
HOW YOU MAY HANDLE LEGAL ISSUES ARISING FROM YOUR SEPARATION

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A. INTRODUCTION

Separating from a partner is one of the more stressful and confusing times in a person's life, especially if there are children involved. Not only is separation an emotionally difficult time, it can also be financially stressful as two households must now be supported. There are various methods of resolving family law disputes including negotiation, collaborate family law, mediation, arbitration, and going to court, each with its own pros and cons. This bulletin will seek to analyze the advantages and disadvantages of each method in order to assist you in choosing the option that is most suited to your situation. Not all of these options are appropriate in every circumstance. Talking to a lawyer who has an impartial view of an emotionally charged situation can help you understand your options and the steps that make the most sense in your case, and will give you a better idea of your rights and responsibilities in separating from your partner.

B. NEGOTIATION

One common way of resolving family law disputes is through negotiation, either direct negotiation where you are able to come to an agreement (written or verbal) with your partner on your own, or negotiation through lawyers. If you are negotiating on your own with your partner, it is highly recommended that you consult a family law lawyer prior to negotiations in order to get information about your basic legal rights and obligations. If you and your partner come to an agreement, the lawyer

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for one of the parties can draft a separation agreement that reflects your agreement using legal terminology and including the proper legal releases. The other party can then take the draft separation agreement to their lawyer for review and receive some independent legal advice. Both parties will have to provide full financial disclosure in order for the lawyers to be able to properly advise each party what their rights and obligations are based on their situation. Once both parties have signed the separation agreement, it may be filed with the court either on its own or along with an application for divorce.

You may also ask your lawyer to negotiate a separation agreement on your behalf. How quickly an agreement can be negotiated will depend on the complexity of the issues that you are dealing with; your ability to communicate, either directly with your partner or through your lawyer; and the proper disclosure of financial information. If you are not able to come to an agreement about an issue arising from your separation, you still have other options as discussed below.

C. COLLABORATIVE FAMILY LAW

Collaboratively trained family lawyers work together with their clients to resolve the disputes that arise from separation. You are represented by your own lawyer during the collaborative process and you and your partner meet with your lawyers in four-way meetings. At the outset, everyone agrees that they will work together to resolve the dispute collaboratively and without resorting to litigation or threats of litigation. If the negotiations are at an impasse, collaborative lawyers will often bring in a mediator to assist you and your partner in resolving the dispute. In the event that you find yourself unable to collaborate and decide to pursue litigation, the collaborative lawyers must withdraw from the case. This gives an added incentive to all parties to reach an agreement.

Negotiating an agreement using the collaborative family law method can sometimes take a little longer than going to court and may in some situations prove more expensive than litigation depending on the complexity of the issues involved. However, many participants in the collaborative process have found the process to be empowering and they are satisfied with the agreement reached between the parties in the end as opposed to a judge's imposed order if they were to go to court.

D. MEDIATION

Mediation is a process whereby a third party who is independent and impartial attempts to assist you and your partner in negotiating an agreement. Mediation can be used as an alternative to litigation but the two are not mutually exclusive. For example, you may use the mediation process to negotiate a parenting plan but use litigation or another means to resolve support and property issues. Some mediations are “closed” which means that all of the information exchanged by the parties during mediation remains confidential and is “without prejudice,” so that information that is shared during the mediation cannot be used in any future litigation. You can choose whether or not you want your lawyer to attend with you at mediation. The mediator cannot give legal advice even if he/she is legally trained, as this would put the mediator in a conflict of interest with the other party.

Mediation may not be appropriate in all circumstances; for example, where there is domestic violence in the relationship. The ability to reach an agreement depends largely on the ability of the parties to communicate with each other and trust each other. It is very important for you to speak with a family law lawyer before going to mediation in order to be informed of your legal rights and responsibilities. Some people are not aware of certain legal consequences of separation, such as tax consequences or their right to benefit from their partner’s pension. Others unknowingly have misunderstood the law as it relates to their situation because of misinformation obtained from family members or friends who have given them bad advice. An agreement that is based on misleading or incomplete information could be found by a court not to be enforceable. It is therefore very important that the parties consult a family lawyer prior to going to mediation.

E. ARBITRATION

Arbitrators act as neutral decision makers for people who cannot agree on their family law issues. Unlike mediators, arbitrators have the power to make binding decisions for you and your partner if you both agree to the arbitration process. Except in certain circumstances, the arbitrator’s decision is final and you must follow it. The cost of an arbitrator is usually shared between you and your partner. All arbitration decisions involving children will be made in the best interests of any child or children involved.

Family arbitrators are required to make decisions under the laws of Ontario in order for their decisions to be effective, and they are required to have taken training in family law and domestic violence. It is mandatory

for you and your spouse to each get independent legal advice from your own lawyer before you can begin the arbitration process. You also run the risk that your arbitration agreement will be set aside by the court if you have failed to make relevant financial disclosure or did not understand the nature or consequences of the agreement.

F. GOING TO COURT

Litigation is one of the more familiar options for resolving family law disputes. There are several reasons why people may choose not to go to court:

- A lack of understanding about the rules of the court
- The amount and complexity of paperwork involved in bringing a court action
- The impersonal nature of court – a judge is making serious decisions about your family without having the benefit of knowing you or your family
- It is expensive – lawyers are generally paid by the hour and it can take many hours for a lawyer to prepare and file the necessary court papers, travel to and from various court locations, and to attend court
- It is stressful for all parties, and sometimes even for the child or children.

Despite its drawbacks, litigation is necessary in some circumstances; for example, if you and your partner cannot agree on what will happen with the children; you need a court order to deal with the children's school, medical treatment and/or travel arrangements; child support isn't being paid; the situation at home is intolerable; or the other parent doesn't allow you to see the children and/or tries to interfere with access. Some advantages of going to court are that a legally qualified judge will decide the case; legislation and case law will be applied by the judge which leads to reasoned decisions; and there is an appeal system if you are unhappy with the judge's decision.

If you are unable to resolve your dispute through negotiation, mediation, or arbitration, a judge can assist you and your partner in reaching a settlement agreement by advising you of what the likely outcome of trial would be for each party. You should talk with a lawyer to determine whether going to court is the right option for you.

G. CONCLUSION

There are various methods to handle any legal issue that arises from separation. It is up to you to pick the best method suited to you and your family's needs. Each method has its advantages and disadvantages and speaking with a lawyer can help you decide which option to choose.



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