. Accept that your ex's success in "getting to you" is only reinforced by you reacting in the same predictable way each time. Every time you do, you build up evidence against you to lead a judge to say that the two of you can't get along well enough for shared parenting to work.
Chapter 2

Shared Parenting

And learn to stop pushing the buttons which get your ex riled up and upset. Stop trying to "get back". However satisfactory the feeling is for the moment, it’s contrary to your position that you’re the sort of parent with whom your child should be spending more time.

The effect of "pushing the buttons" is different depending upon whether you are the custodial or access parent because it is the access parent who is trying to get the court to change the existing status quo. That's more difficult, so the court will look at you more critically than the other parent. You have the burden of showing why the existing arrangement should be changed and if you’re the “button” pusher, you’re the one thought to be instigating trouble and your access won’t likely be increased, and may be cut down.

If the residentiial, or custodial, parent is doing the pushing the court may well be upset at that conduct, but will want to see how you respond if you're the one asking for the change.

6. Be Cooperative

Even when you have to bite your tongue, be cooperative. And remember this even when being "cooperative" means you giving in six times and your ex only once.

If you’re going to be asking the court to consider a shared parenting plan, or to give you more time with your child, every instance of when you didn't cooperate will be more damaging to you than you can now imagine - even when there are good reasons for why you acted the way you did. Try to have witnesses or other people available who will later be able to testify and show how cooperative you have been in issues regarding the child.
Chapter 2

Shared Parenting

Include The Children
Assure your kids that you and your ex still love them and that the breakup is not their fault. Be sure NOT to talk to them about who is "wrong" or to involve them in the dispute between you and their other parent. Most parents don’t realize that the writing on this subject makes it clear that the biggest single thing which is damaging to children of divorce is to be involved in, or see, conflict. Speaking badly about the other parent, whom the child still loves even if you don’t, isn't a good idea at all.

One thing to keep in mind is that while parents might end up with new spouses after a separation, the children never end up with "new" parents. No matter how terrific the relationship between a child and a step-parent is, it’s different from that between a child and a parent, even if that isn't such a good relationship at all. So don't try to convince a child that your new partner should be called "mommy" or "daddy" and don't do anything to interfere with a natural relationship between your child and your former spouse. Consider getting counselling or family therapy wherever that's available to you. It's a good investment in the happiness and welfare of your child. Currently in Alberta and in some States, couples must attend counselling before a divorce is granted.

Conclusion
Whatever you do, don't use the strategies set out above cynically or as part of a campaign to take time with your child away from the other parent. Don’t use the comments above as tips to "beat" or "triumph over" your ex. Use them because they make sense to improve the way you interact with your child and because they allow you to highlight your best qualities if you need to go to court.

Shared parenting may be best for your child, but the court won’t automatically order it.
Chapter 2

Shared Parenting

Just because there's no longer a knee-jerk reaction by judges to reject the idea just because there isn't consent by both parties, doesn't mean getting it is easy. There are cases where the resistance of the other parent may be so strong that you won't be able to work out an agreement which makes sense to you or for the child.

In those cases you may be left with only the choices of going to court or accepting the situation presented to you. If you're going to be proceeding in the courts, the more effectively you've used the techniques described above, the more likely it is that you'll be awarded fair and full contact with your child. Either way - whether by cooperation or by litigation - your child ends up the winner if it gives him or her more time with each of the parents in a positive and loving environment.

There's an old saying: "Children are natural mimics; they act like their parents in spite of every effort to teach them good manners." In the same way, the way you act now in a custody or access dispute may influence your children for the rest of their lives, as well as influence the way they treat their spouses and raise their children.

So no matter what happens, remember to tell your children that you love them and will continue to do so no matter how things ends up and no matter how much or little time you're allowed to be with them.

Help them remember that the whole issue is about them and that they're not merely prizes being fought over in a war between the parents. Show them the love and respect you have for them, and then no matter what happens, you'll have done the best you can for your children.
Remember, however, if you haven't been doing the kinds of things mentioned above, this may be a fruitless exercise for you, because neither the children nor the court will buy the talk if you aren't walking the walk.
Chapter 3  14 Things To Do When You Have The Kids

1. Be careful with your language around the children. Don’t say anything negative about, or disrespectful to, their other parent no matter how upset they make you. If you can’t say something nice about your ex don’t say anything at all.

2. Be open and communicative with your children – let them know what’s happening but don’t try to make them allies in the dispute between you and the other parent.

3. Be as consistent in your schedule and routines with them as possible. Let them know that you’re a reliable presence in their lives.

4. Don’t set up household rules that are dramatically different from those in their primary residence. You don’t have to follow the other home’s rules exactly, but don’t set up competing sets of rules.

5. Maintain the children’s basic diets and health routines.

6. Always show respect to your children and others while they are with you.

7. Love your children unconditionally.

8. Set up a special activity at your home your kids love so they can look forward to doing it when with you. Perhaps it’s going swimming at the local community centre, or visiting their cousins, or watching an uncle curl or play hockey, or going to the library, or visiting a special part of your city or local area. Or maybe it’s something different each time and a surprise. Experiment until you hit upon something which works for you and is a treat for the kids.
Chapter 3 14 Things To Do When You Have The Kids

9. Spend time with your children doing things they like to do - not the things you want them to do.

10. Make sure you get their homework done and help them with school projects when they're with you.

11. Go to school and extra-curricular events with them.

12. Maintain their weekend routine so they don't have to "give up" soccer to go with you for access. Don't force them to make "choices", even if that cuts into your time with them.

13. Keep them in touch with their friends. Invite their friends over to your place or let them go to their friends' places, even if that means they won't be with you for the full access period.

14. Don't force them to like your new partner or his or her children. Go easy on that. Your kids don't want to feel that they have to compete for your attention when they're with you. And they don't want to feel that they're supposed to change the person they love just because you did. You may love your new partner better than your old one, but the old one is still someone they continue to love. Don't let them think they need to choose between the people in your life in order to get your love.

Just as there are things to do with the children when they're with you, there are things you can do when they aren't. These are steps you can take to maintain and strengthen your connection with them. Here are some examples:
Chapter 4  11 Things To Do When You Don't Have The Kids

1  Volunteer to help out at programmes at your child's school such as lunch time activities, school clubs, after school events, etc.

2  Coach in his or her sports league.

3  Go to watch their practices, games, activities, etc.

4  Offer to assist your ex by driving the children to and from after school lessons or activities.

5  Offer to pay for activities such as school trips or events, tutors, summer activities or special events, sports or other equipment, etc. - even if you won't be involved in the activity. This kind of thing can't be done by everyone, but look to see what you can do in your situation.

6  Go to parent-teacher meetings at school even if it means that you'll be there with the ex's new partner. If that won't work, call the teacher to set up your own interview - but let your ex know this will be happening.

7  Consider taking parenting classes or getting involved in parent groups dealing with any special situations your child is facing or problems your child may have.

8  Get a pet for your house to be regarded as your child's pet even though you're doing the work to keep it. Pick it out together and let your child name it. If it can't be a dog, pick out a fish, but get something.
Chapter 4  11 Things To Do When You Don't Have The Kids

9  Organize your time with the kids to include the things they like doing - not the things you want them to do.

10  If there's some friction between your kids and your new partner or his or her kids, spend time with them during the periods you don't have your kids with you so your kids won't see that your attention is divided when they're at your place.

11  Make it clear to your new family, by the way you spend time with them when you don't have your children, that when you do have your kids they're the ones you'll be focussing on.

Not everyone can do all of the things set out above. But give careful consideration as to which of them make sense in your situation and what things you can or should change to improve the time you spend with your children.
Chapter 5 Getting the Results You Want

Be Realistic
Don't get carried away with the "justice" of your case or how "right" you are. Zealots are so convinced that they're right that they don't often give enough consideration, or respect, to the views of others. If you act that way you'll only help convince judges and others that you aren't seeing things realistically and aren't likely to act in the best interests of the children if they don't coincide with your own.

You can help yourself develop a list of realistic expectations by working with people who are concerned about your situation, but not emotionally committed to it. These would be people who've shown in the past their ability to speak frankly when they don't agree with you. If you're involved in any therapy or counseling, that would be a place to sound out your views. And certainly an experienced family law lawyer will be able to put forward suggestions to help you assess what is and isn't realistic.

You can - and should - be optimistic in your expectations and you should always aim high. But don't let your emotions (whether they be love for your child or anger at your ex) take control. If you set out objectives that a court will see as being "out of the ball park" you won't get them. Judges will likely sense that you aren't realistic and go with the other person's suggestions. So try to design your objectives as being inside the "ball park" but at the centre-field wall. Then a judge can look at what you're proposing and compare that to what the other side is proposing and see whether the other plan is as reasonable as yours.

This means compromise. Don't be afraid of realizing that finding a "middle ground" is better for you if that means an improvement in your situation, than asking for so much that you don't get any change at all. The other side may not be interested in compromise and may be counting on you being "outrageous" in your demands so they can be rejected.
Chapter 5  

Getting the Results You Want

But if you come in with more modest proposals you may put the other side at a disadvantage where they may have to give in to what you want rather than risk having a court look at your suggestion and ask them "What's wrong with this proposal?"

Start At The End

There's a principle used in business management which says the first step to take in developing the strategies you need to achieve your objective is to "start at the end". That means that you shouldn’t rush off with different initiatives or act in a particular way without first knowing clearly how you want things to end. By looking at the last stage of the project - achieving the success you want and being able to define what that is – you’ll get a better idea of the steps needed to get there.

For those concerned about a particular result in a custody and access issue that means focussing on the last stage of the process first. What are the terms you want a judge to put into an order when he or she turns to your lawyer and says: "Mr. Lawyer, your client has convinced me to give him or her every reasonable request you asked for. What do you want me to order?" Focus on the specific terms you want in your order, separation agreement, or agreed upon parenting plan.

This isn't an opportunity to put out your "wish list". Most people don't get everything they might ask for. But it is an opportunity to spell out, in a clear manner, the realistic expectations you have.
Chapter 6

Lawyers

When Do I Need A Lawyer?
In today’s world, if you suspect that your relationship is about to end, you require sound legal advice from an experienced family lawyer. Maybe your partner has made it clear that he or she is about to make a move which will change the relationship, or perhaps you’ve received a letter from a lawyer representing your partner. On any of these occasions you’ll need to contact someone who knows what they’re talking about to make sure you know your rights and obligations. Often, delay in getting good legal advice will cost you much more later on. So get your legal advice earlier, rather than later.

Be Prepared
Keep in mind that you’re in charge; the lawyer works for you. Identifying the things that are important to you is up to you. Know what you want before you go looking for a lawyer. Discuss your concerns with people you trust and consider bringing a friend who is familiar with the situation when you meet the lawyer.

Often, because of the emotional side of the breakup, we tend to spend a great deal of time talking about what happened instead of what we want. In the Family Law Centre membership package are a number of information sheets. Take the time to fill them out. They’ll help you clarify issues and organize your thoughts without you having to pay a lawyer to sit while you try to get things straight.

The more organized you are and the more thought you give to your situation – the better able you’ll be to understand your options and make wise and informed choices. You’ll save time and money and help make your lawyer better able to focus on getting you the information and results you need.
Chapter 6

Getting FREE Legal Advice

♦ Ask if the lawyer you contact will offer a free initial consultation.
♦ Your provincial Law Society can provide a variety of FREE services depending on your situation.
♦ There are a lot of web sites that can answer some basic questions for you.

Where To Find a Great Lawyer

If you’re a member of the Family Law Centre the first thing you should do is to call the office to get the names of experienced family law lawyer affiliated with the FLC. You should also check around with friends and people you know, especially people who’ve had to use a family law lawyer recently. (Sometimes people will recommend the lawyer their spouse used rather than the one they used themselves because they thought the other lawyer did a better job.)

For FLC members, the FLC has a roster of affiliated lawyers across the country that practice family law as a substantial part of their practice. They offer FLC member a free initial consultation and if hired, will give a discount off of their normal hourly rates. Take advantage of these membership benefits.

Hiring a Lawyer For The First Time

If this is your first time hiring a lawyer, finding a good one can be a real challenge. Keep in mind that, as in other areas of life, there are good lawyers and bad lawyers, as well as experienced and inexperienced lawyers. And although most experienced family law lawyers will genuinely care about your case, there will be some who only see it as a payday. See if you can find out something about the reputation the lawyer you’re seeing has.
Look for a lawyer that is interested in serving your best interests, and will look at your situation with a view to discovering and pursuing your most effective options. A good lawyer doesn’t come cheap, and a cheap lawyer could prove to be the most expensive.

Identify the issues that you are facing. Inform yourself as much as possible before the first meeting. Be prepared. Organize your material and bring it all to the meeting. And most of all, don’t be afraid to tell the lawyer that you’ll be speaking with one or two other lawyers before deciding whom to hire.

10 Questions To Ask At Your First Interview With A Lawyer

To save time and money, have the following information written out and ready:

♦ All relevant information about yourself and your spouse
♦ All the questions you want to ask the lawyer
♦ The money details
♦ The relevant history

Organize your thinking and your information by completing the information sheets in the FLC membership packages.

Some sample questions to ask prospective lawyers:
1. How long have you been practicing family law?

2. Have you dealt with cases like mine before?

3. How will your fee be calculated?

4. What can I do to help keep costs down?
5. How long will this process take and what are you basing that estimate on?

6. I am on a fixed income, can I make payments?

7. Will either of us (spouses) have to appear in court? Under what circumstances?

8. Walk me through the process from start to finish.

9. What are the realistic expectations I should have about the outcome of my case?

10. If I need legal services other than family law, such as real estate or criminal law, will you represent me or another lawyer in your firm or will I need to get another law firm?

Remember to make note of the answers. There aren’t “right” or “wrong” answers to these questions. They’re designed so you’ll have some signposts against which to measure the different lawyers you might see, but even more so they’re designed to let you hear from the lawyer you’re interviewing so you can see if you’ll be comfortable using him or her. If everything else is right but the mix between you and the lawyer isn’t keep looking.

Proceed with the lawyer only you choose only if you feel that he or she has a clear understanding of the results you want, you’re confident they can provide effective representation for you at a competitive rate, and you feel comfortable with him or her.
Chapter 6

Lawyers

Face-to-Face
When you call to arrange your first meeting, ask the lawyer exactly what documents he or she will require. Completing the Fact Sheet and the Money Sheet in the FLC membership package will be a great help in that regard. Bring a friend with you and write out a brief synopsis of what your situation is and what you expect from the lawyer.

Your lawyer isn’t your therapist so don’t expect him or her to have the answers to why your relationship is on the rocks. But you should expect that he or she will have preliminary answers to your legal questions and to be able to offer you options to choose from.

Ask About Other Legal Services
Sometimes your matter may involve issues other than family law, and you’ll want to know if you need another lawyer to handle them. There may be criminal charges involved or the sale of property, or dealing with a family business. Check to see if there are lawyers associated with your family law lawyer to look after these things. If not, ask your family law lawyer how he or she proposes to deal with those issues. If you don’t like the answer, don’t use that lawyer.

Retainers
Most lawyers will want you to sign a written retainer before they agree to act for you. That’s a document, which usually sets out the lawyer’s fees and says what the lawyer will do for you. It sets out how you’ll be charged for the work done for you. Don’t be afraid to sign this and ask about one if the lawyer doesn’t raise it. If a lawyer balks at a written contract, you don’t want him or her handling your case. Most lawyers have some form of “retainer” agreement. Discuss this during your first meeting.
At the same time the lawyer will usually want to receive some money (also called a "retainer") or have a clear idea of how the fee will be paid when they open your file. Don’t try to avoid this. If you want the lawyer to work hard for you, the lawyer needs to know how they’ll be paid.

**Male Lawyers vs. Female Lawyers**

There are some people who think that if you’re a male contesting allegations of spousal abuse and allegations that you can’t get along with women etc., you should consider appearing in court with a female lawyer. This suggests that you don’t have a problem with women. But this kind of thinking may have less significance today than years ago. Times have changed and there are now as many or more women practicing family law as men. Experience and ability are better recommendations than gender and since there are now usually a reasonable number of lawyers of both sexes to call upon, no one uses the gender of the lawyer you hire as an indicator of anything.

**How Much Does a Lawyer Cost?**

Lawyers charge anywhere from $150 to $300 per hour or more and the average cost of an experienced family lawyer will vary across the country. Ask about the hourly rate when you call to set up the first appointment.

Once you hire a lawyer, he or she will require a retainer. This is a fee paid up front to the lawyer and your accumulated legal bill is deducted from these funds. Once your retainer is used up, you may be required to provide another one to cover future legal fees. Any residual funds remaining once your lawyer’s services are no longer needed are returned to you. The amount of the retainer required varies so it’s important to ask your prospective lawyer about it up front.
Chapter 6

11 Steps To Communicating Effectively With Your Lawyer
1. Take notes when you discuss things with your lawyer.
2. Summarize with him or her the conclusions and decisions you’ve reached together.
3. Ask for a realistic time-table for you to expect the various steps to be completed.
4. Set up a time for the next, or follow-up, contact.
5. See if you can speak by telephone or if it should be face-to-face.
7. Ask to have copies of all correspondence with your lawyer.
8. Keep copies of all documents for your file.
9. Keep on top of the cost so you won’t be surprised – request frequent bills.
10. Be open and candid if there is anything bothering you or which you don’t understand.
11. Above all, be sure you are clear about what was said and that you’re comfortable with your lawyer. If you’re not comfortable, leave your lawyer a message about your concerns and ask for an appointment to clear the air. If that remains a problem, consider changing lawyers. Not everyone gets along well with everyone else. Don’t think it’s your fault if you don’t get along with your lawyer.

Your Legal Bill
The following is a simplified example of a lawyer’s bill. For this purpose, we are assuming that the lawyer charges $200.00 per hour and the disbursements are only for examples. Notice that there is a description of the services performed as well as the time spent on each of the services.
Example Bill:

<table>
<thead>
<tr>
<th>Mr. Tom Jones</th>
<th>Good, Better &amp; Best Law Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>19 Rural Road</td>
<td>105 Main Street</td>
</tr>
<tr>
<td>Anywhere, BC M5X 1A3</td>
<td>Anywhere, BC M4X 1X4</td>
</tr>
</tbody>
</table>

**SERVICES RENDERED THROUGH MARCH 30, 2003**

To all legal service and advice as more particularly set out below:

<table>
<thead>
<tr>
<th>Date</th>
<th>Service Description</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feb 6/03</td>
<td>Consultation and file review</td>
<td>1.5 hrs.</td>
</tr>
<tr>
<td>Feb 8/03</td>
<td>Draft and dictation of letter to your spouse’s lawyer</td>
<td>0.5 hrs.</td>
</tr>
<tr>
<td>Feb 14/03</td>
<td>Drafting petition for divorce</td>
<td>2.0 hrs.</td>
</tr>
<tr>
<td>Feb 14/03</td>
<td>Call to client</td>
<td>0.5 hrs.</td>
</tr>
</tbody>
</table>

**DISBURSEMENTS**

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filing fees: Petition for divorce</td>
<td>$145.00</td>
</tr>
<tr>
<td>Serving documents</td>
<td>$190.00</td>
</tr>
<tr>
<td>Photocopying charges</td>
<td>$30.00</td>
</tr>
<tr>
<td>Facsimile Charges</td>
<td>$10.00</td>
</tr>
<tr>
<td>Total Disbursements</td>
<td>$1185.50</td>
</tr>
<tr>
<td>Sub Total</td>
<td>$1470.50</td>
</tr>
<tr>
<td>GST 7%</td>
<td>$102.90</td>
</tr>
<tr>
<td><strong>Total Account</strong></td>
<td><strong>$1573.40</strong></td>
</tr>
</tbody>
</table>

Read our legal bill carefully to be sure that you understand the services charged for. If there’s any question in your mind about any aspect of your legal account, you should be sure to discuss this with the lawyer sending the account.
Read our legal bill carefully to be sure that you understand the services charged for. If there's any question in your mind about any aspect of your legal account, you should be sure to discuss this with the lawyer sending the account.

Managing Your Lawyer
It is wise to discuss all your expectations with your lawyer up front. You must describe what closure would mean to you. Your lawyer is there to protect your legal rights. He or she is the law expert on our legal system. Let your lawyer know that you’re expecting that he or she consider the facts of your case and explain all sides of the legal issues to you, and offer some recommendations. But once you are informed of your options, and their consequences, the choice is yours. Don’t let the lawyer push you into a position you don’t understand or don’t want.

Keep your lawyer focused on the issues relevant to your case. Using your lawyer to discuss your problems to gain sympathy can become very expensive for you. Develop a network of friends, relatives, and relevant professionals to do that. Use your lawyer in the most efficient ways possible.

What to Tell Your Lawyer
Tell your lawyer as much as you can about your situation. Answer every question he or she asks fully and honestly. The more information your lawyer has to work with, the better he or she will understand your position, and the better he or she will be able to represent you effectively. One of your lawyer’s job is to design a strategy to bring you success. That strategy is built upon knowing the strength and weaknesses of both your case, and as much as possible, the other side’s case.
Leaving out important information, even if it is damaging to you, may result in the lawyer taking steps which may be harmful to you reaching your objective, or damaging your creditability. So cooperate as much as possible to help create a winning approach to your case.

As a practical matter, concealing information or giving false information may ultimately put you into a terrible situation such that even the best lawyer won’t be able to help you and you’ll be much worse off than if you had been honest and candid with your lawyer.

**Having A Lawyer or Not**

In most cases, it’s better to have a lawyer with you when you go to court. This should be the lawyer who prepared the documentation filed on your behalf, so that he or she is familiar with the case.

If you can’t afford the cost, and you plan to go on your own, make sure you know what you’re doing. Consider hiring a lawyer to act as a coach for you for part of the case. All lawyers won’t do this, but there are lawyers who’ll agree to help prepare a part of your case, or who’ll spend some time with you going over what you’ve done and what you need to do and know if you’re going to act for yourself.
If you want to raise the issue about changing the amount or nature of contact time you have with your child, or are resisting a claim from the other parent about this, or are dealing with a support issue or property you should be sure you have a lawyer who’s knowledgeable in these areas and with whom you are comfortable. Consider these steps:

1. Seek out a lawyer with views about the parenting approach which matches yours. Ask your friends about whom you might call. Feel free to ask the lawyer about his or her views on this.

2. Ask the lawyer if you could meet with him or her for an initial consultation to discuss the case. Don’t hesitate to mention when setting up the appointment, that you’re having interviews with 2 or 3 lawyers and want to have a preliminary discussion about the case before deciding whom to retain. If the lawyer gets upset or offended at this, you need to decide if he or she is the one for you. Most lawyers agree that seeing more than one lawyer before you choose the one to act for you makes sense.

3. Be sure to go over the question of fees and what the lawyer’s expectations are regarding retainer and payment. Can you afford this lawyer or work out a way he or she can be paid?

4. Make sure that you have a list of questions to ask each lawyer and ask them in the same sequence so that you’re able to make meaningful comparisons of the answers you get and the way they were given.

5. Go over your objectives and see if you agree with what the lawyer thinks are realistic expectations.
Choosing the Right Lawyer

6. Don't hire someone who will ask the court for whatever you want just because you want it without analyzing how that will advance your overall objectives.

7. Ask your lawyer about the percentage of his or her practice spent doing family law matters.

8. See if your lawyer has spoken or written on family law matters and if he or she is involved in any teaching.

9. Make notes of what the lawyer tells you so you can review them later and make comparisons.

10. Consider bringing a friend along to the interview. If you're going to do this, you should bring the same friend to each of the interviews so that their comparisons will be based on the same information as you have.

11. Then hire the one you feel most comfortable with.

"Aggressive" Isn't Always "Effective" - Don't Confuse the Two

Always keep in mind that the reason you are spending good money for a lawyer is that you want to increase the chances of getting the results you want. So don't confuse an "aggressive" lawyer for an "effective" lawyer.

Generally speaking, effective lawyers don't act aggressively, although they can and do where it's necessary to protect their client. Usually, aggressive conduct just puts off the other side and the judge.
Chapter 7 Choosing the Right Lawyer

So long as the lawyer you’re using has experience in family laws, he or she isn’t likely to be intimidated by aggressive conduct from the other side and doesn’t need to play that game to best represent you. Most often, aggressiveness builds up resistance to settlement and resolution and increases the cost and expense of the process. By getting a lawyer who is focussing on being effective rather than aggressive, you help increase the likelihood for settlement and keeping costs down.
Chapter 8                                                                                      Courts

There are different courts for different circumstances and these courts have different names in different provinces.

The Lower Courts
These courts deal with custody, access, and support issues. They can’t grant a divorce or divide marital property. There’s more flexibility in these courts and you may be able to move through the process with less cost and more speed.

The High Courts
Depending upon your province this court may be called the Court of Queen’s Bench, the Supreme Court or the Superior Court. Divorce falls under federal jurisdiction and to get a divorce, you must file in one of these higher courts. One spouse will file the actual complaint or petition for divorce with the courts. In accordance with applicable laws, the other spouse must file an official response. Alternatively, both spouses can file a joint petition for divorce. Division of assets or property is addressed in these courts also.

Be prepared to pay for virtually everything you file.

In most cases the documentation is different in the higher courts than in the lower courts. If you’re not familiar with court procedures, get help from a qualified lawyer. Making a small mistake could cost you big time, so make sure you know what you are doing.
Chapter 8

Temporary Or Interim Orders

This starts when one spouse files a formal request for a temporary or interim court order for such issues as access or custody, child or spousal support, or exclusive possession of the family home. In some instances, these requests will include provisions for one of the parties to pay the other party’s legal costs and often there is a term restraining people from dissipating assets or removing a child from the jurisdiction. An interim order is designed to get something in place fast and govern matters until a trial can be held.

The Discovery Process

The examination for discovery process, or the co-terminus process in your province, is used to obtain information about every aspect of your claims. Here you’ll need to come up with tax returns, pay stubs, bank and investment account statements, credit card statements, etc., as well as setting out the facts you’re relying on for any claim you’re making. Take the time to re-read all the materials before your examination and be sure you’re familiar with what you’re requesting and why.

In some provinces this is done by a formal examination under oath and in other provinces by written questions and answers. If information is required to resolve a matter, and it’s not made available, a court can order that it be produced. Because of this most lawyers encourage full and open disclosure at an early stage on a voluntary basis. It’s cheaper and helps lead to resolving matters more swiftly if the parties are co-operative at the beginning.

You may want to hire professionals such as financial planners, accountants, tax advisors, real estate agents, appraisers, pension valuers and the like, to help you accurately establish actual monetary values.
In addition, these consultants can advise you of relevant information with respect to tax consequences and other risks or advantages associated with the retention or surrender of certain property or assets.

**Settlement Negotiations**

People can begin negotiating a legal and financial settlement at any time one party suggests it. This can be achieved through the use of lawyers, a mediator, an arbitrator, or by the actual divorcing parties themselves. But mostly it’s done by the lawyers on behalf of their clients.

When parties negotiate to settle matters for themselves a great deal of money can be saved in terms of fees paid to professionals and trial expenses (i.e. court costs, expert witness fees, etc.). However, it’s very important to make sure that all the legal issues such as child and spousal support, custody and access, and financial concerns (tax ramifications, potential fiscal advantage or pitfalls) are thoroughly addressed and understood so that equitable conclusions can be reached. Don’t be someone who was so anxious to save $1,500 in legal fees that you create a problem costing much more than that to fix, if it can be fixed at all.

The temptation to do your own negotiating is often pretty strong. But be careful about this. After all, you and your spouse have already shown that you don’t get along that well. The idea that you and your spouse will be able to work out a really fair settlement may not be reasonable. But using your respective lawyers often leads to that result. Indeed, there are times when your lawyer can negotiate a settlement on terms favourable to you which you probably couldn’t do yourself. This is because the lawyer will frequently be better able to look at your reasonable options without getting caught up in the emotional factors which block your way to finalizing matters.
While negotiations can be begin at any time, it doesn’t make much sense to get into detailed negotiations until after there’s been full and accurate disclosure. Starting to negotiate too soon generally means that one of you is short of the information necessary to make an informed and wise decision. There are people who will say they just want to make a deal and settle without letting the situation go to litigation or becoming complicated and costly by bringing in the lawyers. But what they really mean is that they want you to get into negotiations without having all of the information because there may be information they’re withholding and don’t want you to have.

Rather than holding off trying to settle anything there are times you can agree that the negotiations will take place now for certain issues and that the other issues will be left for later, after the required information can be gathered. But don’t allow yourself to be stampeded into making any decisions until the other side has produced all of the information they have which is relevant to the matter being negotiated.

There are people who don’t like to disclose information just because the other side asks for it. For that kind of person the issue is about control and trying to show that they can’t be pushed around rather than focusing on how best to deal with the issue. That attitude is usually very short sighted as it revolves around responding to the other person’s agenda rather than their own agenda. Refusing to make proper disclosure may push the other side into beginning a court action simply in order to get the proper disclosure. Once an action has begun and people realize that the court will require that the disclosure be made that person generally tends to comply with the law and provide the information. All they’ve done is create suspicion about their honesty and made things more difficult for them to settle.
Chapter 8

Separation Agreement

Once an agreement has been negotiated, an over-all settlement agreement will be formally drafted. This document will incorporate the conclusions you and your spouse reached and may or may not become part of a formal court order or divorce judgment. It’s quite common that parties enter into a separation agreement, which covers many issues in detail, and then get a court order dealing only with some of the issues raised in the separation agreement. The terms of the separation agreement will survive the divorce order unless the order covers the same matters.

Final Order

Depending upon the legal process you’ve been involved in, there may be a final order or divorce judgment, although sometimes the separation agreement is all you need or want at this particular time in your life. At this point, it’s best to confirm that all legal documents such as deeds, registration forms, and other ownership documents have been updated to accurately reflect your divorced status.

Lastly, go over all financial papers such as bank accounts, stock certificates, insurance policies, etc., to ensure that these also accurately reflect the completion of the divorce process. And be sure to re-do your will. Remember that issues relating to children such as custody, access and child support are never final. These can always be re-opened by a court in the event of a material change in circumstances or in the best interests of the child. Even if you’ve had a two week trial!
Chapter 8

Courts

What to Expect
A court battle is just that: a battle of your interests against those of your spouse. This requires that you be aggressive and sometimes stubborn. It breeds anxiety and stress because you fear that you may end up on the losing end.

Throughout the process it’s really important that you be clear and realistic about your objectives at all times. Don’t let your emotions over-rule your good sense. Focussing on what you want will bring you closer to your objective than focussing on how to prevent the other party from getting what they want. The ultimate goal is to bring about your success, not the other party’s defeat.

Don’t expect that insisting on getting everything you want will be a successful tactic or that spending more money than the other person will necessarily work. Don’t expect that you can “win” more by fighting every issue than by giving in and being reasonable on the issues of real concern to the other party.

A family law court is a public forum. In addition to the lawyers, judge, court reporter and other officials required to be there, complete strangers can walk into the courtroom and listen with interest as details of your private life are hauled out before the court. Always present yourself at your best – don’t let the other lawyer, or your emotions, show you in your worst light. Staying dignified and cool, while being honest and candid, and showing emotion where appropriate and genuine, will impress a judge. But getting angry or bad-mouthing the other party seldom brings the desired results.

In court, generally, you sit at a table with your lawyer, facing a judge who sits above you on a raised bench. Your spouse sits across from you at a separate table for lawyer and client. Behind you, strangers may sit, watching the proceedings.
Chapter 8  Courts

This is a formal, imposing environment that we usually associate with criminal or movie trials. At a trial you don’t have the opportunity to respond as matters are discussed. Don’t interrupt your lawyer’s concentration by interrupting at each point. But we suggest that you take notes to review with your lawyer at the break.

In court, each side gives their testimony and puts up their witnesses. Each witness may be cross-examined. Then the judge hears the evidence and makes a decision. That’s it. When determining spousal support or child custody arrangements, this decision may be great for you, or it may be a disaster. It is most often win-lose or a lose-lose situation. That why you should consider reaching an amicable settlement which is fair to both sides.

Even partners who start out relatively cooperative can end up at each other’s throats after the court process. In court, bitterness and resentment are often stirred up. You have to remain in silence as your spouse’s lawyer claims that the interests of your child are better served by your spouse having sole custody. Or that you should be regarded as having more money to pay support than you feel you’ve got, or that you really don’t need as much in support as you’re claiming. A trial can be a very frustrating way to resolve matters.
There are times to represent yourself, and there are times when it is best to use a lawyer to represent you. Your first appearance in court is generally not an ideal time to represent yourself! Your first time in court will likely address the major issues of custody, access and support. Most people don’t have the experience or the skills to deal with an experienced lawyer on the other side, especially when it’s likely that they have a lot of emotion regarding the matter. So you can put yourself into a hole by acting for yourself rather than having a lawyer there for you.

We also suggest that you refrain from representing yourself at a trial! The odds are likely that you’re not equipped with the required skills for cross-examinations or submissions (especially legal submissions), and you aren’t likely to do a very good job examining yourself to get your story told in the best way for the court. Keep in mind the old legal saying: “A lawyer representing himself has a fool for a client.”

However, there are times when it may make sense to you to represent yourself. Some people are forced to represent themselves because they don’t qualify for Legal Aid and they can’t afford to hire a lawyer. Sometimes an issue has come up so swiftly that you’re in court before having had a chance to get a lawyer.

13 Tips If you’re Representing Yourself

1. Go to court and watch other proceedings before you have to appear.

2. Always speak in a polite and courteous manner.

3. Always speak clearly and loud enough for the judge to hear what you’re saying.

4. Don’t sound hostile.
5. Watch your body language.

6. Refer to the children as "ours" not "mine".

7. Don't refer to your spouse as "Mr. Jones" or "Mrs. Jones" – use their first name.

8. Present written materials that are easy to read and neatly set out – check other court documents to see what a lawyer's work-product looks like.

9. Set out the key points you need to get from each of the witnesses and structure your questions in advance.

10. Remember that when you're examining a witness you can't make statements, but must ask questions.

11. Don't misrepresent the evidence that other witnesses have given and don't exaggerate the evidence that you'll be presenting.

12. Realize that issues of law may come up and consult with a lawyer on specific issues.

Chapter 10

Filing out Documents

Don’t have a lawyer? If you’re going to be in court, you’ll need to fill out detailed documents and we suggest you get help. Have someone you trust look over all your documents, maybe a paralegal or a lawyer you retain just to review your material. Making a tiny mistake here can cost big time later on.

Filing for divorce is risky business if you’re not familiar with the documents you’ll be required to fill out. So be careful and pay attention to details. If you’re unclear about anything, ask questions. If you are still having troubles, consult a lawyer. You could end up paying a lawyer lots more than you’re trying to save if you make a mistake when filing out your forms.

Sole and Joint Petitions For Divorce

When filing a petition for divorce by yourself, you’re the applicant or the petitioner. However, you and your spouse can work together and make a conscious decision to separate and divorce by making a joint application for divorce.

Talk with your spouse and ask for agreement on filing for the divorce jointly. If this isn’t possible or agreeable then you need to file as a sole applicant. At this point, think about your actions and the consequences. Be sure you know the position of your spouse and children.