



DIVORCE LAW:

.....

Questions and Answers



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DIVORCE LAW: QUESTIONS AND ANSWERS





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This booklet gives basic information about divorce law in Canada.
It also provides suggestions about where to find more information.
It does not contain the official text of the law.

This booklet updates *Divorce Law Questions and Answers*,
first published by the Department of Justice Canada in 1986.

To order more copies of this publication, please call 1-888-373-2222
This publication is also available electronically at
<http://www.justice.gc.ca/en/ps/pad/resources/divorce>



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Introduction

Deciding to end a marriage is difficult. You have to deal with huge emotional issues and make many tough decisions. You also need to know your legal rights and responsibilities. This booklet tells you a few of the basic things you need to know about getting a divorce in Canada. It also talks about the requirements for getting a divorce, some of the forms you have to fill out, how to set up living arrangements for your children, child support, spousal support, and the sharing of property and debt.

This booklet cannot tell you all you will need to know. It cannot replace the advice and help that you can get from a lawyer as you go through the divorce process. Other resources that might be helpful, such as mediators and information centers or programs, are listed on page 14.



Separation

What is the difference between separation and divorce?

A **separation** occurs when one or both spouses decide to live apart with the intention of not living together again. Once you are separated, you may need to discuss custody, access and child support with your spouse. You may also need to work out issues dealing with spousal support and property. You can resolve these issues in different ways:

- You can negotiate a **separation agreement**. A separation agreement is a legal document signed by both spouses which details the arrangements on which you have agreed. In some jurisdictions, independent legal advice is required to make the document legally binding.
- You can make an application to the court to set up custody, access, support and property arrangements under the provincial or territorial laws that apply to you.
- You can come to an informal agreement with your spouse. However, if one party decides not to honour the agreement, you will have no legal protection.

To legally end your marriage, you need a **divorce**, which is an order signed by a judge under the federal law called the *Divorce Act*.

What if we were never legally married?

If you are not legally married, divorce does not apply to you. However, you can still negotiate a separation agreement or make an application to the court under the laws in your province or territory to set up custody, access, child support and other arrangements. Common-law spouses have fewer rights upon separation than married couples. For more information on the rights of common-law spouses, contact a lawyer or obtain a provincial or territorial publication (see page 14).



Getting a Divorce

Is the marriage over once I begin divorce proceedings?

The marriage is not over until a judge gives you a divorce order at the end of the process.

Before you begin divorce proceedings, you may wish to consider whether marriage counseling could help you and your spouse. Once you have started formal divorce proceedings, you may stop the process at any time if you and your spouse wish to think about reconciling.

Who can apply for a divorce in Canada?

You can apply for a divorce in Canada if:

- you were legally married in Canada or in any other country; *and*
- you intend to separate permanently from your spouse and believe there is no chance you will get back together, or you have already left your spouse and do not intend to get back together; *and*
- either or both of you have lived in the Canadian province or territory for at least one year immediately before applying for a divorce in that province or territory.

You do not have to be a Canadian citizen to apply for a divorce in Canada.

Do I need a reason to get a divorce?

To get a divorce, you will have to show that your marriage has broken down. The law says marriage breakdown has occurred if:

- you and your spouse have lived separate and apart for one year with the idea that your marriage is over; or
- your spouse has committed adultery and you have not forgiven your spouse; or
- your spouse has been physically or mentally cruel to you, making it unbearable to continue living together. Cruelty may include acts of physical violence and those causing severe mental anguish.

You can get a divorce if *one* of these situations applies to you.

Over 80 percent of divorces in Canada are based on one-year separations.

Do I have to prove that my spouse is responsible for our marriage breakdown?

Under the *Divorce Act*, you do not need to prove that your spouse was at fault in order to get a divorce. If the reason you are asking for a divorce is marriage breakdown, shown by one year of living apart, either of you can request a divorce. It does not matter



which one of you decided to leave. In fact, the law gives you the choice of applying to the court together to ask for a divorce.

However, if the reason you are asking for a divorce is marriage breakdown because of adultery or mental or physical cruelty, you will have to have proof of what happened.

How do I start a divorce application?

It is always advisable when starting a divorce application to speak to a lawyer knowledgeable about family law. A lawyer can tell you exactly how the law applies to your situation and how to protect your rights. You can then decide what to do.

1. To start a divorce application, you fill out the appropriate forms for your province or territory. If you have a lawyer, he or she will fill out the forms for you and will be responsible for processing the divorce. You may obtain forms at government bookstores, some private bookstores and, in some cases, from the Internet. In some jurisdictions, court offices and information centers provide forms.
2. There are a few things in particular that you have to include in the forms. If there is a child of the marriage, you need to write down the parenting arrangements, including financial support. If these arrangements are in dispute, you will need to describe the arrangements that you are seeking.

3. Once you have completed all the forms, you file them at the courthouse, pay the required court fees, and follow the court rules and procedures for your province or territory.

What if I apply for a divorce and then try to live with my spouse again?

Before or after you have applied for a divorce on the ground of one-year separation, you can live together for up to 90 days for the purposes of reconciliation. If things don't work out, you can continue your action for a divorce as if you had not spent this time together.

What happens if my spouse and I agree on all the issues raised by the divorce?

If you and your spouse agree on all issues, you have an **uncontested** divorce.

In most provinces and territories, court officials process uncontested divorces and you do not have to appear in court.

What happens if we can't agree?

If you and your spouse cannot agree on one or more terms of the divorce, such as the parenting arrangements for your child, child support, or spousal support, you have a **contested** divorce. You and your spouse must both submit court documents about



the issues you can't agree on. The provincial or territorial court rules set out the steps you must take to resolve or clarify the issues before a trial takes place. These steps often take a considerable amount of time.

Once all of the steps have been completed, your case will be set down for trial. During the trial, you will explain your case to the judge. You may also bring witnesses to help you to prove your case. The judge will make a final decision about the issues you and your spouse cannot agree on. At any time during the divorce proceedings and even after you submit the court documents, you can still try to reach an agreement with your spouse on these issues, and negotiate further with the help of lawyers or you can work with a mediator.

About 90 percent of cases are settled before trial. However, there are often months of negotiations and many low moments before settlement.

The last step of the process is for a judge to review all of the information you have submitted, either on your application form or in the trial, to make sure you have met all the legal requirements for a divorce. The judge grants the divorce and sets out his or her decision on any issues that need to be resolved in a divorce judgment. This judgment normally becomes final 31 days after the judge signs it.

Once the judgment is final, you can apply for a **Certificate of Divorce**.

A Certificate of Divorce is legal proof that you are no longer married.

What if I have issues that can't wait?

When you apply for a divorce, you may request that a judge deal with certain issues right away.

These issues include short-term parenting arrangements for your child (see page 6), child support (see page 9) and spousal support (see page 9). The judge issues an interim or temporary order that stays in place until the judge varies it or makes a final order at trial.



Taking Care of Children

How are decisions made about custody of the children?

Often, deciding on a parenting arrangement after a marriage is over is not easy. Under the *Divorce Act* one or both parents may have custody of the children.

If you cannot agree on a parenting arrangement, the divorce law sets out some basic principles that a judge must use when making decisions about children.

- The best interests of the children come first.
- Children should have as much contact as possible with both parents so long as this is in the children's best interests.
- The past behaviour of a parent cannot be taken into consideration by the court unless that behaviour reflects on the person's ability to act as a parent.

When deciding on the best interests of the child, the judge will take into account a number of factors including:

- Care arrangements before the separation. (Who looked after the child most of the time? Who took the child to the doctor and dentist? Who arranged extracurricular activities? Who dealt with the child's school and teachers?)
- The parent-child relationship and bonding.

- Parenting abilities.
- The parents' mental, physical and emotional health.
- The parents' and the child's schedules.
- Support systems (for example, help and involvement from grandparents and other close relatives).
- Sibling issues. Generally, brothers and sisters remain together, but under some circumstances it may be necessary to consider separating them.
- The child's wishes. (There is no magic age at which a child has the right to decide where he or she is going to live. The court gives more weight to the child's wishes as the child matures. An older teenager's wishes will often be decisive.)

What is joint custody?

Sometimes both parents want a divorce, but want to continue to share their responsibilities as parents equally. Joint custody means that both of you have custody of the children. In other words, you both continue to share in making all the major decisions concerning the children (about discipline, school, major outings, holidays, etc.). If there is joint custody, many different living arrangements are possible. The



children may live with each parent about the same amount of time or live mostly with one parent.

What are my responsibilities if I have custody of my children?

If you and your spouse agree that you should have custody of the children, or if the judge decides that you should have custody, you have the responsibility for making the major decisions about your children's upbringing and schooling. The children will usually live with you most of the time.

In most cases, the other parent still has responsibility to care for the children some of the time. Remember, the law says that there should be as much contact as possible with both parents as is best for the children. However, in serious circumstances, a judge may decide that it is in the children's best interests not to spend time with the other parent.

Children benefit from the opportunity to develop meaningful relationships with both parents and with other extended-family members as long as it is safe and positive to do so.

I don't have custody. Can I still spend time with my children?

Generally, the parent who does not have custody of the children still has responsibility to spend time with them. If you cannot agree on these access arrangements, the court will decide for you.

A parent with access:

- usually spends time with the children, such as on a weekday evening, on weekends and on holidays; and
- may ask for information about the children—news about their health and well-being and about how they are doing at school.

As a parent with access responsibilities, you can ask the court to order the other parent to give you advance notice—at least 30 days—if he or she intends to move the children to another home.

Do I have to use the terms “custody” and “access” when deciding upon parenting arrangements?

The *Divorce Act* uses these terms, but this does not limit the types of parenting arrangements that may be included in written agreements or legal documents. Other words or descriptions can also be used to set out parenting roles and responsibilities.

What alternatives are there to going to court?

Not many parents go to trial about custody. Proceedings can be expensive and stressful both for you and for the children. You have choices other than going to court to reach agreements on parenting arrangements.

- You can go to a family mediator. A mediator is generally a person with a legal or social work background who has special training in helping people resolve disputes. A mediator works with both of you and helps you discuss and decide on the arrangements for your children.
- You can meet with a lawyer who will explain your legal rights and obligations and help you negotiate an agreement.
- You can meet with a family therapist, child psychologist, social worker, family doctor or other professional who knows about the effects of separation and divorce on children of different ages.

Many courts now offer parent-education sessions, which present different choices for settling the issues you face when you separate or divorce. These sessions include discussions about the impact of separation and divorce on children.



Settling Money Matters

How is the amount of child support determined?

Even after divorce, both parents have a legal duty to support their children financially.

Once you have worked out the residential arrangements for your children, you will need to look at the payment of child support. Before granting a divorce, the judge must be satisfied that appropriate financial arrangements have been made.

You will use a set of rules and tables, called child support guidelines, to help you figure out the amount of child support. The federal government has produced a number of publications to help you calculate child support. (See page 14 for information about obtaining these publications.)

Who pays child support depends on the child's residential arrangements. The basic amount is based on three things:

- the paying parent's income;
- the number of children involved; and
- the province or territory where the paying parent lives.

In some circumstances, the base amount can be increased or decreased. For example, the amount could be adjusted if the children have special expenses, such as childcare. The

amount could also be adjusted to prevent financial hardship for a parent or the children. This might be fair when, for example, the parent paying the child support is suffering a hardship—perhaps because that parent is supporting a new family and has a lower standard of living than the parent receiving the child support.

Child support amounts set out in a separation agreement or court order made after April 30, 1997, do not affect income tax.

- The person who receives the child support payments does not have to list them as income on his or her income tax form.
- The person paying the child support cannot deduct the support payments from his or her income.

How is spousal support decided?

During a marriage, spouses usually share their love, their time and their income. They both invest in their life together. But unlike an investment with a bank that pays a given amount of interest, an investment in a life together is difficult to add up and then divide.

For example, you may have worked and paid all the bills. Maybe you worked while your spouse trained to get a better job. Or you may have helped in your spouse's business.



Often, a spouse gives up a job so that he or she can stay home, manage the household, and care for the children. These contributions to a marriage all have value. The *Divorce Act* sets out factors and goals to be considered when figuring out if one spouse should pay another spouse financial support after a divorce. Among these factors are answers to the following questions.

- How long did you live together?
- What was your role in the marriage?
- Who is living with the children?

The amount of spousal support to be paid depends on the needs of each spouse and on their income and resources.

Other things are also important. The law sets several goals to keep in mind.

- Spousal support should give value to the contributions made during the marriage. If one spouse has benefited financially from a contribution, the other spouse should be compensated.
- Another goal is to make sure that after a marriage is over, one spouse doesn't suffer economic hardship.
- A third goal is to make sure that the spouse who lives with the children is not at a financial disadvantage because of that.
- Finally, spousal support should help each spouse become economically independent within a reasonable amount of time, if possible.

A judge can order one spouse to pay spousal support to the other for a particular amount of time or indefinitely.

Does it matter whose fault it is that the marriage is over?

The reasons your marriage is over have nothing to do with your financial obligations to each other after a divorce. The divorce law says clearly that the court will not consider the behaviour or misconduct of either spouse in deciding on support payments. Fault is not taken into account.

How do we divide our property?

The *Divorce Act* does not deal with sharing your property or debts. Each province and territory has its own law that sets out the rules for dividing the property and debts you and your spouse have.

“Property” includes such things as the home you and your spouse shared, its contents, any other real estate, pensions from employment, Canada or Quebec Pension Plan credits, RRSPs, investments, bank accounts and cash. Debts include such things as amounts you owe on your credit cards, your mortgage, and any loans you have. Some provinces or territories also include business assets in their definition of property. It is very important to receive legal advice on property division.

Usually, people who are separating come to an agreement about how to divide the property and debts fairly. This agreement may become part of the written separation agreement.



For separation agreements to be legally binding, they usually require independent legal advice and full financial disclosure.

In some provinces and territories, if you wait too long after your separation or divorce to make a claim, you may lose all your rights to share in family property or spousal support. Check with a lawyer or a provincial/territorial family law publication (see page 14).

Canada Pension Plan (CPP) credits are a special category of property. Once you and your spouse are separated, and if you meet other basic requirements, you or your spouse can fill in a form to ask the CPP to divide equally the CPP credits you both earned while you were married. The Quebec Pension Plan (QPP) also allows you to split your pension credits.

Your local Canada or Quebec Pension Plan office has pamphlets that tell you how to do this. The toll-free phone numbers for the CPP and QPP are listed on page 14.

For more information on dividing property, please consult a lawyer or other resources listed on page 14.



Family Violence

Some important words about family violence

“Family violence” is a term that includes many different forms of physical or psychological abuse or neglect. It can be experienced by adults or children in a family.

Many forms of family violence are crimes, including:

- physical abuse (such as hitting, punching, kicking, burning, cutting, stabbing, forcibly confining or shooting);
- sexual abuse (such as any unwanted sexual touching or sexual activity and any sexual conduct with children)
- some forms of psychological abuse (such as threatening violence, destroying property, stalking),
- financial abuse (such as taking a pay cheque, failing to provide the necessities of life).

Other forms of family violence are not crimes but are often signs that violence will get worse (such as yelling, humiliating, controlling movements).

Family violence can have serious—and sometimes fatal—consequences for victims and those that witness the violence.

If your spouse physically or psychologically abused you or your children, your family’s future safety becomes of primary concern. There are many people and organizations

available to help you in this situation, such as lawyers, social workers, counsellors, support groups or your local shelter or transition house (see page 14). There are also many useful publications available, including the Department of Justice booklet *Abuse is Wrong in any Language* (see page 15).

Traditional mediation or counselling with your spouse may not be appropriate in these circumstances. However, in some provinces or territories, specialized counselling procedures have been developed to support couples when there are concerns about violence. Working together doesn’t always mean sitting in the same room.



After a Divorce

What if my former spouse is not obeying the court order or divorce judgment?

Your divorce judgment may include court orders dealing with parenting, child support and spousal support. Both parents must obey these orders. When one parent does not, the other parent can take action. Here are two examples.

- When you are scheduled to see your child but your former spouse will not allow it, you can go back to court to ask for help. A judge may set out a very specific schedule for access or grant extra time to make up for the visits you missed. You could also ask the judge to change the parenting arrangements.
- When your spouse is supposed to pay child or spousal support under a court order, but is not paying, enforcement offices will help you collect the money. All provinces and territories have these offices.

To find out how you can get help dealing with these situations, get in touch with your local court or family law information office, the support enforcement program in your province or territory, or a lawyer.

How can I get a court order changed?

The divorce judgment legally ends your marriage and that cannot be changed. But sometimes you may

need to change other parts of the judgment, such as the parenting arrangements for the child, or child or spousal support. You may ask a judge to change an order for custody or access when there has been a significant change in the condition, means, needs or other circumstances of the child and/or yourself or the other parent since the last order was made. You may ask a judge to change an order for child support if:

- the special expenses of the child change;
- your income or your former spouse's income changes; and/or
- there are other significant changes in your circumstances or those of your former spouse or the children. In some cases, you may also change a spousal support order.

If you and your former spouse agree about what needs to be changed, you can file the application form with the court and the judge will consider and, most likely, approve the change. This is called a consent order, because both you and your former spouse consented to it. Where child support is involved, the judge continues to have an obligation to ensure that a reasonable amount of support (in light of the child support guidelines) is agreed to.

If you cannot agree, you can go back to court, present your case and ask a judge to make a new order.

More information

Where can I get more information?

This booklet provides only an overview of some issues you may come across when you are separating or getting a divorce. There are many professional people, organizations and other sources that can help you or provide more information:

- A family law lawyer.
- An information centre specializing in family justice.
- A parent education course for separating parents.
- Duty counsel at a legal aid office.
- A community legal clinic.
- A university law school with a student-run legal information service.
- A public legal education and information organization.
- A law society or bar association referral service for a lawyer.
- A mediator, social worker or counsellor.
- An emergency shelter.
- A divorce support or self-help group.
- Relevant library books and videos.
- A multicultural community organization.

The yellow pages, white pages or blue pages in your telephone book have listings for many of these resources.

A librarian at your public library may also be able to help you.

Here are some specific sources:

- The Canadian government information line: please call 1-800-O-Canada.
- Canada Pension Plan: for service in English, please call 1-800-277-9914; for service in French, please call 1-800-277-9915.
- Quebec Pension Plan: please call 1-800-463-5185.
- Federal Child Support Guidelines information and free publications: please call 1-888-373-2222, or go to www.justice.gc.ca on the Internet (click on “Programs” and then “Child Support”).
- Family Services Canada: please call 1-800-668-7808 for information about this counselling service.
- To order the Health Canada booklet *Because Life Goes On... Helping Children and Youth Live with Separation and Divorce*, please call (613) 954-5995. You can get an electronic copy of the booklet on the Internet at www.mentalhealthpromotion.com
- Canada Revenue Agency (CRA): Guides and forms in respect to child and spousal support payments are available at your local CRA office or through the Internet at www.cra-arc.gc.ca



- The Department of Justice Canada publication on family violence, *Abuse is Wrong in any Language* is available by calling 1-613-957-4222, or go to www.justice.gc.ca on the Internet (click on “Programs” and then “Family Violence”).

Provincial and Territorial Child Support Information

ALBERTA

Edmonton Family Law Information Centre..... (780) 415-0404
 Calgary Family Law Information Centre (403) 297-6600
 Toll-free access from other areas within Alberta 310-0000
Internet: *Alberta Justice Department* www.gov.ab.ca

BRITISH COLUMBIA

British Columbia 1-888-216-2211
 Vancouver(604) 660-2192
Internet: *B.C. Ministry of Attorney General* www.gov.bc.ca/ag

MANITOBA

Manitoba..... 1-800-282-8069 ext. 0268
 Winnipeg (204) 945-0268
Internet: *Government of Manitoba* www.gov.mb.ca

NEW BRUNSWICK

New Brunswick..... 1-888-236-2444
Internet: *New Brunswick Department of Justice* www.gov.nb.ca/justice

NEWFOUNDLAND AND LABRADOR

Newfoundland and Labrador(709) 729-1864
Internet: *Newfoundland and Labrador
 Department of Justice* www.gov.nf.ca/just

NOVA SCOTIA

Toll-free access within Nova Scotia..... 1-800-665-9779
 Halifax..... (902) 455-3135
Internet: *Nova Scotia Department of Justice* www.gov.ns.ca/just

NORTHWEST TERRITORIES

Northwest Territories 1-800-661-0798
 Callers should indicate that they would like to speak to someone regarding the
 Federal Child Support Guidelines.
Internet: *Government of Northwest Territories* www.gov.nt.ca



NUNAVUT

Iqaluit(867) 975-6137

Internet: *Government of Nunavut* www.gov.nu.ca

ONTARIO

Ontario 1-800-980-4962

Internet: *Ontario Ministry of Attorney General* www.attorneygeneral.jus.gov.on.ca

PRINCE EDWARD ISLAND

Prince Edward Island 1-800-240-9798

Charlottetown (902) 892-0853

Internet: *Government of Prince Edward Island* www.gov.pe.ca

QUEBEC

Communication Québec 1-800-363-1363

Quebec Justice Department (418) 643-5140

Internet: *Quebec Ministry of Justice* www.justice.gouv.qc.ca

SASKATCHEWAN

Saskatchewan 1-888-218-2822

Internet: *Government of Saskatchewan* www.gov.sk.ca

YUKON

Yukon 1-800-661-0408 Ext. 3066

Whitehorse(867) 667-3066

Internet: *Government of Yukon* www.gov.yk.ca

