



Separation: Issues to Consider

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Upon the breakdown of a marriage or a long-term relationship, there are a number of issues which normally need to be resolved depending upon the circumstances of the parties. These issues may include: the custody of children, child support, spousal support and the division of property.

The following is a summary of these very important issues and the factors that are often considered in resolving them.

Custody and the Residency of Children

One of the most important decisions that will need to be resolved on the breakdown of a marriage or relationship is who will have “custody” of the children.

The term “custody” refers to a parent’s right to make important decisions regarding a child’s care. A custodial parent is entitled to make decisions regarding a child’s education, health, religion and welfare.

Upon separation, one parent may be granted “sole custody” which means that that parent is entitled to make all of these important decisions alone. If one parent has sole custody, the other parent does not participate in these decisions but is still entitled to be informed of the decisions after they have been made and also receive information about other important issues in the child’s life. In other cases, the parents may be granted “joint custody” of the children. This means that the parents are joint decision makers and they must both agree before a major decision affecting the child is made. In order for joint custody to work, the parents must have an ability to effectively communicate with each other and they must have a common outlook towards parenting.

The residency of the children is an issue, which although technically separate from the issue of custody, is closely related to it. Upon the breakdown of a marriage or relationship, the parents may agree that the children will maintain their primary residence with one parent and the children will see the other parent according to a fixed access schedule. A typical access schedule normally involves the children seeing the other parent once during the week, every second weekend and during all major holidays.

In other families, the parents may agree that the children should not have a primary residence but rather the children should reside equally with both parents. This is referred to as “shared residency” or “shared custody.” Finally, the parents may also agree that one or more children should maintain their primary residence with one parent and one or more children should maintain their primary residence with the other parent. This is referred to as “split residency” or “split custody.”

The issues of custody and the residency of the children are always decided on the best interests of the children. In determining the “best interests of the children”, the following factors are considered: the love, affection, and emotional ties between the parent and the child, the views and preferences of the child, the



length of time the child has lived in a stable home environment, any plans proposed for the upbringing of the child, the ability of each party to act as a parent, and the ability and willingness of each parent to provide the child with guidance and education, the necessities of life and any special needs of the child.

Child Support

Both parents have a responsibility to financially support their children, regardless of the custody or access arrangement that is in place.

Generally, child support will be determined in accordance with the federal or provincial Child Support Guidelines. The guidelines provide a comprehensive but straight forward method of determining how much child support each parent will pay.

A child support order is usually comprised of two amounts: the “table” amount and a contribution towards a child’s “special and extraordinary” expenses.

The “table” amount represents a parent’s contribution to the day to day costs of raising a child, namely: shelter, clothing, food, basic extracurricular expenses, etc. Within the guidelines, there are different sections which detail how the table amount is to be calculated based upon the residency arrangements for the child(ren). Thus, if the children maintain their primary residence (defined as at least 60% of the time) with one parent, the table amount is calculated in a certain manner. If the children reside with both parents at least 40% of the time (referred to as “shared custody”), there is a different method of calculating child support. Finally, if there is more than one child, and at least one child maintains his or her primary residence with each parent, there is another method of calculating child support.

Regardless of which section of the guidelines will be used, the other variables which must be known prior to determining the table amount are: the number of children, the ages of the children and the incomes of both parties. Once these are known, the determination of the table amount is relatively straight forward.

Special and extraordinary expenses, as the term implies, are those expenses which fall outside the purview of a child’s daily needs. Examples of such expenses include: child care costs, medical and dental insurance premiums relating to the child, health related expenses such as orthodontic treatments or eyeglasses, the costs of post-secondary education, or expenses for extraordinary extracurricular activities.

A separate section of the guidelines details how each parent’s contribution towards these expenses will be determined. First, one must determine if the expense in question is both reasonable and necessary. If the answer to both of these questions is in the affirmative, then the parents will each contribute to the after-tax cost of the expense in proportion to each parent’s income. For example, if the after-tax cost of the expense is \$1,000 and the mother earns \$100,000 and the father earns \$50,000, the mother will pay 67% of the expense and the father will pay 33%.

Spousal Support



Spousal support is designed to provide financial assistance from one spouse to the other upon the breakdown of a marriage or relationship. It is one of the most controversial areas of family law and one of the most difficult on which to advise.

There are three major issues that need to be resolved when spousal support is considered: entitlement, quantum and duration.

Entitlement involves, as the name implies, the determination of whether one spouse should receive support from the other. It is normally resolved after reviewing various factors including: the length of the marriage, the roles the parties assumed during the marriage, the financial circumstances of the parties at the breakdown of the marriage and the self-sufficiency of each party.

If there is an entitlement to spousal support, the next issues to be resolved are how much support should be paid and for how long. In determining these issues, the following factors will be relevant: the ages, health and incomes of the parties, the length of the marriage or relationship, the incomes of the parties, the needs of the recipient and the ability to pay of the payor, and, the future employment prospects for the parties.

To assist in the determination of the issues of quantum and duration, the federal government created the Spousal Support Advisory Guidelines (“SSAG”). These guidelines are advisory in nature, unlike the child support guidelines which are mandatory. The SSAGs use the incomes and ages of the parties, the length of the marriage whether child support is being paid to develop ranges of spousal support. The parties can then use the ranges generated as a means of resolving the issues of quantum and duration of spousal support.

Division of Property

The division of property will be directly affected by the nature of the relationship in question. Married spouses participate in a property division scheme which is detailed in Part I of the Family Law Act. It is referred to as the Equalization of Net Family Property. Unmarried spouses do not participate in this scheme. Property between unmarried spouses is generally divided according to ownership.

The Equalization of Net Family property scheme is premised on the fact that there is an equal contribution by both parties for the care of children, the management of the household and the financial provision for the family during a marriage. When a marriage ends, both parties should share equally in any assets and liabilities that were acquired or incurred over the course of the marriage.

The rules that need to be followed in complying with the scheme are complex and numerous exceptions and exemptions exist. The following is a very basic outline of the steps that need to be followed:

Step 1 - Each spouse determines his or her net worth on the date of separation. An individual’s net worth is determined by subtracting the value of all debts and liabilities one has from the value of all assets that one has. An adjustment may also have to be made to take into account whether a spouse has “excluded property” on the date of separation. Excluded property may include such things as:



gifts or inheritances that were received during the marriage and which still exist on the date of separation, damages for personal injuries that were received during the marriage and which still exist on the date of separation, or life insurance proceeds that were received during the marriage and which still exist on the date of separation.

Step 2 - Each spouse determines his or her net worth on the date of marriage.

Step 3 - Each spouse determines his or her net family property. Net Family Property (“NFP”) can be defined as a spouse’s net worth on the date of separation (see step 1) less his or her net worth on the date of marriage (see step 2).

Step 4 - The parties compare their NFPs. If the two amounts are equal, nothing needs to be done. If one party has a higher NFP, the party with the higher NFP will pay the party with the lower NFP half of the difference between them to “equalize” their NFPs. This will result in each party receiving half of the assets and liabilities that were acquired over the course of the marriage.

Step 5 - Determine if the result in Step 4 needs to be adjusted to account for any unconscionable results. It should be noted that the result in Step 4 will generally stand and it is only in very rare circumstances that it will be adjusted by Step 5.

If one party owes the other an equalization payment, it is normally paid through a cash payment. However, the parties may agree that the payment is to be funded through the transfer of property, the assumption of debt or some other transaction.

Summary

This overview of the basic family law issues is a very brief summary. These issues are very complex and are often only resolved after a full analysis of numerous factors. As such, one should not rely upon the foregoing as being a definitive answer to your individual situation.

If you have questions about your separation or how a separation may affect you in the future, please contact one of our family law lawyers at (613) 728-8057.