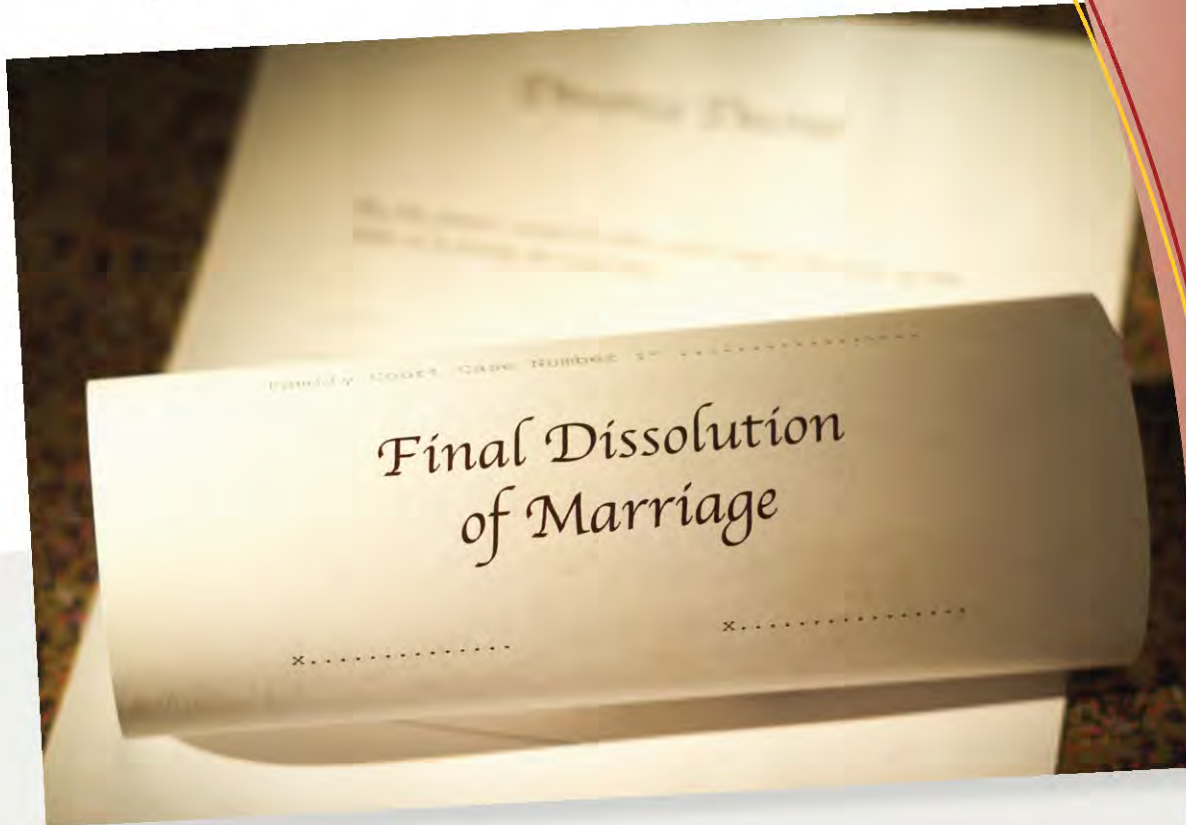




Lancaster, Brooks & Welch LLP
Niagara's Lawyers Since 1882

Resolving the Matrimonial Dispute – The Lawyer's Role



Accessibility and Convenience

Lancaster, Brooks & Welch LLP have offices in both St. Catharines and Welland which are conveniently located in the downtown core.

Regular office hours are Monday to Friday from 8:30am to 5:00pm.

We are happy to make appointments at other times to satisfy our clients' needs.

80 King St., Ste. 800, St. Catharines, ON
905.641.1551

3 Cross St., Ste. 202, Welland, ON
905.735.5684

By reviewing the process of dispute resolution in marriage breakdowns, we hope to make your options clearer, equip you to discuss matters in detail with your lawyer, and help you achieve a desirable resolution.

905.641.1551
www.lbwlawyers.com

Solving the Problems

A matrimonial dispute can be resolved largely in one of three ways: a separation agreement, a court order or a court order on consent (settlement before trial).

Separation Agreement

A separation agreement is a contract where the rights and obligations of spouses are settled. It usually deals with all issues, including custody, access, support and division of property. Once an agreement is signed, some say they have a legal separation, but they are already legally separated if living separate and apart with the intention of continuing that way, even without a signed agreement. A separation agreement needs the consent of both spouses and should be signed only after independent legal advice and full financial disclosure.

Agreement terms can be negotiated with more flexibility than courts typically use, although once signed, the court can enforce the agreement.

Flexibility, control of costs and avoiding court are benefits of the agreement. Divorce can only come from the court, but that is usually a straightforward procedure once an agreement is in place with full financial disclosure.

Court Orders

Court orders come from court actions. A court can deal with issues of support, custody, access and division of property, with or without divorce. The court application usually follows a standard format. Papers (pleadings) are exchanged setting out each position. A temporary court order may be applied for but typically cannot be obtained, except in emergency cases, before a case conference is held (a meeting of the parties and their lawyers before a judge). Decisions are made at the case conference on what steps should be taken before a settlement conference is held. These interim orders can be varied, but usually last until a settlement is reached or a final court order made after the trial.

Parties to an application may attend a questioning where each lawyer questions the other spouse, who answers under oath, to determine their case. This is not a court hearing, for no judge is present, but answers are turned into written transcripts to be used at trial. Before trial, a settlement conference is scheduled before a judge who encourages the parties to settle their action by offering views on the disputed issues.

It is not unusual for a typical family case to take one year or more to reach the courtroom. Settlement is encouraged at all stages of proceedings and is possible at any point until the court makes judgment. A court application is recommended if no voluntary agreement is possible. The judge will conclude the application by

imposing his or her view on both parties. It can also force the reluctant spouse to deal with issues. Since lawyers require time to prepare a court case, court action can often prove an expensive way of resolving disputes. However, court is appropriate as a last resort if parties cannot reach an agreement and is available to everyone.

Court Orders on Consent

If parties can resolve issues in dispute before the trial ends, their agreement can be reduced to writing and form the basis of a court order on consent. The risks of an adverse court ruling, the unpredictability of the law and costs of lengthy trial are all good reasons to consider settlement at any point during litigation.

Divorce

A divorce order is the legal termination of a marriage. It can come at the conclusion of a contested court application in which support and property division is also determined. A divorce can also proceed on an uncontested basis if the claim is for divorce only or if all other issues have been resolved by consent. Under divorce legislation, the most common ground's separation for a period of one year. An uncontested divorce can often be completed in three months, and the necessity for a court attendance can usually be voided by the signing of the necessary affidavits.

Your lawyer typically will not recommend for or against divorce; that is a personal matter that you must determine. Those seeking divorce should consider if everything can be dealt with in order to resolve all issues.

Areas of Dispute

Parties to matrimonial breakdowns often need assistance in resolving issues that include some or all of these: support, custody and access, the division of property and possession of the matrimonial home. The law provides



guidelines, but not absolute rules, on how disputed issues should be resolved.

Support

Both spouses have a legal obligation to support each other and their children as means allow, and also to become financially independent from the other in due course where possible. There is no "going rate" for support. Spousal support guidelines are in use and those similar to Child Support Guidelines may be enforced in the future. The court examines financial statements of each spouse to see what money is needed to approximate a similar lifestyle for each and recognize the needs of children. Usually, separated spouses cannot live as well on a fixed amount of income in two households as they could in one, so both must make adjustments.

Children are usually supported until they are aged 18 (or longer if in full-time school and living at home) or until they marry or become independent. The courts assess the amount in accordance with Child Support Guidelines, based on the income of the non-custodial parent. Visitation (access) is not related to support payment. The court tries to protect the best interest of the children at all times and considers that when dealing with the support issue. In assessing the need for support (for the spouse and/or child) and the ability to pay, spouses must make financial disclosure by way of sworn statements. Parties should also try to assess realistically their needs and ability to pay.

Under the provisions of the Income Tax Act, legal fees paid to collect support arrears and to obtain an initial court order for support may entitle a taxpayer to a deduction, so a breakdown of expenditures relating to support, as opposed to other issues, may be required. Should you wish to pursue this possibility with Revenue Canada or your accountant, your lawyer can prepare a breakdown of the legal fees.

Custody and Access

Whenever parents with minor children separate, the issue of custody and visitation must be dealt with. Normally, children will reside with one or other of their parents, with the non-residential spouse able to visit the children. If separated spouses have a cordial relationship, they sometimes agree to share custody.

In all circumstances, both parties should strive for some communication and help to achieve what is best for the children. In determining the proper spouse to have custody, the law requires the best interests of the children, rather than the parents, be the paramount consideration. An interpretation of "best interests" can be different depending on one's perspective. Before formal negotiations, the parties should try to agree on a situation that will best provide for the children's physical and emotional needs. The object is to minimize disruption and anxiety for the children. A copy of the brochure "Where do I Stand," a child's legal guide to separation and divorce, can be obtained.

The time, place and amount of visiting is determined in the same way as custody: What is best for the children? Usually, they are assumed to benefit from regular contact with both parents. Whether visitation can be left as "reasonable" or specified by certain times and dates is a matter to be resolved in each case. The parties should attempt to be flexible and considerate in both scheduling visitation and making the children available. Occasionally, the court will refuse access altogether or restrict it based on the conduct of the non-custodial spouse, especially where there is a potential danger to children.



Family Law Group

Malte von Anrep, Q.C.
H.E. Thorsteinson, Q.C.

Jean S. Beaton

Kevin H. Robins

Maria G. Lucarelli

Yaroslav O. Diduch

Michael S. Stratton

Stanleigh E. Palka

Thomas G. Hanrahan

Division of Property

Subject to any marriage contract, or other agreement to the contrary, the Family Law Act provides that each spouse is entitled to an equal share of the value of all assets (including pensions) accumulated by both during the marriage. The total amount, less debts, is divided in half, and each spouse is entitled to that share of the total matrimonial property. The value of property brought into the marriage is deducted from the value of the assets at the end, and any damages for personal injury or money received as an inheritance or gift from third parties, during the marriage are exempt, provided the funds have been kept separate and can be identified. The matrimonial home has special significance in the Family Law Act. If either spouse owned assets on the date of the marriage including the matrimonial home, the value of those assets, except the value of the home, are deducted for the net value of all assets of that spouse at the end of the marriage. The division of family property applies, even if one spouse never worked outside the home or contributed any money to its acquisition.

Possession of the Matrimonial Home

Under the Family Law Act, both spouses have the right to reside in the matrimonial home unless by consent one spouse gives up their residence or a court orders that one spouse may have exclusive possession. When possible, the parties should attempt to resolve who is to remain in the home pending resolution of the matrimonial breakdown issues. A court will look at the balance of convenience for the parties, including the stability of children and their safety. The court may be reluctant to force either party to leave the residence without compelling circumstances. Frequently, if the matrimonial home is owned rather than rented, there is a question of whether its sale can be forced or whether one spouse has the right to reside there indefinitely or for a period of time. Negotiation between the parties can usually resolve this matter. However, the law provides that the matrimonial home is in no different position than any other asset and that, in order to be fair to both spouses, an equalization of net family property may require the sale of certain assets to free up necessary cash for the equalization payment to be made. By agreement or



court order, one or the other may be allowed to remain in the home without it being sold for a period of time that can vary up to several years. This usually occurs when young children are involved. The home cannot be sold or mortgaged without the consent of both spouses.

Most matrimonial homes are held jointly in the name of husband and wife. With that type of ownership, the death of one spouse means the property automatically goes to the other. Recent Ontario court cases have allowed a spouse who is a joint owner to sever that joint ownership by signing a deed to him or herself without the consent of the other. Subsequently, either may leave their interest in the matrimonial home to a third party in a Will should death occur. As a result, you should consider severing the joint tenancy when you discuss financial circumstances with your lawyer.

Mediation

Traditionally, lawyers face each other in an adversarial role, each trying to do the best for their clients. This is often an appropriate and desirable approach, even where there is willingness to negotiate terms of a separation agreement. In some cases spouses are sufficiently committed to amicable settlement that one lawyer acting as mediator (often in conjunction with a counsellor and/or accountant) can negotiate a satisfactory agreement by making recommendations. The mediator must be skilled at negotiation and knowledgeable in family law. Once an agreement has been reached in principle, each spouse visits a separate lawyer for independent legal advice. If no agreement is possible, the mediator cannot act for either party.

Mediation can be substantially less expensive and quicker than standard negotiation procedures, since only one hourly rate is charged and time is saved by avoiding the need for communication between lawyers.

The Use of Arbitration in Family Law

Recent legislative amendments have been made to enable parties to use arbitration in family law disputes. It must be conducted in accordance with the law of Ontario or that of any other Canadian jurisdiction. Family arbitration agreements are now added to the definition of "domestic contract" with all the protection of full and frank financial disclosure and independent legal advice. Parties seeking greater control (i.e. deciding who will conduct the arbitration and where and when it takes place) and cost saving in resolving family disputes are increasingly pursuing arbitration.

Counselling

Competent family lawyers can ease the strife of marriage breakdown by working to settle matters or having a court decide issues that arise between spouses. However, lawyers are not social workers, nor are they trained to help keep marriages together. Community resources are available, some at low cost, to help in the reconciliation process, and we encourage the use of these facilities even before the lawyer becomes actively involved. Ask us for a referral if you feel reconciliation counselling could help your situation or if you require help in dealing with a separation, either for yourself or your children.

Your Will

It is generally desirable for everyone to have a current Will. If there is no Will, a spouse (even if separated) will receive a substantial portion of the estate on the death of the other. Particularly when there is a matrimonial dispute, it is appropriate to consider making or updating your Will so the proceeds of your estate, in the event of death, will be divided according to your wishes. The creation of a new Will is a relatively simple procedure that you should discuss with your lawyer.

The information provided in this brochure is designed to provide topical information of a general nature only. You may wish to discuss any specific matter with your lawyer and you should feel free to do so at any time. This material is provided for information purposes only, not as legal advice, and is not intended to be exhaustive of your rights under the relevant legislation.

*Provided by way of public information as a courtesy by:
Lancaster Brooks & Welch, Barristers & Solicitors*