

The Process of Separation and Divorce

A Legal Overview

The reality of marriage breakdown is that it often brings with it, extreme and wildly variable emotions in each spouse. The intensity of these emotions often create an environment ripe for the perpetuation of hostilities and a prolonged adversarial relationship. This emotional turmoil can direct either or both spouses along a pathway of adversity.

The initial mindset of both spouses, whether positive and constructive, vindictive or irrational, largely determines parties' course. Every decision made at each stage of the process of dissolving the marriage or the partnership, is thereafter made within the logic and analysis of that crucial initial mind set. It is therefore essential that a spouse, from the earliest possible moment, consider and set proper and realistic goals.

Setting Goals

There are three fundamental areas in which a spouse must be able to canvass the relevant factors, set out his/her goals and chart a feasible plan.

1. Parenting

- List the general and special needs of the children.
- List the parenting and personal strengths and qualities of each parent.
- Describing the ability and willingness of each parent to communicate on child relevant and parenting issues
- Developing a flexible child's residency schedule which offers alternatives that are real and capable of implementation in whole or in part.
- Formulating and detailing a parenting plan that is "child centered".

2. Property Division

- Itemizing the contents of the home with realistic present day sales values, accompanied with a proposal for an item by item division.
- Listing all assets owned in either spouse's name, their values as of the

date of marriage and their values as of the date of separation.

- Preparing a separate listing of all property owned by either spouse during the course of the marriage and their values as of the date of separation.
- Listing of any assets that were gifted to or inherited by either spouse during the course of the marriage, from a third person
- Listing all debts and liabilities in either spouse's name as at the date of marriage and as at the date of separation
- Preparing a proposal for division of property or payment of equalization
- Organizing (where possible) and the safekeeping of documentation, receipts and other evidence of value, for future proof

3. Child and Spousal Support

- Preparing an outline of your background including educational, religious, recreational and general histories for both spouses.
- Preparing a chronological history of your employment and also that of your spouse.
- Preparing of an outline of the type of role that each spouse played during the course of the marriage together with your perspective on how those roles worked as a deterrent or advancement of your career potential and that of your spouse's.
- Listing of your every day and special living expenses and separate listing of expenses of any children residing with you. Where possible, retain receipts for future proof.

A spouse must receive timely, accurate and complete disclosure of the other spouse's financial documents to enable him/her make a proper assessment and to formulate achievable goals. A spouse may also need accounting advice to determine the proper valuation of assets as well as achievable income of spouses in more complicated cases. At all times, a party is well-advised to have the benefit of legal counsel on the central issues in order to fully appreciate their scope and extent and to arrive at realistic and achievable goals. To address a spouse's emotional needs, he or she may seek the assistance of therapeutic counselors who may help the spouse deal with the varied emotions

experienced throughout the different stages of the process.

Once goals are set, the spouses may consider the various processes available to achieve these goals.

Various Processes Available to Achieve Goals

1. Negotiation

The "Negotiation Option" permits the parties to resolve their outstanding issues by entering into an agreement, arrived at either by themselves or with the assistance of various professional advisors. At every stage of the negotiation process, it is essential that both spouses have and maintain confidence that complete financial disclosure has been made leading to and being the cornerstone on which economic decisions are determined and finalized. Once an agreement is arrived at it will most often form the basis upon which the parties will conduct their affairs in the future. The only caveat to the enforceability of an agreement is that most courts do not surrender their inherent jurisdiction to determine issues dealing with children. However, the agreement made by the parties will be considered and given considerable weight by the Court in any final resolution.

2. Mediation

Mediation is another available tool that may be utilized by the parties to retain control of their own destiny by seeking the intervention of a third person skilled in the art of bringing together the polarized parties to an agreement on their outstanding issues. Mediation employs the assistance of an independent and trained communicator whose skill is in assisting the parties to see beyond the moment and arrive at their own agreement. As with all of the methods of resolution, it is essential that each party provide early, complete and accurate financial disclosure in order to allow the other to assess their entitlements. Although the parties have opted for the involvement of a mediator, the mediator does not give legal advice to any of the parties, with each spouse having independent legal advice and representation.

Once again this process may result in an agreement of the parties which may require the sanction of the court, if children are involved.

3. Arbitration

It may not be logistically or effectively possible to resolve some (or all of your issues) by either negotiation, mediation or settlement techniques. Arbitration is an alternative to the Court process that may be appropriate.

Arbitration is a process in which an independent professional(s) is chosen by agreement of the parties to resolve the issue by considering the facts and making a binding decision of the outstanding issues. The parties themselves shape by formal agreement the parameters of the process and the nature of the arbitration process itself, addressing as well the manner in which the costs of this process are to be shared.

The Arbitrator will be the judge of the issues that are brought before him or her. The decision of the arbitrator may usually be appealed to a Judge, depending on the arbitration legislation in the parties' jurisdiction.

4. The Courts

It may however, for a number of reasons, be necessary for the parties to access the courts to resolve their matter. In essence, where the parties are not able to agree (on some or all of their issues) and Arbitration is not an appropriate or available resort the court process may be the only way to resolve an issue.

Most courts that deal with family matters have now become much more sophisticated at instituting alternate methods of resolving disputes and the vast majority of cases never end up with an actual trial. Experience has shown that only 5 - 10% of all cases actually end up with a completed trial.

It is most important that the parties review with each professional that they must engage an outline of the costs involved. This should be done at the very onset of the involvement with that professional. Although it may be that the professional is not able to give a total figure for the future costs, a detailed outline of the cost process is absolutely necessary. As with any expenditures it is important that the parties, at every stage of the process weigh the costs against the potential gains. When emotions intrude on logical decision, it is imperative that this rational approach to decision making be employed in order to avoid the result of having most of the families resources spent on resolving the issues between them.

What Needs to be Understood (but is seldom emphasized) is

The Complete Unpredictability of the Court Process

The unknown variable in a Court proceeding is the **LEANING OF THE JUDGE** which will ultimately affect his view and perception of the facts of the case. The corresponding result and decision in the case, can often times, detrimentally affect the case by virtue of the time frame required by that specific Judge to formulate a decision and write a judgement. Although our Court takes pride in advancing a belief to the public at large that there is open and prompt access to the Court, this is no longer the case for a multitude of reasons . The competency of the judiciary, which in the past has been beyond reproach, is sadly lacking in many respects as individuals who are poorly qualified in specialized areas are appointed to be the decision makers in areas of complex law where they have neither the experience, knowledge or intuition.

The failure to be able to provide a prompt decision may create the largest obstacle of a case and certainly, one that is not anticipated by either counsel. There is no doubt that in an adversarial process of litigation, one of the parties and counsel will find its purposes served by the delay. Unfortunately, it is seldom that the party who relishes the delay is the party who is in fact worthy of the Court's protection and the Court's action. The failure to act in a prompt and decisive manner has been exemplified in numerous cases before the Courts, one of which is the Ravida decision. The inexcusable delay that was occasioned between the end of the trial, end of submissions and rendering of a judgement had left the entitled spouse financially devastated and penniless notwithstanding that all correct procedures and all appropriate steps had been taken in a timely fashion.

It is helpful to follow the checklists that are included in this booklet. With information brought to your professional advisors in an organized manner, your case will proceed with better clarity and economy. Ensure that all of your questions are answered. Understand all of your issues and possible paths to resolution. Your professionals advise you, but you must instruct your professionals in an informed manner, consistent with what is good for you.

Checklist of Documents to Provide Professionals

Assets

1. Contents

- Prepare a list of all the home contents - Be specific and organize it by room.
- List personal items of value - e.g. jewelry
- Give approximate value if possible
- Provide appraisals if available

2. Real Estate

- Prepare a list of all real estate owned by you or your spouse
- Prior to, during and after separation
- Provide copies of title documents and any legal reporting letters of sales or purchases

3. Recommended Procedures

Because of the significance of being able to establish what assets exist on date of separation and existed as of date of marriage, you can dramatically improve your case by providing as much detail as you can with respect to the assets. Our presentation of your case in Court is not limited to simple valuations and oral evidence, but can be dramatically improved by way of photographs or video presentation. At the present time, you no doubt have a photograph album which dates back to, at, or before the date of your marriage. By careful scrutiny of your photo album, you may be able to provide photographs and other detail with respect to assets that you may have otherwise forgotten. Because we are looking to establish value, a significant difference may arise in perception by a valuator or by a Judge after having the opportunity of observing a photograph of the motor vehicle you owned at the date of marriage, or jewelry, etc.

A more convenient approach is to have a video prepared of each room in your house and all of the contents. This process may take one or two hours, but will dramatically increase the possibility of your evidence being

accepted. The video presentation on a room by room drawer by drawer observation gives us the opportunity to have specific assets listed and valued and if necessary, available for cross-examination on issues of value.

In the event you do not have a video camera, we will arrange a loan of such a camera from our office.

4. Investments

- Prepare a list of known investments (stocks, bonds, mutual funds, RRSP's, etc.) of yourself and your spouse
- Provide copies of statements from any institution regarding these investments.

5. Corporations/Partnerships/Business Interests

- Prepare a list of any corporation/partnership/business that either you or your spouse had an interest in either before, during, or after separation
- Set out the dates of acquisition or sale
- Provide copies of any financial statements and tax returns where possible (at least the last 3 to 5 years)

6. Inheritance

- Prepare a list of any inheritance or gifts from someone other than your spouse
- Set out the dates of receipt
- Bring in copies of any receipts, proof of gift or inheritance, and value

7. Income

- Provide at least the last 3 to 5 years income tax returns
- Provide 3 to 5 months pay stubs (where applicable)

8. Liabilities

- Prepare a list of all liabilities (debts) existing in your name

- Provide copies of any statements of these debts including mortgage statements

9. Pension Information

- Obtain pension information from personnel or human resources of your employer
- Sufficient information is required to establish present day value of your pension

10. Living Expenses

- Prepare a list of all your weekly expenses for yourself and your children
- Provide copies of all carrying costs of your living accommodation (heat, hydro, taxes, repairs)
- Keep and provide copies of all other expenses (groceries, restaurants, entertainment, vacations, clothing, etc.)

11. Relevant Dates

- Your assets and liabilities should be listed and valued at date of marriage, date of separation, and present date

Positive Pathways

In Separation and Divorce



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