GALBRAITH FAMILY LAW

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COMMON QUESTIONS FROM CLIENTS AT INITIAL CONSULTATIONS

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CUSTODY AND ACCESS

1. What is the difference between joint custody, sole custody and shared custody?

'Custody' is the legal right of the parent to make decisions for your children.

- **Joint Custody:** In this situation, both parents make major decisions (such as education, religion, non-emergency health care) for the children together. Joint custody situations differ, so that children may spend their time equally between both parents' homes or they may live primarily with one parent.
- **Sole Custody:** Sole custody means that one parent has the authority to make all of the major decisions for the children.
- **Shared Custody:** Shared custody refers to physical custody of the child: it is the situation where parents each have the children more than 40% of the time.

With sole custody, only one parent has custody of the children. The children reside with the parent who has sole custody and the other parent may or may not have visitation with the children. In sole custody situations, the parent with sole custody can solely make decisions for the children on matters such as health care and education, although the other parent may have some limited rights to give input on those decisions. Day-to-day decision making is usually made by the person having physical care of the child.

2. If I agree to "joint custody" does that mean that I will have to accept lower child support?

No; the amount of child support you may receive is based on the physical custody arrangement and the income of the spouse who pays child support. (Federal Child Support Guidelines, SOR 97-175). If your children live with you at least 60% of the time, you will be entitled to the Child Support Guidelines' amount of support.

3. If I agree to "shared custody", does that mean that I will have to accept lower child support?

No, but it is more likely that you will receive a reduced amount because the children are spending equal time with both parents. However, a Court may still order an amount of support similar to the Guidelines' amount (Child Support Guidelines, s.9)

4. How is child support calculated in a shared custody situation?

In this situation, because the children are dividing their time roughly equally between the two households, we look at the amount of support each parent would be paying under the Guidelines. Assuming you are both employed, these amounts would be set off against one another. For instance, as a simple example, if you were to be paying $100 to your spouse based on your income, and your spouse would be paying you $200 based on his/her income, then the set-off amount is $100. The person making less income would be compensated the difference between the 2 amounts, $100.

However, there is a lot of discretion in shared custody arrangements. A Court will consider the increased costs of the parenting arrangements, and the conditions, means, need and circumstances of each parent and child to determine the amount of support. (Child Support Guidelines, s. 9)

5. Will I be able to get sole custody? If we went to court, how does a judge decide whether it should be joint or sole custody?

You may be able to get sole custody. There are many considerations a judge will consider; however, the overarching question is what is in the best interests of the children. If both parents are capable parents, a judge will strive to ensure both parents are still involved in their children's lives. Each parent has an equal right to custody of the child (Children's Law Reform Act, s. 20(1))

The 'Best Interest's' test used by judges considers:

a. the love, affection and emotional ties between the child and,
   (i) each person entitled to or claiming custody of or access to the child,
   (ii) other members of the child's family who reside with the child, and
   (iii) persons involved in the child's care and upbringing;
b. the child's views and preferences, if they can reasonably be ascertained;
c. the length of time the child has lived in a stable home environment;
d. the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
e. the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
f. the permanence and stability of the family unit with which it is proposed that the child will live;
g. the ability of each person applying for custody of or access to the child to act as a parent; and
h. the relationship by blood or through an adoption order between the child and each person who is a party to the application.

(Children's Law Reform Act, s. 24(2))

It's tough to take an objective look at things, especially when you're emotional and want to protect your childen. Reference our handy Best Interests of the Child Checklist (*pg. 24*) to learn more.

6. We have not yet separated. We have very young children. They are aged 1, 3 and 5 years old. What is the typical parenting schedule for children this age?

Children this age typically have one primary residence, with frequent and predictable access arrangements. Because the children are so young, it is common to work up to overnight visits. For example, you could begin with one afternoon or evening per week, and a half day-full day on the weekend. This could increase to an overnight once a week, and so on.

However, there are numerous factors to consider and each family's arrangement may be different depending on the parties' work schedules, distance between the parents, and level of conflict.

7. Our children are teenagers. They have lived with me since separation five years ago but now want to live with their father. He is not a good parent. He parties too much and has lost his driver's license for DUI. What will happen?

Typically, the courts will allow teenagers to live with whomever they choose. If they are 16 or older, they have the right to withdraw from parental control altogether. However, if they are younger (12-15), you have more latitude to argue that their preference to live with their father is not in their best interest due to their father's inability to be a responsible parent. A judge would look at their age, maturity, intelligence and views amongst other considerations in making a determination as to whom they should live with. (Children's Law Reform Act, s. 20(1))

In terms of process, since the children have been living with you since separation, you would be considered the custodial parent. In the absence of any court order or agreement between you and your spouse, your spouse would have to apply for custody or reach an agreement with you. Courts also strongly consider the current status quo, which is in your favour because the children have been primarily living with you since separation.

8. What are the typical parenting schedules for children?

There is no 'typical' arrangement: schedules typically depend on the needs of the children, preferences and scheduling abilities of the parents (i.e. work schedules) and ultimate best interests of the children.

Schedules may include:

Traditional: Reside with one parent, spend every second weekend and one night during the week with the other parent; pick up and drop off at a set time on Friday night and Sunday night.

Alternatively, the Department of Justice website (http://www.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/p5.html) lists different rotation parenting schedules. **These include:**

The children will live alternating weeks with Parent A and Parent B. If the children are living with Parent A in a given week, Parent A will pick the children up on Monday after school and drop them off at school the following Monday morning. Parent B will do the same.

OR

This schedule is a rotation, based on two consecutive days with each parent and then five consecutive days with each parent. The children will live:

a. with Parent A from Monday after school until Wednesday morning before school
b. with Parent B from Wednesday after school until Friday before school
c. with Parent A from Friday after school until the following Wednesday morning before school
d. with Parent B from Wednesday after school until the following Monday morning before school.

When a parent's time with the children begins after school, they are responsible for picking the children up at school. When the parent's time ends on a school morning, they are responsible for dropping the children off at school.

OR

This schedule is a rotation over a two-week period. In each week, the schedule is based on two consecutive days with one parent, then two consecutive days with the other parent, and then three consecutive days with the first parent. The children will live:

a. with Parent A from 6:00 p.m. on Sunday until Tuesday before school
b. with Parent B from Tuesday after school until Thursday before school
c. with Parent A from Thursday after school until 6:00 p.m. on the Sunday beginning week 2
d. with Parent B from 6:00 p.m. on the Sunday beginning week 2 until Tuesday before school
e. with Parent A from Tuesday of week 2 after school until Thursday before school
f. with Parent B from Thursday of week 2 after school until 6:00 p.m. on the following Sunday.

When a parent's time with the children begins after school, they are responsible for picking the children up at school. When the parent's time end on a school morning, they are responsible for dropping the children off at school.

OR

The children will live mainly with Parent A. The children will live with Parent B from after school on Tuesday until 8:00 p.m. and after school on Thursday until 8:00 p.m. The children will also live with Parent B every second weekend from after school on Friday until Monday morning. Parent B will be responsible for picking the children up from school on Tuesdays and Thursdays, and on those days Parent A will pick up the children from Parent B's home at 8:00 p.m. On the weekends when the children live with Parent B, Parent B will pick the children up at school on Friday and drop them off at school on Monday.

OR

The children will live primarily with Parent A. The children will live with Parent B from after school on Wednesday until 7:00 p.m., and every second weekend from afterschool on Friday until Monday morning. Parent B will pick the children up from school on Wednesday and drop them off at Parent A's residence at 7:00 p.m. On the weekends when the children live with Parent B, Parent B will pick the children up from school on Friday and drop them off at school on Monday morning.

OR

Parent B will have time with the children from 2:00 p.m. to 4:00 p.m. every second Saturday, supervised by X. The children will live with Parent A at all other times.

9. I want to attend the extracurricular activities of the kids (attend their hockey games) even when they are with their mother. Is that okay?

Do you have a separation agreement or court order in place? If so, what are the terms of your separation agreement or court order with respect to access?

How do you get along with your ex now? If you are quite high conflict and you think a disagreement may ensue, for the sake of your children and respecting the parenting time with their mother, I would not recommend you attend.

However, if you get along fairly amicably, and you do not think it would interfere with their mother's parenting time, and there is nothing in an agreement/court order precluding you from attending, then I think it's fine to attend.

If your separation agreement/court order says that you can attend events together, then you have a right to attend.

10. We have four children. My husband wants each of us to have two. What would the court do?

Courts are generally reluctant to split up siblings. Typically, split custody is only given if there is consent. In addition, the court will be more likely to award split custody if there is a large age gap between the children.

How old are the children? Are they all from your current marriage? How close are the children to any half/step-siblings? Who has been the primary caregiver throughout the marriage?

11. If two kids resided with each of us, what would happen on the weekends?

This would depend on your circumstances. I would recommend a schedule so that all 4 children are with each parent on alternating weekends. A court would likely want to avoid the situation where the children alternated houses without spending time together, as this would not allow them to get to know their siblings and would not be seen as being in their best interests.

12. What is "reasonable communication" with the children by my husband when the kids are in my care?

This will depend on the age, needs and circumstances of the children and access arrangements. "Reasonable communication" typically includes communication via phone, email and Skype/Facetime. "Reasonable" communication may also depend on the relationship between the parent and child, the length of time the children spend with the access parent and the age of the children.

Courts have commented that: "the notion of maximizing contact is not the same as equalizing contact. The court must still consider the best interests of the child in weighing the proposals of the parents." (Baxter v. Cameron, 2010 ONSC 4501, para. 64) This same principle applies to reasonable communication proposals as well – there is not a "one size fits all" formula.

I would recommend aiming to reach an agreement with your spouse as to what is a good arrangement for your children and schedules.

13. How can I ensure that my husband follows the daily routines for the children when they are in his care?

I suggest you formulate a parenting plan with your husband to ensure you're both on the same page. You may have to vary this plan as the children get older. If you can't come to an agreement, it's typical for parents to use a parenting coordinator/coach to assist in formulating a parenting plan.

There is also parenting software you can use to log important information about the children's daily routines that can serve as a reminder to the other parent. You can also glean information by speaking with the children about what they did and making sure he's following routines.

If you cannot come to an agreement and carry out the agreement, you may consider filing a court application to obtain a court order that will specify the parenting plan or curtail access. It is not uncommon to "work up" to greater access in stages so your husband can get the hang of parenting as well.

14. My wife has custody of the children. They are with me every second weekend and once during the week. She wants to move to Australia with the kids. Can she move with the kids?

It depends. In this situation, the only consideration is the best interests of the children (Goertz v. Gordon, (1996) SCR 27). The courts will look at several factors in determining whether a parent can move with the kids, including:

i. The relationship between the child and the custodial parent – what is the relationship like with your wife and the children?
ii. The existing relationship between the child and the access parent -- how much time you currently spend with the children? How close are you with the children?
iii. The desirability of maximizing access between each parent and the children ('maximum contact' principle as per s. 16(10) of the Divorce Act). Time, distance and expense would prevent you from seeing your children very often if they moved to Australia. Do you have the means to travel to Australia several times per year?
iv. Views of the child -- Do the kids want to move to Australia? The older your children are, the more consideration or weight this factor would be given.
v. Parent's reasons for moving (only in exceptional cases where it is relevant to that parent's ability to meet the child's need).
vi. The judge will consider the disruption to the children as a result of the change in custody.
vii. Disruption to the child of removal from school, family community. How old are your children? How would you describe their current family and community support? Does your wife have family or friends in Australia? How does the school she is proposing in Australia compare with the one in Canada? Do your children have any special needs or care needs?

15. We separated six weeks ago. My ex won't let me see the children. How can I get access?

You have a legal right to see your children. As a result, your ex is unlawfully withholding access. I would recommend writing a letter your ex advising that she is acting contrary to the law by withholding the children, and in that way, she may allow you have access. I would also propose an access regime in this letter on at the very least, an interim basis.

Is she stating any reasons for why she is withholding access?

If your ex is unwilling to negotiate, you can bring an application in court for access, and/or custody, of the children.

16. We don't have a separation agreement or court order. We just separated a few weeks ago. If my ex goes to the babysitter's home, can my ex pick up and take the children? Can I have my ex charged with kidnapping or something?

Until you have a court order in place, or a separation agreement, you both have equal parenting rights. You cannot have your ex charged with kidnapping, unless he or she goes to the babysitter, takes the children and does not return them to you. However, in that case, I would recommend an urgent court motion rather than a criminal charge in order to get a court order in place. This would be considered child "abduction" where a parent takes the children without the consent of the other parent and is appropriate to bring to family court on an urgent basis.

17. My ex and I cannot agree on where the children will reside and how much they will be with each of us. How can we resolve this issue?

There are various ways of solving this:

i. Does your ex have a lawyer? If so, we can try lawyer negotiation (phone calls, or 4-way meetings between your ex and lawyer, and you and me to negotiate an access agreement).

ii. Mediation: working with a neutral third party to facilitate a solution.
iii. Collaborative Practice: all parties meet to discuss the issues. You could also work with a family professional who would consult with both you and your ex about your parenting goals and styles and work towards a solution together. Hence the term "collaborative practice".
iv. I always recommend court as a last resort; it is the most costly and highest conflict solution. In this case, you would have a judge determine the solution after hearing from you and your ex.

18. When is an assessment ordered?

A judge may order an assessment during the course of a custody and access dispute, to help the court determine the needs of the children, and which parent is best able to meet those needs. It is often ordered when the court requires specialized evidence to determine the best needs of the children (such as if there are particular psychological issues of the parents or children). The Court will interview both parties separately with the children and make a recommendation. (Children's Law Reform Act, s. 30)

Relevant Sections of the Children's Law Reform Act that apply:

Assessment of needs of child

30 (1) The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child. R.S.O. 1990, c. C.12, s. 30 (1).

When order may be made

(2) An order may be made under subsection (1) on or before the hearing of the application in respect of custody of or access to the child and with or without a request by a party to the application. R.S.O. 1990, c. C.12, s. 30 (2).

Agreement by parties

(3) The court shall, if possible, appoint a person agreed upon by the parties, but if the parties do not agree the court shall choose and appoint the person. R.S.O. 1990, c. C.12, s. 30 (3).

Consent to act

(4) The court shall not appoint a person under subsection (1) unless the person has consented to make the assessment and to report to the court within the period of time specified by the court. R.S.O. 1990, c. C.12, s. 30 (4).

Attendance for assessment

(5) In an order under subsection (1), the court may require the parties, the child and any other person who has been given notice of the proposed order, or any of them, to attend for assessment by the person appointed by the order. R.S.O. 1990, c. C.12, s. 30 (5).

Report

(7) The person appointed under subsection (1) shall file his or her report with the clerk of the court. R.S.O. 1990, c. C.12, s. 30 (7); 2009, c. 11, s. 13 (1).

19. What is the cost of an assessment?

There is no standard cost for an assessment and will depend on the complexity of your case and the fee charged by the assessor. The costs can range from anywhere between $3000-$8000.

It is a practice, though not a rule, that the litigants share equally in the cost of assessment. However, where one party does not have the ability to pay, it would be pointless for the court to order any cost-sharing. In that case, it should be the parent asking for the assessment that pays for it fully.

As Justice Granger said in *Linton v Clark*:

"The cost of an assessment and the length of time required to complete such an assessment must be taken into account by a ... judge when asked to order an assessment of the needs of the children and the abilities of each parent to satisfy such needs.

"Assessments should not be ordered in all cases as a vehicle to promote settlement of custody disputes."

"If the legislature had intended that assessments were to be a vehicle to settle custody disputes, the legislation would have mandated assessments in all cases."

If the OCL is ordered to complete an assessment, there is no charge.

20. What does the Office of Children's Lawyer (OCL) do?

The Office of the Children's Lawyer represents children under the age of 18 in court cases involving custody and access and child protection.

The Office of the Children's Lawyer employs both lawyers and clinicians (social workers). Clinicians prepare reports for the court and help lawyers who are representing children. (https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/) st-sharing. In that case, it should be the parent asking for the assessment that pays for it fully.

21. What is the difference between a lawyer of the OCL representing the kids and "social work assist" and a social worker assessment through the OCL?

A "social work assist" is someone who is a trained social worker who investigates the clinical concerns of the children. Social workers can also investigate and prepare reports. A social work assessment is where only a social worker and not a lawyer from the OCL is assigned to assess the matter and possibly prepare a report.

22. How enforceable is a separation agreement? For example, if my ex takes off with the children or won't return them and I only have a separation agreement, will it be enforceable? How?

A Separation Agreement is enforceable. If your ex leaves with the children, you can bring a motion in court to enforce the agreement.

23. How enforceable is a separation agreement? For example, if my ex takes off with the children or won't return them and I only have a separation agreement, will it be enforceable? How?

There are various ways of resolving a custody/access dispute between parents. Court is the most expensive and most conflictual option, so I would not recommend it unless absolutely necessary. Other options include mediation, arbitration, collaborative practice and lawyer negotiation (I would then canvass all of these options with the client and recommend one depending on his/her circumstances).

24. What is a temporary order of custody?

A temporary order can be sought by either parent on an interim basis until the time of trial, in which there is a final order made.

25. How are the holidays usually divided by the parents?

Holidays can either be shared between the parents or rotated. You may even decide to split the actual holiday itself between you and your ex if you both have special routines/customs on that day (i.e. Christmas). You could split the days in other ways; for instance, your ex could have Christmas Eve until Christmas morning and you could have the rest of Christmas and Boxing Day. Holiday weeks can also be split between parents, i.e. the first half of Christmas is with one parent and the latter half with another parent.

CHILD SUPPORT

26. How is child support determined? The kids are with me 65% of the time. He is employed.

In your case, because the children live with you 65% of the time, your ex will need to pay support based upon the Child Support Guidelines. These are amounts set by government that depend on the number of children, which province you live in, and the payor's gross income.

27. How is child support determined? The kids are with each of us 50/50. We are both employed.

This is what's referred to as a "shared custody" arrangement. Because the children spend an equal amount of time with each parent, we look at the amount of support you would each be paying under the Child Support Guidelines if you had the children less than 40% of the time. This is based on your income and the number of children you have. These two amounts are then set off against on another, so that the parent who makes more money, and therefore a higher support payment, pays the other parent the difference.

In shared custody arrangements, a judge would also look at other factors in determining the amount of support to be paid. The increased costs of the parenting arrangement, and the condition, means, needs, and circumstances of each parent and child. This is done on a case by case basis and may result in adjustments to the amount of support payable pursuant to the guidelines.

28. How is my ex's income determined? He is self-employed and writes off every expense possible.

In this case, you need to see your ex's business records to show what he is paying himself as income and what his business expenses are. The Child Support Guidelines allows an expense to be added back into the payor's income if those expenses were improperly deducted from his income. His income is not necessarily as reported to the CRA.

You can request a qualified business assessor prepare an income report in order to determine your ex's true income.

Proper financial disclosure is needed to ensure that your agreement is legal and binding. Refer to our hand Financial Disclosure Checklist (*Pg. 25*) for a list of documents you'll need to start the process.

29. What extracurricular costs are shared?

Extraordinary will depend on an analysis of the parent's ability to pay, the nature and number of activities the child is enrolled in, the special needs or talents of the child, and the overall cost of the activity (Child Support Guidelines, s. 7).

30. How are extracurricular costs shared? Equally?

The costs are typically shared in proportion to each parent's incomes. For instance, if your ex made 80% of your combined income, then he would typically pay 80% of the cost of the activity. You should also obtain consent from your ex before paying for an activity to ensure he/she consents, if possible, as he is not necessarily obligated to pay. You can reach an agreement with your spouse as to how you wish to pay for extracurricular activities.

31. I have two kids I am paying child support for from a previous relationship and now I have two more from this new relationship. Is the amount of child support less for me because of my two previous children?

No, although you may be able to claim undue hardship to pay a reduced amount of support. You will need to show that your standard of living is lower than that of the recipient spouse. This is done according to a formula set out in the Guidelines. A court would also look at whether the children of the second relationship would suffer a significant deprivation if the table amount were ordered for the children from your first relationship or a lesser amount were ordered for the children from your second relationship.

32. Can I get child support from the step-father? He makes a lot of money and the biological father is only paying $200 per month. How is it calculated?

A court would look at a number of factors to see if the step father "stood in the place of a parent" in order to determine whether he would be ordered to pay child support.

The starting point would be the Child Support Guidelines' amount in terms of the calculation. However, in addition, the court may look at the needs of the children, and the amount of support being paid by the biological father.

33. How are post secondary education expenses shared?

Post-secondary expenses are normally shared in proportion to each parent's income, after deducting any amount paid by the child. You should consider RESP contributions, bursaries, scholarships, the child's summer earnings, etc. first before assessing how much each parent should pay.

34. Do we have to pay for our kids' post secondary education?

A court would consider the financial circumstances of both parents and the child, the child's academic performance and family education expectations. It is normally expected that a child will contribute to their education costs through summer employment, and possibly student loans. However, if the parents have the means to assist the child pursue post-secondary education, they will likely be required to contribute financially towards it.

35. Does my ex husband's new wife's income impact the amount of child support he is to pay?

No. It is only your ex-husband's obligation.

36. Is it okay if I pay child support into a RESP instead of paying it to the mother?

If you and your ex-spouse agree, then this is fine. However, a court would likely not agree to this arrangement as the purpose of child support is to support the living expenses of the children (not necessarily future educational expenses).

37. What is the FRO?

FRO is the Family Responsibility Office. The FRO collects, distributes and enforces court-ordered child and spousal support payments.

38. Should I insist that child support be paid through the FRO?

It is an administrative burden on the payor but if it is unlikely that your ex will pay consistently, then FRO is a good option. It has many options at its disposal for enforcing agreements. It can take child support directly from your ex's income, for instance, or take away his passport if he refuses to pay.

39. If I don't insist on it being collected by FRO and he goes into arrears, what do I do then?

If you don't have support collected by FRO and he goes into arrears, we can bring a motion to enforce support.

40. Can I pay by post-dated cheques? Direct deposit?

Yes, either method is fine. If you are the support payor I would not recommend cash as you will want a clear record of payment.

41. Our son is now 20 years old and is severely disabled. He cannot work. Do I have to pay child support for him?

If your son is still living at home and is dependent on both parents, then it is likely that you would have to pay child support for him. However, you may not be required to pay the full table amount set out in the Guidelines. A Court would consider whether your son qualifies for ODSP and possibly off-set some of the child support amount based on what he is receiving from ODSP.

SPOUSAL SUPPORT

42. How much do I have to pay? How do you determine the amount of spousal support?

There is no set amount for spousal support as there typically is for child support (based on the Guidelines' amount). There is a range of recommended amounts based on the Spousal Support Advisory Guidelines. A judge will heavily rely on the guidelines amount in determining what is an appropriate amount and there are various factors suggesting whether support shall be in the low or high end.

The following factors are commonly considered: length of your relationship, income earning potential, roles during your relationship, the age of each spouse, property division, and whether there are still children at home.

In looking at the spousal support guidelines, there are two basic formulas in the guidelines, the without child sup-

port formula and the with child support formula. In the without child support formula, the amount ranges from 1.5-2% of the difference between the spouses' gross incomes for each year of marriage up to 50%. This maximum range remains fixed for marriages longer than 25 years at 37.5 to 50 % of the income difference. The with child formula starts by determining the net disposable income of each spouse. Net disposable income is then added up, and the range is determined but the amount required to the leave the lower income spouse with between 40-46% of the combined individual net disposable income (Spousal support guidelines executive summary, http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/ex.html)

43. Are the SSAG "the law"?

The SSAG are not "the law", per se, as they are not included in legislation (in contrast to the Child Support Guidelines, which are legislated). However, the Court of Appeal has endorsed the use of the SSAG as a helpful indicator for the appropriate range of spousal support. As a result, the SSAG will be the starting point in determining spousal support awards in most cases.

As Lang J.A. states in Fisher v. Fisher, "the Guidelines cannot be used as a software tool or a formula that calculates a specific amount of support for a set period of time. They must be considered in context and applied in their entirety, including the specific consideration of any applicable variables and, where necessary, restructuring." (Fisher v Fisher, 2008 ONCA 11, at para 97, [2008] WDFL 1078.)

44. Can I pay by a lump sum payment?

Yes, if you and your spouse are able to agree on this. If you go to Court, the judge will make the final decision but if you negotiate with your spouse you can both decide on how support is paid.

45. When will the court order a lump sum payment of spousal support?

A lump sum is rarely ordered by the court. However, if there is reason to believe a party may disappear or has a history of non-payment it may be ordered but generally monthly payments are the preferred method. Lump sum payments are more common in short marriages, where the obligation for support would not last more than a few years and where the parties want to make a clean break. Clients can agree to lump sum payments any time. It is a great way to meet the payor's need to minimize cash flow problems and it helps the recipient get money to buy a house, car, etc. Lastly, the payor is able to use a lump sum to purchase a termination of spousal support and achieve a clean break.

46. What are the tax advantages of each method (lump versus monthly)?

Monthly support: Tax deductible for the payor; taxed as income to the recipient (s. 56.1(4) of the Income Tax Act).

Lump Sum: Normally treated as tax neutral – not deductible, not taxed in the hands of the recipient. However, the software that lawyers use (DivorceMate) can accommodate for the tax implications and set-off tax if you were to pay a lump sum payment. Both parties would have to agree to this deduction as it is not legislated.

47. Can I pay by lump sum and monthly spousal support?

Yes, this is an option. You may need to pay a lump sum to make up for arrears prior to a separation agreement or court order for support. Or you may wish to reduce your monthly payments by paying a lump sum at the outset. There are various ways to structure a spousal support payment depending on what is best for each individual and subject to what you and your spouse can agree upon.

48. I am going to get spousal support because I have no income. What happens if I get a job?

Your separation agreement may provide for this scenario; spousal support will likely reduce if you get a job and be readjusted. If you are going through Court, this would likely be considered a 'material change of circumstances' and the spousal support order can be varied as a result.

49. I don't have a job. Should I be looking for one? Or go back to school?

Following separation, the law says that you have an obligation to become as self-sufficient as possible. Therefore, if you have the skills necessary to find a job and earn an income, you should take steps to do so. It is not uncommon for people to go back to school to enable them to further their career and income earning potential. If you think this is a viable option for you, you should consider it.

50. How long will I get spousal support?

This depends on a number of factors. The factors that a judge must consider in awarding spousal support are set out in s. 33(9) of the Family Law Act and include:

- both parity's assets and means;
- your capacity to contribute to your own support;
- your spouse's capacity to provide support;
- the physical, mental health, and age of each party;
- the needs of each dependent;
- the measures available for the dependent to provide for his own support;
- any obligation to provide for dependents;
- the desirability of a dependent remaining home to care for a child;
- the contribution by the dependent to the realization of the respondents' career;
- the length of cohabitation;
- the effect on the spouses earing capacity;
- whether the spouse has undertaken child care;
- whether the spouse has undertaken to assist in the continuation of a spouse's education; any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support;
- the effect on the spouse's earnings and career development of the responsibility of caring for a child;
- and any other legal right of the dependent to support, other than out of public money.

As a general rule, courts will follow the spousal support advisory guidelines that provide two basic methods which provide two calculations for determining length and amount of support. The first is without child formula where the amount ranges in duration from .5 to 1 year for each year of marriage and indefinitely if the marriage is longer than 20 years or if the marriage is longer than 5 years and the age of the recipient and the years of marriage add to more than 64. Alternatively, the with child formula may propose an indefinite period or a definite period being the longer of the length of the marriage, or the date the youngest child finishes high school at the higher end or, at the lower end; half of the length of marriage or the date the youngest child starts full time school.

51. We have been married 22 years. How long do I pay spousal support?

In marriages of 20 year or longer, entitlement to spousal support is often on an indefinite basis.

52. Does spousal support end if my ex wife gets married?

This will depend primarily on the household income of your ex wife and her new partner. You may still be required to pay support, albeit possibly a lessor amount, if your ex wife's standard of living, or household income, becomes lower than your own. You must show that the remarriage has affected the needs or means of the party in issue to vary.

Whether the amount is eligible for variation also depends on whether spousal support is on a compensatory basis or needs-based. If there is a compensatory basis for support (i.e., your ex stayed home with the kids so that you can advance your career) and if you have not been separated very long, there is a great probability that your spousal support obligations will not end. If there was no compensatory basis for support and you can show that her needs have decreased with re-partnering, then there is a greater chance that you can decrease support. [*Relevant Spousal Support cases*: *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24 (re. variation of spousal support in a separation agreement); *Moge v. Moge,* [1992] 3 S.C.R. 813 (compensatory support); *Bracklow v. Bracklow,* [1999] 1 S.C.R. 420 (re. non-compensatory support)]

53. I pay spousal support. Does the amount of spousal support get increased or decreased if I get married or have a baby?

The amount of spousal support you are paying in this situation is unlikely to increase unless you begin to earn a higher income.

Historically, the law has taken a "first family comes first" approach to support. In other words, your obligations to your first family take priority over any subsequent obligations to a second family. However, each case must be considered in context. If you have a baby with your new spouse, you have an equal obligation to that child as you do to your first family. Therefore, if the amount of support you are paying to your first spouse would impoverish your second family, a court might consider reducing the amount of spousal support you pay. More recently, courts have been trying to balance the rights of both families. A Court will have to consider whether your remarriage and child constitute a 'material change in circumstances' that would result in a change in support.

54. I have a lot of debt from the marriage. Does that impact the amount of spousal support I pay?

The existence of marital debts does not necessarily affect spousal support. This is because often, debts are adequately taken into account in property division. However, where a couple has a negative net worth, then the allocation of the debt payments can have a large impact upon ability to pay. If you are carrying a disproportionate share of the debt accumulated during the marriage (i.e. family debts), the amount of spousal support you would normally be expected to contribute could be reduced. This is commonly referred to in the SSAG as the "debt exception". The reduction may only be for a specified period, depending on the balance remaining to be paid.

More specifically, the debt exception is at section 12.2 of the SSAGs. The guidelines limit the debt exception to 3 situations: the total family debts must exceed the total family assets or the payor's debts must exceed his/her assets; the qualifying debts must be "family debts"; the debt payments must be "excessive or unusually high". (pp. 118 and 119, SSAG).

55. What happens to spousal support when there is no longer any child support owed?

This will depend on various factors. You can negotiate that spousal support shall increase slightly when child support stops, as child support often affects a payor's ability to pay spousal support. More often, however, the amount of spousal support will decrease when there are no longer any dependent children to care for. This is because spousal support is intended to compensate for the indirect costs of child-rearing.

56. I am going to just quit my job and go on welfare. Is that okay?

The law says that you have an obligation to become as self-sufficient as possible. If you are intentionally under-employed, such as quitting your job, a court has the ability to impute income.

57. I don't have a job, but I have assets of over $1million dollars I inherited. Do I have to pay spousal support? She is disabled.

Yes, you will likely need to pay spousal support, despite not having a job. This income will likely be used as a basis for calculating support. In addition, if you worked prior to inheriting the money and subsequently quit your job, a court may also look at your previous earning potential and order that you pay support on this basis.

Given your assets, you may wish to pay your wife a lump sum, as opposed to periodic support payments. However, if she is unable to work due to her disability, a lump sum payment will need to be of sufficient size so as to ensure that she is supported potentially indefinitely.

(*From Andrew's Outline re. Case law*): In considering an award for spousal support, the courts must consider the "conditions, means, needs, and other circumstances of each spouse. The Supreme Court of Canada has defined means to include ""all pecuniary resources, capital assets, income from employment or earning capacity and any other source from which the spouse receives gains or benefits".[1] In addition, Binnie J. Reasoned that "There is no support in the case law or in logic for the proposition that the chambers judge was wrong to take into account the appellant's capital assets acquired after the marital break-up" in the case Leskun v. Leskun [2]

The health of a recipient spouse is a factor that is considered in the amount or duration of support, irrespective of if that disability steams from the marriage or not. [3]

PROPERTY ISSUES

58. How is the amount of the equalization calculated?

Equalization Steps:

- Add up your assets on the date of separation
- Subtract your debts on the date of separation
- Subtract any gifts from third parties, inheritances or proceeds from a personal injury claim received during the marriage which were kept separate and are still in existence on the date of separation
- Subtract your assets less any debt you had on the date of marriage.
- The resulting number is called your Net Family Property (NFP). Your spouse does the same calculation. If your Net Family Property number is higher than your spouse's number, you owe half the difference so as to make the NFP's equal.

59. How is the amount of my pension determined?

In order to determine the amount of your pension, you will need to obtain a professional pension valuation. You can apply to your pension administrator to value it for no cost or we can refer you to an actuary who can produce a reliable valuation (which may be more reliable than the administrator but there will be a fee).

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[1] See Strang v. Strang 1992 SCR 112

[2] Leskun v. Leskun, [2006] 1 S.C.R. 920, 2006 @ Para 29

[3] Bracklow v. Bracklow

60. What is "double dipping" regarding pension income? Are there times when this is allowed?

Double dipping is when a pension has been included in the equalization payment, but support is also claimed later, when the pension is in pay and is the main or even the only source of income of the spouse from whom the support is sought.

There are instances when double dipping is allowed. The Superior Court of Justice in Hickey v. Prinic stated that "Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and despite this, an economic hardship from the marriage or its breakdown persists." [4]

61. I have a statement from my employer as to the value of my pension. Is that okay to use for the value of my pension?

No, there are special valuation of pension forms provided by the Financial Services Commission of Ontario, that plan administers must use to determine the value of a pension. The plan administer may charge a fee for the completion of these forms.

62. I have RRSP's, but they have gone down in value since separation. Can we use the lower value?

It is possible to use the decreased value of the RRSP's; however you would need to get the consent of your spouse or you would have to bring an application asking for unequal equalization. The presumptive rule is that the value of the asset at the valuation date will be used for separation purposes. While 5(6) allows for unequal equalization, it is a high threshold to meet. The Ontario Court of Appeal in *Seirra v. Seirra* distinguished between short term recession issues, where the payor spouse was likely to bounce back and long term financial issues, where the payor spouse was unlikely to bounce back. If the drop-in value is related to the later, as it was in Seirra, the court may order unequal equalization. However, if the asset is more likely a temporary drop in value, courts will be hesitant to order unequal equalization.

You would likely have to show that there is a significant drop in the asset's value in order to apply for unequalization.

63. How is the value of the cars determined?

The value of cars is determined by taking their fair market value at the time of separation. An estimate of the fair market value can be obtained through the black book at the following URL: http://www.canadianblackbook.com.

You can also use: www.autotrader.ca for comparable cars and their current selling value.

64. What about a leased car? Is it part of the equalization calculations?

Yes, it would be considered a debt due to your ongoing lease payments. However, if there was a substantial down payment on the leased car there may be some equity in it which will need to be included. For example, if a leasor has made a substantial down payment on a high end car and intends to purchase it at the end of the lease, the equity in the car will be included in their NFP. On the other hand, if there is a lot of mileage on a leased car, it may need to be included as a liability since there will be a mileage charge when the car is returned.

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[4] Para 36

65. Do I have to take half of his debts?

No. Debts remain with the debtor in a marriage or cohabiting relationship. However, debts acquired during a marriage, while remaining in each person's name, are included in the equalization process to determine if an equalization payment is owed. Only debts in joint names (eg. joint line of credit) are split equally.

66. Is it possible to get an "unequal" equalization? In what circumstances?

Yes, unequal equalization is available in a number of circumstances, as set out in the family law act. They are as follows:

> S. 5(6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> a. a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
> b. the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
> c. the part of a spouse's net family property that consists of gifts made by the other spouse;
> d. a spouse's intentional or reckless depletion of his or her net family property;
> e. the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
> f. the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
> g. a written agreement between the spouses that is not a domestic contract; or
> h. any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property. R.S.O.

67. I owned a house prior to the date of marriage. We moved into it upon marriage. We lived in it on the date of separation. Can I deduct the value of the home on the date of marriage?

No. Because you were on the date of separation, it is considered the matrimonial home for the purposes of equalization of net family property, and therefore is split equally between you and your spouse. *The Family Law Act* (s. 4(1)(b)) prevents you from deducting the value of the matrimonial home that was owned on the date of marriage.

68. I owned a house prior to the date of marriage. We moved into it upon marriage. We then sold and bought a second home with the money. We lived in the second home on the date of separation. Can I deduct the value of the home I owned on the date of marriage?

Yes, you can deduct the value of the home you owned on the date of marriage, as it falls into the category of property that you owned on the date of marriage and is therefore not included in your net family property. Because you were not living in the first home when you separated, it is not considered the "matrimonial home" for the purposes of calculating net family property.

You will need to determine the value of the home on the date of marriage for the purposes of deduction, and not the value of the home at the time you sold it and bought your second home.

69. I owned a farm prior to the date of marriage. Upon marriage, we moved into the home. At the date of separation, we were living at the farm. Can I deduct the value of some or the entire value of farm which I owned on the date of marriage?

You will be able to deduct some of the value of the farm.

The value of the home is not deductible, as it was being used as the matrimonial home on the date of separation and is therefore included in your net family property.

You may be able to deduct the farmland if the matrimonial home is the only part of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence. There is some dispute as to whether the surrounding farmland will be considered part of the matrimonial home or not. In the Ontario High Court decision *Dudly v. Dudly* and the Ontario Court of Appeal Decision *Ling v. Ling*, the court found that only the portion of a farm relevant adjacent to the matrimonial home constituted part of the matrimonial home. [5] However, in the Ontario High Court case *Sample v. Sample,* the court concluded that the entirety of the farm property formed the matrimonial home, when it the land was not an "viable economic unit", and was used solely for the enjoyment of the party's the entire property was the matrimonial home. [6]

If the farmland beyond the matrimonial home is not considered part of the matrimonial home, then you will be able to deduct it as a pre-marriage asset. If it is, then you will not

70. How do we determine the value of our privately-owned family business?

A professional business valuator will assist you in determining the estimated "value" of the business for the purposes of calculating net family property. There can be various approaches for how to value a business and a valuator is best positioned to assist.

71. Can we just agree on the value of the privately-owned family business? Our home? Our cottage? Our household contents? Our cars?

If you and your spouse are comfortable with this approach, you can "just agree" on these values. However, this will make your separation agreement less legally binding should either of you decide to challenge the values in court in the future. Your best bet is to have your business, house and cottage professionally appraised. We can determine the value of your car based upon valuation tools available to the public, which will produce a range depending on the make, model and year of the vehicle. Couples commonly agree on the value of their household contents. However, if you have valuable antiques, collections, or jewelry, you are best off having these appraised.

72. We have a cottage. We went to it several weekends per year and for about one month during the summer. Is it considered a "matrimonial home"? What impact will that have on the equalization?

The matrimonial home is defined as every property in which a spouse has an interest and that is ordinarily occupied or, if the spouses have separated, was ordinarily occupied by both spouses as the family residence at the time of separation. There is case law to indicate that a cottage that his heavily used will qualify as a matrimonial home. This can include a few weeks or months out of the year (such as summer use).

If you have been using the cottage regularly, as you describe, up until the date of separation, then it will likely be considered a matrimonial home under the legislation, and therefore the value will not be deducted (even if one

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[5] (3d) 261, 17 R.F.L. (2d) 62, [1981] O.J. No. 682

[6] Sample v. Sample, [1985] W.D.F.L. 516

of you owned it on the date of marriage or it was gifted/inherited during the marriage). The cottage will be part of the equalization calculation and will also have the unique rights that attach to matrimonial homes under the legislation (eg. right of possession; consent required to sell/encumber)

It is possible to have two matrimonial homes pursuant to the legislation. However, if both you and your spouse decide to "designate" one home (eg. your primary residence during the week) as the matrimonial home, then the other (eg. the cottage) will not be considered the matrimonial home and will be free to be dealt with according to ownership. (See s. 20(4) of the FLA re. designation).

Note also if the cottage is outside of Canada, it will not be considered a matrimonial home as only homes within Canada can be considered a matrimonial home if you are equalizing and separating in this jurisdiction according to the *Family Law Act*.

73. I inherited a cottage during the marriage. I rent it out during the summer. We have been up to the cottage solely to repair it and prepare it for rent. Is it exempt property?

The value of the cottage will probably be exempt pursuant to the legislated exceptions for inherited property.

However, the rental income may not be exempt, unless you can show that the donor or testator expressly stated that the income from the cottage is to be excluded from joint family property, and you can trace the rental income.

74. I received an inheritance of $40,000 during the marriage. I paid down debt and put it into the jointly owned home. Do I get to deduct the inheritance as exempt property?

If an inheritance can be traced into property acquired during the marriage, it may be excluded from net family property for the purposes of equalization. However, there is an exception to this rule with respect to the matrimonial home. As a result, the money that you put into the jointly owned home will not be deducted.

If you used some of the $40,000 to pay down family debt you will not be able to exclude it. However, if you used some of that money to pay down personal debts, as opposed to family debts (such as a student line of credit), then it may be considered excluded.

75. Should we sell the home or one of us buy out the other?

This depends on your particular financial and living situations.

If one of you is living in the home and wishes to remain there, consider whether it's possible to have the other buy out their interest. This will depend on the amount of assets available for division, and available capital or financing. While it may ideal for one of you to remain in the home if you have children, this is not always possible given the financial realities of separation.

76. Can I get the court to force my spouse to sell me his interest in the home?

No, the only remedy the court can award is a sale of the home if neither of you can or is willing to buy the other out. Only in extraordinary circumstances will the court consider not permitting a sale of the home for a period of time and may allow exclusive possession.

However, once the home is placed on the market, you can bid on the property if you wish. Unfortunately, however, the law says that you do not have a right of first refusal.

77. We both want to buy the home from the other. What will the Court do?

If you cannot agree, the court will likely order the sale of the home to a third party, with proceeds split equally between you.

PROCESS

78. I am crying all the time and feeling depressed. What can I do?

This is very normal; there is an emotional journey in separation that everyone goes through. Have you seen a counsellor? I highly recommend working with a counsellor or divorce coach to assist you through this difficult emotional process. We can take care of the legal aspect, but there is a whole emotional aspect that you may benefit to work one-on-one with someone with.

79. I am feeling guilty, so I am ready to give her everything. Can we just get it done?

Guilt is a very normal reaction when undergoing separation. However, this will likely result in later regret as well. Are you working with a counsellor or coach right now? A counsellor may be able to assist in dealing with your feelings of regret and the difficult emotions associated with divorce.

80. What is the difference between "kitchen table", mediation, arbitration, Collaborative, court and cooperative negotiations? How do each of them work?

Guilt is a very normal reaction when undergoing separation. However, this will likely result in later regret as well. Are you working with a counsellor or coach right now? A counsellor may be able to assist in dealing with your feelings of regret and the difficult emotions associated with divorce.

- **Kitchen Table:** you and your spouse negotiate on your own; it can be around the kitchen table at home (hence the name). Once resolved, you meet with your lawyer who will offer advice and then create a separation agreement.
- **Mediation:** you and your spouse work with a neutral third party who assists you to discuss the issues but cannot offer legal advice or make the decisions. Once resolved, you will meet with your lawyer for advice and then your lawyer will create a separation agreement.
- **Collaborative Process:** you and your spouse work together with trained collaborative lawyers to create a resolution of the issues without going to court. If one of you decides to go to court, you both have to get new lawyers and start over. To keep the costs to a minimum, outside professionals such as a financial professional and family professional will help you resolve the issues. Once resolved, your lawyers will create a separation agreement.
- **Cooperative negotiations:** Similar to collaborative process, above, but may not involve outside professionals and there is not the requirement that both parties sign a participation agreement wherein both parties resolve not to take the matter to court. In this process, lawyers will negotiate and may have 4-way meetings to come to a creative solution. If agreement fails, you often end up in court or arbitration. If you reach agreement, your lawyers will create a separation agreement.
- **Arbitration:** Often times, if an agreement is not reached during mediation, a mediator becomes an arbitrator with the powers of a judge. The arbitrator might hold a hearing (like a trial) in his office space at which the lawyers and clients present their evidence and urge the arbitrator to make a decision in their favour. After the hearing is complete, the arbitrator will present his or her decision. Your lawyer will then create a separation agreement based on the arbitration order.
- **Court:** Going to court involves the completion of many forms and attending court at conferences

with judges on numerous occasions. The court process usually takes 1 to 3 years to resolve the issues. As a result, it is the costliest route to divorce. However, the court can impose sanctions on an uncooperative or dishonest party. The court process is helpful if your spouse is unwilling to negotiate in good faith and in a timely manner.

81. Instead of doing a separation agreement, can't we just go ahead and do a Divorce Agreement?

There is no such thing as a "divorce agreement". A divorce is simply a piece of paper confirming that you and your spouse have divorced and will allow you to remarry. A separation agreement, on the other hand, is an agreement between you and your spouse that resolves issues such as access/custody if you have children, child and /or spousal support, and property issues between the two of you. It is much more comprehensive and binding.

82. Isn't mediation and collaborative about the same? What is the difference?

Mediation and collaborative are not the same thing, although they have similar aspects.

In mediation, you and your spouse work with a mediator (normally a senior lawyer or trained social worker). Neither of you typically have legal counsel present, although in some circumstances you can agree to have lawyers present. The mediator will work through the issues with you and help you come to a resolution or agreement regarding your separation. The mediator will then draft a mediation report, which you should take to a lawyer to review. If you and your spouse are happy with the terms of the mediation report, your lawyer will assist you in turning this into a legally binding separation agreement.

In collaborative law, both parties and their lawyers (who must both be trained collaborative practitioners) will initially meet to discuss the issues in the case. You each sign a Participation Agreement that states that neither party will take the other to court. If one party breaks this agreement, you will have to obtain new lawyers and start over. A team is then assembled consisting of a family professional, and financial specialist to help you work through various issues.

83. Is collaborative team process more expensive than court?

No; court cases normally cost between $15,000 to $100,000 per person (depending on the length, complexity and whether it goes to trial); whereas the collaborative team process normally costs around $5,000 to $15,000 per person.

The collaborative process has an advantage in that you can hire outside professionals such as a family professional and financial professional who have lower rates than lawyers, and this will defray some of the cost.

84. How long will the court process take?

This depends on the complexity of issues in your case and level of conflict between you and your spouse. Initially, you will be assigned a First Appearance date, which is normally about 1-2 months from the date of the application. The next step is a case conference which can be around 5 months after the initial application is filed in court.

Some court cases last years, some last months. Some cases are delayed by motions, trials and appeals. It is difficult to say how long it will take for certain.

85. What does it cost to go to court?

Court is the most expensive route to take in family law matters. This is because it often takes the longest to reach a resolution, requiring much more time spent on a file. We require a $5000 retainer to initiate court proceedings.

On average, court cases cost clients $10,000 – $100,000. The high end of the range reflects cases which proceed to trial (the vast majority settle, also due to an unwillingness to continue to fund it.)

86. What are the steps in the court process?

The process is as follows:

- **Application/Answer:** Filling out the necessary court forms to start the court process. The responding party then has an opportunity to respond within a certain amount of time. Both parties may have to complete financial statements, setting out your income, assets and debts and proof of income.
- **Mandatory Information Program:** both parties must attend the MIP to get information on how the court process works.
- **First Appearance:** this is an administrative step to ensure the parties are ready to go before a judge and have filed the correct paperwork. You can also set a date for a case conference at this stage if all paperwork has been filed.
- **Case Conference:** This is similar to a mediation where the parties (and their lawyers) meet with a judge to discuss and narrow issues and try to come to a settlement. Both parties are legally obligated to attempt to come to settlement.
- **Children's Lawyer/Assessments** (if applicable – the Office of the Children's Lawyer can be appointed to represent a minor's interests and create a report).
- **Motions:** if a temporary resolution of the main issues cannot be found, there may be a motion for a temporary order. The parties may also ask the court to finally resolve the issues so there are no further steps.
- In between there may be **valuations** and further financial disclosure between the parties as agreed upon or ordered.
- **Settlement Conference:** the judge assists the parties in attempting to settle the matter before it proceeds to trial.
- A **trial management conference** is used to gather information concerning how the parties intend to present their case at trial. The expected number of witnesses may be discussed, along with procedural matters in order to ascertain the length of the trial.
- **Trial:** this is a full hearing of the issues remaining in the case. The judge will make a final determination of all outstanding issues not resolved.
- **Appeals:** If you lose at trial, you can appeal the decision to the next level of court. Evidence will not be heard again, rather, the judge hearing the appeal will hear argument from each lawyer and make a decision based upon the law and upon the facts which were previously entered into evidence.

87. We have reached an agreement. Can't we just do a homemade separation agreement?

You can but this is not advised. A "homemade" separation agreement may not properly contemplate all of the issues in the future and will be quite easy to overturn in court as opposed to one which has been drafted by a lawyer, and upon which both parties have obtained independent legal advice. I would recommend drafting an agreement for you, showing it to your spouse and having your spouse obtain independent legal advice on the agreement.

88. I have a homemade agreement on these two pages. Can you just witness it for me?

No. I can work with you to prepare a legally binding separation agreement, but I cannot witness your homemade agreement as I may be interpreted to have drafted it.

89. What are prenuptial or cohabitation agreements? Are they enforceable?

Two people who plan to be married, are already married or are living together can enter into a domestic contract, wherein they agree to their respective rights and obligations regarding property, future support obligations, and the education of their children, or any other matter regarding their affairs other than custody/access of children and the matrimonial home.

Domestic contracts are enforceable at law, although there are provisions in the legislation that if met, will enable a court to set aside a contract. These include: failing to disclose significant assets or debts existing at the time the contract was made; where a party did not understand the nature or consequences of the contract; or where the court finds that there was undue influence, unconscionability, or duress at the time the contract was made.
Note that not receiving independent legal advice is not enough in itself to set aside an agreement. The issue is whether there was a meeting of the minds, or an understanding, as to the nature and consequences of the contract. It is helpful, however, for the other side to get ILA to prevent them from arguing that they did not understand the agreement.

90. Should I get a divorce now? What is the cost? How long will it take?

A Divorce Order formally ends the legal marriage. It is usually ordered on the basis of having been separated for one year. One person completes the documentation requesting the divorce and the other simply is served with a copy. Eventually, documentation is filed at Court and it is sent for the judge's approval. Divorces take about 5 to 8 months to process.

By taking the final step and obtaining a divorce, you will be given finality and freedom to remarry.

We charge a flat fee of $1500 inclusive of disbursements and taxes for an uncontested divorce. This included all of the administrative fees with the court, as well as our time to complete and file the documents.

Best Interests of the Child
PARENT CHECKLIST

In every case of divorce or separation where children are involved, it's important that all parties keep one question in mind: "What is in the best interests of the child?" Using this as a guiding principle means that law professionals, the courts, parents and other professionals take great care for the sake of the children.

Due to the fact that a child's dependency, maturity and legal status leaves them quite "voiceless" in matters of separation, divorce and custody, it's important that the courts protect children. It sometimes happens that a legal provision can be interpreted in different ways. If this happens, the interpretation that best serves the child's best interests should be chosen. After all, in most cases, this is utmost in the minds of parents, as well. When considering matters of custody, access and child support, ask yourself these primary questions, and answer truthfully. Your answers may well guide your actions during the process of negotiation.

- What is your relationship to your child?
- What is your spouse's relationship to your child?
- What are the emotional ties between you and your child?
- What are the emotional ties between your spouse and your child?
- Does your child have siblings or half-siblings?
- What is the relationship between your child and their siblings?
- Who has the primary caretaking responsibilities for your child?
- Is your child living in a stable environment now? If so, for how long?
- What is your plan for the child's care and upbringing?
- What does your child want?
- Has there been any abuse against your child?
- What are your child's religious or cultural ties?
- What roles do extended family play in the life of your child?
- What is each parent's ability to care for the child?
- What is the willingness of each parent to attend required education sessions?
- What is the willingness of each parent to facilitate and encourage a continuing close relationship with the other parent and their extended family?

Financial Disclosure

DOCUMENTS CHECKLIST

Even in the most amenable divorces, Ontario law requires full and complete financial disclosure from both parties. Lawyers have an obligation to ensure that their clients have received the appropriate financial disclosure from their spouses. In fact, separation agreements can be set aside by the courts if it can be shown that full financial disclosure has not been provided. The list below includes the typical documents required for financial disclosure. Speak with your lawyer about any additional requirements they may have.

We recommend keeping a copy of these documents on hand and at the ready for your lawyer to make the process of financial disclosure faster and easier.

	Pay stubs for the past 3 years
	Employment contracts
	Personal tax returns from the last 3 years
	Proof of your current income
	Proof of spouse's current income
	Bank statements for any business or personal accounts
	Pension statements
	RRSP, RESP and Investment statements
	Credit card statements
	Mortgage statements
	Deed to home and reporting letters on purchase or sale, household items and vehicles
	Property tax statements
	Loan statements
	Utility bills
	Completed financial statements
	Monthly budget worksheet
	Benefits statements
	Medical/dental benefits plan and booklet
	Life insurance policies
	Homeowner insurance policies
	Property appraisals

	Inventory of personal property
	Businesses or Corporations you own or have an interest in (share certificates, minute book including Articles of Incorporation, value of shares/interest, and any information relating to the company)
	Monies owed to you
	Other property i.e. travel points, memberships, etc.
	Inheritance received during the marriage
	Gifts received during the marriage
	Documentation regarding personal injury claims or settlements
	Documentation about any pending litigation
	Trust agreements
	Proof of all debt

IF SELF EMPLOYED

	Business tax returns from the last 3 years
	Articles of Incorporation (if applicable)
	Shareholder or other agreements affecting the business
	Details of remuneration of management
	Company liability paperwork
	5 most recent financial statements (of a non-incorporated business showing fees and salaries for the company and all subsidiaries)
	Unaudited interim statements