

Key Legal Terms: Separation Agreements

This resource explains the terms used in the Family Law Education for Women (FLEW) webinar, *Separation Agreements: A Plan to Move on After Separation*.

The webinar looks at what a Separation Agreement is, what makes it legal, what it can and should include, and how it can help a woman and her partner organize money, child custody and access visits, after they separate.

Some Key Legal Terms about Separation Agreements

Separation

A couple is separated when they have decided to end their relationship, they are not living as a couple any more, and it is not likely that they will get back together. Usually when a couple separates, they stop living together. But sometimes that is not possible right away. A couple may continue to live in the same home and still be considered "separated" under the law, as long as they no longer say they are a

couple, or have a shared life, such as sharing meals, finances and a bedroom. The date that you separate is important for calculating money matters such as dividing family property, and support payments.

Separation Agreement

A written and signed agreement between married or unmarried partners, for after they separate and end their relationship. A Separation Agreement can be a less expensive way than going to Court, to deal with family issues such as caring for children, money arrangements, dividing up property, and what will happen with the family home (see matrimonial home below).

A Separation Agreement may not be possible if you and your ex-partner cannot agree, and may not be a good idea if there is bullying, abuse or violence between the partners.

A Separation Agreement can be legally binding, if it is signed and dated by both partners, and if someone else signs that they saw or witnessed that each partner signed. It is important to talk to a family law lawyer before you sign a Separation Agreement, to make sure you know your legal rights, and whether the Agreement affects your rights.

A Separation Agreement is a kind of Domestic Contract (see below).

Marriage

A legally recognized personal or intimate relationship between two people or “spouses”. In Canada, two people of any gender can be legally married. Ontario law treats marriage as an equal economic partnership.

If a marriage ends, the value of the property accumulated during the marriage and the increase in the value of property brought into the marriage is shared equally between the spouses, with some exceptions.

Ontario law also says that married spouses have an equal right to live in the family home while they are married, and that one spouse may have the right to get financial payments to help support themselves if they separate.

Marriage Contract (Pre-nuptial Agreement)

A marriage contract is a written and signed agreement between people who are married or are planning to marry. Marriage contracts that are made before the wedding may also be called a Pre-nuptial Agreement.

Marriage Contracts can make plans for how the spouses will deal with money and family property including the family home, during the marriage and if they separate. A Marriage Contract cannot say anything about child custody, access or child support. These issues can only be decided after the couple separates.

It is important to talk to a family law lawyer before you sign a Marriage Contract or Pre-nuptial Agreement to make sure you know your legal rights, and whether the Agreement affects your rights. A lawyer can also help you get important financial information from your partner to help you decide if the Agreement is right for you.

A Marriage Contract is a kind of Domestic Contract (see below).

Common law spouses/relationship

Under Ontario family law, common law spouses are partners who are not married but have been in a relationship and living together for 3 years or more, or who have a child together and have been in a relationship of some permanence (living together or not).

In Ontario, common law spouses have some rights like married spouses (for spousal support), but have different rights about family property and the family home when they separate. It is a good idea to talk to a family law lawyer if you are separating from your common law spouse, to be sure you understand your legal rights.

Cohabitation Agreement

An agreement that is like a Marriage Contract (see above), for partners who are not legally married. A Cohabitation Agreement can make plans for how the partners will deal with money and family property including the family home, during the relationship and if they separate. A Cohabitation Agreement cannot say anything about child custody, access or child support. These issues can only be decided after the couple separates.

If a couple gets married after they have been living together, their cohabitation agreement becomes a marriage contract.

A Cohabitation Agreement is a kind of Domestic Contract (see below).

Domestic Contract

A legal agreement between people in an intimate relationship about how they will organize their lives together. Separation Agreements, Marriage Contracts and Cohabitation Agreements are different kinds of Domestic Contracts. Domestic Contracts can set out terms for during a relationship and define each spouse's rights and responsibilities if the relationship ends.

A Domestic Contract can be legally binding if it is signed and dated by both partners, and if someone else signs that they saw or witnessed that each partner signed. It is important to talk to a family law lawyer before you sign a Domestic Contract, to make sure you know your legal rights, and whether the agreement affects your rights.

Enforcement

A Court can be asked to make the partners to a Separation Agreement follow the contract. The partners can also file their Agreement with the Court, so that it will be sent to a government office called the **Family Responsibility Office (FRO)**. The FRO's job is to make sure that child support and spousal support payments in a Court Order are paid. The FRO has power to force someone to make payments.

Duress or undue influence

During the process of making a Separation Agreement or other Domestic Contract, if someone forces or unfairly pressures a person to sign the Agreement that is called duress or undue influence. Abuse between partners could make one partner feel they had to sign a Domestic Contract or had to agree to something being included or left out of the agreement.

If a Court believe that duress or undue influence make the terms of an Agreement extremely unfair, the Court can decide that all or part of the Agreement is not valid, and the people who signed the Agreement will not be forced to follow some or all of its terms.

Unconscionable

If a Court finds that a Separation Agreement or a term in any Domestic Contract is extremely unfair, it can decide all or part of the agreement is unconscionable and should not be followed. Some of the factors a Court will consider are whether a spouse felt unfair pressure to agree, didn't have full information at the time of signing the agreement, or whether things have changed that would make the agreement unfair now.

Setting Aside

When a Court decides to cancel, not follow or not enforce all or part of a Separation Agreement (or other Domestic Contract).

Some terms that can be included in a Separation Agreement

Custody

The legal right and responsibility for making important decisions about a child's life, such as medical care, religious upbringing, and education. A parent may have legal custody of a child even if the child and that parent do not live together. The term custody does not determine where a child lives, or how much time they spend with the parent who has custody. However, a parent who has custody often lives with or spends most of the time living with that child.

Under the law, until a Court makes a custody and access order, both parents have equal legal rights to make decisions about their children.

Access

The terms “access” and “custody” are usually talked about together. A parent who has “access” has the legal right to spend time with a child, and to know about the child’s health, school and general life issues. A parent with access does not have full “custody” which means the legal right to make important decisions about the child’s life.

Access can be ordered by the Court or arranged by agreement between the parents, such as in a Separation Agreement. Custody and access agreements or court orders can be very specific about who has the child, and at what times, including during the school-week, vacations and culturally important times of year. For example, the child may live with the mother but spend every other weekend, from 6:00pm on Friday to noon on Sunday, with the father.

Child Support

Child support is money that a parent gets to help look after a child. Child Support is the right of the child. After separation, the parent who continues to care for the child most of the time is usually supposed to get child support from the other parent. Parents can agree to the details about child support in a Separation Agreement. They can also apply to the Court to order child support. Parents can

also agree to not make child support payments. If you are thinking of not including child support payments in a Separation Agreement, it is important to talk to a lawyer to be sure you understand your rights.

The provinces, territories and the federal government all have Child Support Guidelines that explain the usual child support payments that a parent should get, based on location, incomes of the parents, and the number of children receiving support. Courts usually follow these guidelines as well as looking at other factors, such as the child's special needs.

- <https://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/index.html>
- www.attorneygeneral.jus.gov.on.ca/english/family/divorce/support/

Spousal Support

In some situations, after a couple separates, the partner with more income may give the other partner one large payment, or many regular payments over time, to help the person with less income to support themselves. This is called spousal support. Partners can make any agreement about spousal support when they separate.

There are also legal rules that the court can order.

In Ontario, there are certain situations when the Court will order that your partner has to pay you spousal support after you separate. You can also apply to the Court to get spousal support if you were married or if you were in a common-law relationship. In Ontario, common law spouses may be able to get spousal support if they were living together for at least three years, or if they have a child who is younger than 18, and the parents were in a relationship of some permanence.

Spousal support is not an automatic right. It is supposed to help the partner with less income to become able to support themselves after separation. The Court will also look at whether one of the partners has less money and income after the separation because of their contributions to the relationship.

Payor

The person who makes support payments. This could be child support or spousal support.

Recipient

The person who receives support payments (money) from a payor.

Family property

Anything you own, such as your homes, cars, personal and household items, pensions, bank accounts and any other investments. Property also includes debts, which is money that you borrowed and have to pay back.

Division of Family Property

When partners separate, they can agree on how to divide their family property in a Separation Agreement. It is important to know the law to be sure you understand your rights before you sign an Agreement.

In Ontario, when a marriage ends, the law assumes that both spouses made equal contributions to the marriage, and says that they have to fairly share the value of all family property that the spouses bought or that increased in value during the marriage. There is a way of calculating what the total family property is when spouses separate, and how to make sure the family property is shared equally. One spouse may have to make a payment to the other spouse, called an “**equalization payment**”.

In Ontario, the law for dividing family property only applies to people who were married. If you were in a relationship, but you did not get legally married, you do not have the right to divide all family property. Anything that you own continues to belong to you. If you purchased things together with your partner, you both have the right to share the value of those things. You may also be able to get a Court Order to share the value of family property that you helped maintain, or made contributions to, that affected the value of the property.

Dividing family property at the end of a relationship can be complicated, and it is a good idea to talk to a family law lawyer about your rights and options.

Matrimonial Home

The family home where the family was ordinarily living at the time of separation is called the Matrimonial Home. Ontario family law gives special importance to the matrimonial home when spouses are married. The law says that both married spouses have the right to live in the matrimonial home until they agree to, or a Court Orders something different. This means that one spouse cannot sell or mortgage the matrimonial home without

getting permission from the other. The law also says that married couples have to share the full value of the matrimonial home at the date of separation.

Partners can make their own arrangements for the matrimonial home in a Separation Agreement. It is important to talk to a family law lawyer to find out your rights under the law before you sign an Agreement about the matrimonial home.

Financial disclosure

When a couple separates and they are asking the Court to make an order related to division of family property or support payments, the law says that each partner must give the other full, accurate and honest information about their financial situation, including all of their income, assets and debts.

It is important to have full financial disclosure between the partners if they are making a Separation Agreement, so that they can be sure that the agreement is fair. If a person finds out their partner did not give full, accurate and honest financial disclosure, they can ask the Court to set aside and order that the Agreement is not valid.

A lawyer can help you make sure you get full financial disclosure from your partner, or help you if you think your Agreement is unfair, based on incomplete or inaccurate financial information.

Negotiate/negotiation

Negotiation is a process of communicating aimed at coming to an agreement. Partners can negotiate to make a Separation Agreement. They can communicate in any way, including in person, in writing or on the phone. They can do it themselves or ask for help. Either person can ask a lawyer to negotiate for them.

It is important to be sure that the negotiation process is fair, so that the Separation Agreement is fair to both partners. In situations of bullying, abuse or violence, it is not a good idea to negotiate with your partner alone.

If you and your partner negotiate and decide on a Separation Agreement, it is important that each partner asks a lawyer to review the Agreement before you sign it.

Mediation

Mediation is a process where people agree to get a third person to help them come to an agreement. Partners can

choose to use mediation to help them make a Separation Agreement. The third person is called a mediator, who is supposed to be fair and not want to help one side more than the other. Both partners have to trust the mediator, and can stop the process at any time, if they don't want to continue. Mediators are paid for their service, but in some circumstances, Legal Aid or the government may pay the mediator.

If there has been bullying, abuse or violence between the partners, you have to be very careful about taking part in mediation. A mediator may be trained to make sure that abuse and violence do not influence the mediation. It is important to ask if the mediator has special training and understanding of intimate partner violence. If you are concerned about the fairness of mediation, it may not be a good idea.

A lawyer can help you before, during and after the mediation process. It is always important to talk to a family law lawyer before signing a Separation Agreement.

Mediator

A mediator is a third person who can help partners make a Separation Agreement. Both partners should trust the

mediator to be fair, and a mediator should be neutral, which means they do not want to help one side more than the other. A mediator should try to understand what both sides want, and may make suggestions to try to get a compromise. A mediator could be a lawyer, social worker, psychologist, or other professional. They should have training in mediation skills.

Mediators do not give legal advice, and they cannot force the partners to reach an Agreement.

Private mediators are not required to have any training about intimate partner abuse, but some may have this special training. It is important to ask about this.

Arbitration

A legal process similar to the process in Court, where one person makes a decision in cases where two people can't agree. Partners can choose to use arbitration to make a Separation Agreement. Arbitration is different from court because the partners choose the person making the decision, called an arbitrator, and they pay the arbitrator for this service.

Once the partners agree to arbitration, they must follow the decision of the arbitrator. The arbitrator's decision must be based on the information that the partners provide, and must follow Ontario and Canadian family law. An arbitration can be enforced by a Court, if it is not followed.

Arbitrator

An arbitrator is an independent person, who acts like a judge, but who is chosen by the parties to resolve the issues they can't agree on. The decision of an arbitrator is usually final, and can be taken to Court to make sure that it is followed.

In Ontario, an arbitrator may be chosen to settle family matters such as child custody, child and spousal support and division of family property, but must follow Ontario and Canadian laws. They must make decisions considering the best interests of children, and must be trained and conduct interviews to look for intimate partner violence to ensure the arbitration process and decision is fair.

Independent Legal Advice

Independent Legal Advice is advice that a person gets from a lawyer about their situation, legal rights and options. In family law matters, including making a Separation

Agreement, it is very important for each partner to talk to their own lawyer and get advice about what the Agreement means, how it compares to the person's rights under the law, and the consequences of signing the Agreement. If a person does not know that they can get independent legal advice before signing an agreement, or if they are pressured or tricked to not get independent legal advice, then a Court may set aside a Separation Agreement and say it is not valid. But if a person knows they can get Independent Legal Advice, and they choose to not talk to a lawyer, the Court may say the Agreement is valid.



The views expressed in these materials are the views of FLEW and do not necessarily reflect those of the Province.



While financially supported by the Law Foundation of Ontario, the content of this publication does not necessarily reflect the views of the Foundation.

There is a greater risk of violence when an intimate relationship is ending. If you are in immediate danger, call 911. If you or someone you know is at risk, visit the FLEW website for information on getting support.

If you are a francophone woman living in Ontario, you have the right to access French language services in family law court proceedings. For more information regarding your rights, contact a lawyer, a community legal clinic, or the support line Femaide at 1-877-336-2433, TTY 1-866-860-7082.

You can find more information on how to access services in French on our website at www.onefamilylaw.ca or www.undroitdefamille.ca.