

COMMON LAW SPOUSES



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ORIGINALLY PUBLISHED IN THE WINTER 2006 EDITION OF THE BAILIWICK NEWSLETTER

One of the greatest areas for confusion in matrimonial law is the legal rights and entitlements of common law spouses. Many people believe that a couple living together for a period of one year have a 50/50 entitlement under the law to one another's property.

The reality could not be further from the truth.

This lack of clarity may result from confusion with the tax rules applied to common law spouses by the Canada Customs and Revenue Agency.

In the following article, I will attempt to clarify the laws that govern the rights of common law spouses under British Columbia's matrimonial laws.

Matrimonial or 'family' law as it is commonly referred to is governed primarily by two statutes, the *Family Relations Act*, ("FRA") , which is a provincial statute, and the *Divorce Act*, a federal statute. In addition to the rules set out in these two statutes, the common law set out in case law provides guidance on a range of matrimonial matters. Only the FRA and the common law address common law spouses.

To be considered common law spouses under the FRA, two people must reside together in a marriage-like relationship for a period of at least two years. Many of my clients are surprised to learn that a couple is not considered to be common law under the FRA after a period of one year.

In contrast, for tax purposes, persons living together for a period of 12 months are considered to be common law spouses under the *Income Tax Act*.

The FRA does not provide for a property entitlement as between common law spouses. Married people under the FRA are each entitled to half of the family assets, which includes all assets commonly used for a family purpose and usually includes the home, vacation properties, recreational vehicles and even businesses owned by one or both spouses. Unmarried couples are not entitled to a share of one another's assets under the FRA.

COMMON LAW SPOUSES *continued*

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The one exception to the rule that common law spouses are not entitled to a share of one another's property upon separation is the law of trusts. Under the law of trusts, if one common law spouse can show that he nor she made a significant contribution to an asset or assets of the other spouse, then he or she may be able to argue that he or she is entitled to a portion of that asset in recognition of that contribution. For example, if one common law spouse owns the house and paid the mortgage but the other spouse paid for a significant renovation of the house, the spouse keeping the house after separation may have to pay the other out for that contribution.

Unlike the property division rules, persons living together in a marriage-like relationship for a period of two years are entitled to spousal maintenance. Spousal maintenance is a monthly payment made by the spouse earning the higher income to the spouse earning the lower income. It is comparable to what many refer to as 'alimony.' Please note that an application for spousal maintenance as between common law spouses must be brought within one year of cohabitation.

So, while a common law spouse cannot take half your property under the FRA, he or she may be able to claim spousal maintenance from you if they have a lower income than you, are in need of financial assistance, and completed many of the tasks around the home during the course of the relationship.

Many clients who are concerned about their assets, ask me whether or not they should have an agreement in place prior to moving in with their partner. My advice to this question is decidedly 'no.'

The FRA contains a provision which states that common law spouses may bring themselves within the property division provisions of the FRA by way of agreement. Cases that have examined this provision since its enactment have interpreted it broadly. As a result, any agreement between common law spouses that contemplates the legal rights and entitlements of the spouses as between one another can be interpreted as bringing those spouses within the property division provisions of the FRA. For this reason, it is often best for a person concerned about his or her assets not to enter into any agreement in the common law context.

This example clearly shows why it is important to know your legal rights prior to making any decision that may impact your rights and entitlements with respect to family matters. For this reason I strongly advise consulting a lawyer to clarify your rights and your options when faced with a family problem.

To learn more about Cristen Gleeson, her areas of practice and view other Articles written by lawyers at our firm, visit us online at www.bakernewby.com.