

Family Law - FAQ

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1. How do I know if my spouse and I are "separated"

You and your spouse are separated when one or both of you have made a decision to end the relationship and there is no possibility of reconciliation. Most commonly, separated spouses live in different homes, but it is possible for spouses to live "separate and apart" under the same roof. A determination of whether two people have truly separated is a question that can only be answered by examining the specific facts of each case.

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2. How do I "qualify" for a divorce?

You will have to demonstrate that your marriage has broken down in order to get a divorce. Your marriage can "break down" legally in one of three ways (the first being the most common):

- You and your spouse have lived separate and apart for one year and there is no prospect of reconciliation. This is a no-fault ground of divorce - either party can request it;
- Your spouse has committed adultery (and you have not forgiven him/her); or
- Your spouse has been mentally and/or physically cruel to you. This includes acts of both physical violence and severe verbal abuse that cause mental anguish.

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3. If my spouse and I begin living together again after we separate, does that mean we have to wait an entire year before either of us can apply for a divorce again?

It depends on how long you and your spouse have been "back together". You can live together for up to 90 days for the purposes of reconciliation. If your attempts to reconcile last for longer than that, you will have to begin the process anew.

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4. If my spouse and I are unable to come to an agreement, and we need to seek the assistance of a court, what can I expect will be the general steps involved in the proceeding?

Usually an Application is the first step in a divorce proceeding. This is where the initiating spouse has an opportunity to tell his/her story and requests specific types of relief from the court. Either party may initiate the court proceedings by serving and filing an Application.

If an Application is served, the responding spouse must then serve and file an Answer within 30 days. The Answer is a document that is similar to the Application; the second spouse has an

opportunity to reply to any allegations put forth in the Application, has a chance to tell the story from his/her point of view, and is able to make his/her own claims.

When the applicant spouse receives the Answer, he/she will have the option of submitting a Reply within 10 days. The Reply is meant to directly respond to any new claims made in the Answer.

Once all of the pleadings have been served, the parties generally progress to a Case Conference. A Case Conference is where each party's lawyer advances his/her client's case in front of a judge. This meeting is usually informal, and judges often choose to meet with counsel and their clients in Chambers. Judges are allowed to make procedural orders at the Case Conference.

If the case has not settled, the parties will progress to a Settlement Conference. A Settlement Conference is similar to a Case Conference, however, the emphasis is on examining the efforts that have been made to resolve the dispute. The judge may also provide his/her opinion on the outcome of the case.

If the matter has still not settled and will be progressing to trial, the next step is for the parties to attend a Trial Management Conference (TMC). The primary purpose of the TMC is to organize the witnesses who will be called and how much time will be needed for trial.

In the rare event that the parties have still not settled their case, they will proceed to trial. The probability of this happening is incredibly slim.

Throughout this process, either party is free to bring one or more motions. Motions help determine issues such as spousal and child support payments, custody, access, and property division on an interim or final basis. A motion may not be brought before a Case Conference unless it deals with an "urgent" issue (and this is not an easy threshold to meet).

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5. What other methods are available to settle my case aside from litigation?

There are many ways to settle your case without having to go through the costly process of litigation. Your lawyer may engage in settlement meetings and negotiations (which could lead to the signing of a separation agreement or the acceptance of an offer to settle), or alternatively, you may choose to proceed with mediation, arbitration, or a hybrid process called med/arb.

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6. I got my divorce order. Now what?

A divorce does not take effect right after a divorce order is issued. A divorce takes effect exactly 31 days after the date of the divorce order. At this time, you may apply to obtain a certificate of divorce and choose to remarry.

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7. Why do I need a lawyer?

Going through separation and divorce is often an extremely trying time. You may feel confused, exhausted or emotional. The process is complicated, and it is difficult to see things clearly and objectively. You need a good family lawyer on your side to help you understand your rights and obligations. A lawyer can help you understand your choices, tell you what to expect and explain whether your position is reasonable. A lawyer's experience with and knowledge of the legal process and court procedures will help you to arrive at a fair resolution.

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8. Can my spouse and I retain the same lawyer?

No. Each of you must hire an independent lawyer. Sharing a lawyer would lead to a conflict of interest. Retaining a separate lawyer protects your interests and ensures that your rights are advocated for properly.

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9. Do I have the right to my spouse's financial information?

Yes. Central to any family law resolution is the production of full and frank disclosure. You have the right to information concerning your spouse's income, assets and expenses. This information is disclosed in what is called a Financial Statement, a sworn document which is accompanied by further documentation such as your spouse's Income Tax Returns and Notices of Assessment for the last 3 years.

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10. Do my common-law partner and I need a divorce?

No. Only married spouses need a divorce. You should, however, still consult a family lawyer. There are often other issues that need to be resolved upon separation, such as child support, custody, and even spousal support.

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11. In general, how does the court determine custody and access?

The court bases its decisions regarding custody and access on what is called the "best interests of the child". The "best interests of the child" includes a consideration of many factors, including but not limited to: the ability of each parent to care for the child; the love, affection and emotional ties between the child and each parent; the child's views and preferences (in appropriate circumstances); the plan proposed by each parent; and the ability of each parent to act as a parent.

The court may consider a spouse's conduct, but only insofar as it relates to his/her ability to act as a parent. In assessing this ability, the court is directed to consider whether the parent has ever committed any violence or abuse.

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12. What does the term "joint custody" mean?

Joint custody means that both you and your spouse have custody of the children. In other words, you and your spouse will continue to make all the major decisions concerning the children (health care, religious upbringing, education, activities, etc.) together. As you would expect, the term "sole custody" means that one parent is in charge of making all the major decisions about the children.

It is a common misconception that the term "joint custody" means that the children must reside with both parents on an equal basis. Joint custody is not the same as joint physical custody. If joint custody is awarded, many different living arrangements are possible. The children may live with each parent at least 40% of the time (called shared custody), each child may live primarily with a different parent (called split custody), or both children may reside primarily with one parent.

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13. I've heard that support payments can have tax implications. Is this true?

Yes and no. First and foremost, there are no tax implications with regard to child support. Child support payments are not tax deductible in the hands of the payor nor are they included in the recipient spouse's income.

Spousal support payments, however, can have tax advantages if structured properly. Where spousal support is being paid pursuant to a separation agreement or court order, and where the support is being paid on a periodic (not lump sum) basis, the payments are included in the recipient's income and deducted from the payor's income. The rationale behind this is that the family as a whole should then be paying less tax than they would had the higher income earner been paying tax on his/her higher tax bracket.

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14. What can I do if I haven't received the support owing to me? How can I enforce payment?

If child or spousal support is owing to you, but you are not getting paid, you can register the support order or the domestic contract with the Family Responsibility Office (FRO). The FRO has the authority to enforce support payments through various actions, such as garnishing wages or suspending licenses. For more information, please visit the FRO's website at:

<http://www.mcsc.gov.on.ca/en/mcsc/programs/familyResponsibility/about/index.aspx>.

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15. What can I do if my spouse is abusive and refuses to leave the house?

You should consult a lawyer, who may be able to bring a motion for exclusive possession of the home. This would give you the right to live in the matrimonial home and require your spouse to leave, even if the home is registered in his/her name. There are no guarantees that you will be granted exclusive possession, as the court is directed to consider a number of factors. One of the factors the court must consider is any violence that has been committed by a spouse against another spouse or the children.

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16. What exactly is a marriage contract and what kind of terms can I agree to?

A marriage contract is one type of domestic contract where two people who are married to each other (or who intend to marry) agree on their respective rights and obligations under the marriage, on death, or on separation, annulment, or dissolution of the marriage. You may tailor a marriage contract to suit your personal needs and may agree upon terms concerning the ownership or division of property; support obligations; the right to direct the education and moral training of your children; and any other matter in the settlement of your affairs. You do not have to divide your property equally, and you can specify how support payments will be made if your marriage ends. A marriage contract cannot determine, however, the right to custody of or access to the children. A marriage contract also cannot purport to limit a spouse's rights under Part II of the *Family Law Act* (i.e. the equal right of both spouses to possession of the matrimonial home).

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17. I am getting married in a week, and my fiancée has an antique necklace that is worth approximately \$20,000. When we marry, does the necklace become mine too?

No. If the marriage ends, the necklace is hers. If the value of the necklace has increased from the time you marry to when the marriage ends, however, you and your wife will share that increase in value (unless you have a marriage contract that provides otherwise).

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