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Common Sense

Category: Division of Assets

It was a recent, well publicized, family law decision of Canada's highest court which attracted considerable criticism, particularly from unmarried couples in long-term relationships. In its decision, the Supreme Court of Canada ruled that unmarried couples, unlike married couples, are not entitled to the legal presumption of a 50/50 split of family assets upon separation.

But despite the "gloom and doom" reaction of various unmarried couples, interviewed by the media, who attacked the decision for allegedly failing to recognize the "committed" nature of common law relationships or potentially forcing separated spouses and children into poverty, there are two important elements of the decision which have been generally overlooked.

Firstly, is the perception that there are no legal implications which arise at the end of a common law relationship, if one party should simply decide to "walk away". This is certainly not the case, particularly with respect to child and spousal support. In my own family law practice I am constantly amazed at the reaction I receive when I advise clients, at the end of a common law relationship, that they may have a continuing obligation to pay child support to a child of their former common law partner.

An obligation which may extend until the child has completed university, regardless of whether or not the child's natural father is contributing to the child's support. In addition to child support there may also be an obligation to pay spousal support. This can occur if "the marriage-like relationship" has lasted for more than 2 years, and the application for support is brought not more than 1 year after the end of the relationship.

There is also the possibility, at the end of a common law relationship, that one of the parties will claim an interest, based on trust or unjust enrichment, against property owned by the other party. This can occur if one party contributed either financially or through labor and materials towards the operation, upkeep or maintenance of the property.

Secondly, despite the ruling, all common law couples have the option and opportunity to arrive at their own view of what is fair and appropriate upon separation with respect to the division of family assets, as well as other key matters such as child and spousal support. Hopefully, this decision will encourage more common law couples to enter into Cohabitation Agreements to address such issues should the need ever arise.

In my own view, as a family lawyer, the common sense way for couples to minimize the emotional, financial and legal cost of separation is to reach a valid and binding agreement with your partner while you're still talking. If not, as the expression goes, you can pay me now, or you can pay me later. 🤝