



Scott T. Taylor

Family Lawyer & Mediator

Common Knowledge

Category: Division of Assets

After 10 years of living together and raising two children the end of her common law relationship was not what Mary Walsh expected. Ms. Walsh, a resident of Nova Scotia, was shocked to discover that Nova Scotia's Matrimonial Property Act did not allow her, as a common law spouse, to enjoy an equal share of the family's assets. If however, Mary Walsh and her spouse Wayne Bora, who first met in 1984, had married, Mary would have been entitled to a 50/50 sharing of the couple's property.

The couple separated in 1995, and Mary Walsh commenced a court action to challenge what she perceived as an unfair law. Mary Walsh's lawyer argued that this unequal treatment violated the equality guarantees of the Canadian Charter of Rights, an argument which proved successful at the Nova Scotia Court of Appeal.

The case is now before the Supreme Court of Canada and a final decision is not expected for several months. The province of Nova Scotia supported by the provinces of B.C., Ontario, Alberta and Quebec, has adopted the position that unmarried couples should not be entitled to the same shared property benefits as married couples when relationships fail. However, if the Supreme Court of Canada decides in favour of Mary Walsh, it would have a significant impact for common law couples throughout the country.

Here in B.C. we have our own provincial legislation, The Family Relations Act, which addresses the division of property on "marriage break up" with the presumption that all family assets will be shared on a 50/50 basis.

However, common law spouses, who are described as people living in a "marriage like" relationship for a period of at least two years, do not qualify as "spouses" for the purpose of the equal division of family assets. Currently, the only legal recourse available to common law spouses upon separation is an application for spousal and child support and a trust claim in the couple's property.

Those who support the current legal status quo, and the inability of common law spouses to share family property argue that to do so otherwise would actually be contrary to the parties' intentions. After all, it is suggested, if the parties upon entering into the relationship had wanted each other to share in the other's property it would have been agreed in advance, by way of a written agreement. There is also the expressed concern about the difficulty in defining what constitutes a "common law relationship".

But there are also those who believe that to deny common law spouses the same property rights as married couples is an injustice, which begs correction. Further, it is argued that since courts already make orders for spousal and child support based upon a definition of "common law relationships" it should not be "too difficult a stretch" to make similar orders pertaining to property division as well.

My advice to anyone considering living together, is to obtain legal advice before taking the plunge. Common knowledge is the best way to protect against unpleasant surprises. 