

Why common-law couples should consider a prenup



By Gail Johnson | Pay Day – Fri, 2 Aug, 2013 1:46 PM EDT

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British Columbians with live-in lovers might want to add one thing to the list for that romantic dinner besides red roses, candles and wine: a [prenuptial agreement](#). Now that a new law has taken effect in the province, certain roommates with benefits are considered married and will [face the trappings of divorce](#) when a relationship ends, including the equal division of assets and debts.

[The Family Law Act](#) was revised to reflect changing times: according to the B.C. Ministry of Justice, the number of common-law families in B.C. is growing at a rate three times faster than the number of married couples.

Under the revised act, couples who have lived together in a “marriage-like relationship” for two years are treated the same as married couples when it comes to property-division rules. This means common-law couples, like married couples, will generally share the property that accrues during the course of their relationship — but not property brought into the relationship. (Most other areas of the law, including wills, estates, income tax and spousal support already treat common-law families the same as married families.)

“Although difficult conversations to have, we’re [urging singles embarking on a relationship to be a lot more candid about their finances](#) much earlier on to prevent post-relationship trauma if it doesn’t work out,” says Blair Mantin, vice president of [Sands & Associates](#), B.C.’s largest firm of licensed proposal administrators and bankruptcy trustees.

B.C. Minister of Justice Susan Anton wasn't available for an interview, but senior public affairs officer Lori Deluca provided information from the ministry via email explaining that under the former Family Relations Act, unmarried couples faced "extremely complex" laws to divide property.

"As a result, unmarried couples often faced unfair outcomes with respect to property division," the ministry states. "B.C.'s new property division rules, which are in step with many other Canadian jurisdictions, help provide fair, clear ways for these families to resolve their disputes." So what exactly does "marriage-like relationship" mean, anyway?

"Basically the question is 'what's the nature of your relationship?'" explains family lawyer [John-Paul Boyd](#), who will become director of the [Canadian Research Institute for Law and the Family](#) in September. "The court usually analyzes that from a financial basis: Do you co-own property? Do you share a bank account? Do you pay for each other's expenses? Is there a common bill like a phone bill or a hydro bill that both of you pay?"

The court also looks at it from a social perspective: Do you consider yourselves in a committed relationship? When you go out to party do you say things like 'I'm Sally and this is my partner, Frank.' Do your friends and family think you're in a committed relationship? And then there's the functional perspective: Do you live under the same roof? Do you share tasks? Do you cook for each other?"

For most common-law couples, the answers to those questions are fairly clear, but things can still get complicated.

"Most people ... don't really argue about this too much," Boyd says. "But let's say there's a couple living together and every now and then they have sex; their relationship may or may not be marriage-like. Or they're roommates who then start dating, crossing that line from friends who occasionally have sex to people in a tangible relationship."

"However, the fundamental concept, what matters with the new act, is the date you began to live together or got married -- whatever was sooner -- and the date that you separate," he adds. "The basic model is you get to keep all of the property you had on the date you began to live together, and what you are required to share as family property are assets that you acquired during relationship up until separation. You also have to share the increase in value of that stuff you brought into the relationship."

Here's an example. Say you enter a relationship with a home with \$1 million in equity. Three years later the home is worth \$1.2 million. You get to keep the original equity since you brought it with you into the relationship, but you have to split the \$200,000 increase in value.

But what about debts? The old Family Relations Act never dealt expressly with debts. The new act does.

"The FLA deals with debt for unmarried spouses on exactly the same terms as married spouses," Boyd says. Under the act, each spouse is responsible for one half of the debts incurred by either of them between the date they began to live together or got married, whichever is earlier, and the date of separation.

"They may be each one-half liable for debts incurred after the date of separation if the debt was incurred to maintain family property, for example a loan taken to maintain the mortgage on the family home," Boyd says.

Why a prenup is important

The best way to avoid a battle? Come up with a written agreement as early in the relationship as possible.

“It doesn’t matter if it’s a marriage agreement or a cohabitation agreement; an agreement has the benefit of identifying all of the family property and all of the excluded property – the property that’s excluded because you’re bringing it into relationship,” Boyd says.

“That’s really helpful, because in 12 or 20 years when the relationship comes to an end it’s going to save everybody a whole lot of headache trying to figure out ‘What did I have and what was it worth?’

“Rather than making you dig up microfiche statements of your RRSP statements, you just get out the agreement. That helps you stop fighting about things down the road,” he adds, noting that written agreements can also spell out exactly how shared property will be divided in the event of a breakup.

If you don’t have money to spend on a lawyer, you can do a poor man’s prenup by simply making sure you’ve got copies of all your statements of all your accounts – investments, RRSPs, B.C. assessment notice, mortgage statement -- for the month you began to live together or got married and keeping it in a safety deposit box.

“That will be your way of demonstrating this is what you had going into the relationship and this is what it was worth,” Boyd says.

Mantin also emphasizes the need to address debt and to include the division of debts accrued during the relationship into a written agreement.

“Have a conversation with your partner about each person’s financial situation, and try to have it early on to prevent surprises,” Mantin says. “Educate yourself on the new legislation and the risk factors involved with a potential split.”