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Common Law Relationships in Canada

Common-law relationships are on the rise: according to Statistics Canada, the number of common-law couples is growing at 16 times the rate of marriages. There's a lot of confusion about the rights and obligations arising from this kind of relationship -- especially when it breaks up. Here's a brief primer.

By Malcolm Kronby, LL.B., Q.C.

Through a long period of English history, competent individuals could marry without the intervention of any civil or religious authority. If there was at the time a statute governing marriage, this was not the only way a marriage could be formed. Parties could be married at "common law," that is, quite apart from "legal" marriage or accordance with the formal requirements of a Marriage Act, such as issuance of a licence, and a ceremony of solemnization conducted by some person officially empowered to do so.

To create a common-law marriage, there had to be an agreement between the parties, as in some exchange of promises; legal capacity to make a contract, e.g., sufficient age, sound mind and free will; cohabitation; consummation by sexual intercourse; and public and continued recognition of the relationship.

After a lengthy controversy, a statute was passed in England in 1753 aimed at the abolition of common-law marriages and secret marriages, and that contained strict requirements for a valid marriage. By 1844, as a result of judicial decisions, it was clear that no valid marriage could be formed at common law in England, and that this was the state of the law at least back to the 1753 statute.

The effect of the English statute in Canada is not as clear as it should be after all these years. Probably the statute was not imported into Canada, so that in every province except Quebec it is possible to have a valid marriage in very special circumstances without strict compliance with the provincial Marriage Acts setting out the formal requirements. For instance, parties may not absolutely need a marriage licence if they go through a ceremony of some sort with the intent to be validly married, then live together, particularly if there are children of the union. This body of family law is extremely technical. Our courts have a long-standing tendency to narrow the possibility of a valid marriage of this sort.

Also, the courts will interpret formal validity of marriage in accordance with the law of the place where the marriage was solemnized. Many places do not have procedures as strict as our provinces, or adverse conditions, such as war, make these procedures impractical.

So, although it is possible to create a common-law marriage recognized in Canada in the sense that common-law marriage hasn't been specifically abolished, no one who wants the legal state of marriage should fail to comply with all of the statutory rules of the place where the marriage is performed.

What constitutes a "Common-Law" Marriage?

We generally use the term "common-law marriage" to describe the voluntary union of a man and woman in a lasting relationship resembling marriage. The parties may indeed behave as if married, refer to each other as if married, and be recognized or assumed to be married in their community. In fact they are not married -- no matter how long they have lived together, no matter how many children they have.

They may have specific rights as conferred by statutes. For instance, they may treat each other as dependants for tax purposes, and take the same deductions as if they were married. They have mutual obligations to their children, with all rights of custody and access, as if married. They receive Child Tax Benefits. They can insure each other's life and qualify for pension benefits.

In Ontario, they have a mutual support obligation at law because of the Family Law Act. This arises because the Act states: "Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so," and defines "spouse" to include either of a man and woman not being married to each other who have cohabited:

a) continuously for a period of not less than three years; or
b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Almost exactly the same words are used in the Ontario Succession Law Reform Act to permit an unmarried dependent "spouse" to claim against an estate. One remarkable case dealt with the effect of an incomplete sex change. The parties, both born female, had in the course of their lives married and had children. After that, they formed a relationship together that endured for 20 years. One of them, taking the male role, had extensive psychotherapy, hormonal injections, a double mastectomy and a panhysterectomy but no genital surgery. He (she) had changed the gender designation on his (her) birth certificate. They separated, and the male partner claimed support from the female. The court held that they were not a man and woman who had cohabited, since the sex change was incomplete, and reversible if hormone injections were stopped. The mastectomy and hysterectomy were inconclusive, since many women have this surgery without any question of their gender. The result might well have been different if there had been genital surgery.

Property rights

Parties who live together as if married have no property rights under the Family Law Act, so that there's no statutory entitlement to sharing of assets if they separate. Parties who live together may have property rights against each other based on the same legal principles that govern property rights between any unrelated people. This law is founded on the idea of compensating a person for the contribution he or she makes to the property of another, by imposition of a constructive or implied trust from the recipient in favour of the contributor.

The Supreme Court of Canada considered the case of a couple who lived together unmarried for about twenty years, during which they worked together to build a successful and prosperous beekeeping business, registered in the name of the man. The court found that the woman's contribution in equal work and effort gave rise to a constructive trust in her favour for one-half of the property and business assets. There have been many other cases in which a share of property or some money award has been given to a party in a "common-law" union.

Cohabitation agreements

Parties who live together can create their own support obligations and property rights by making a "cohabitation agreement." The Family Law Act specifically permits this, in the following words:

"A man and a woman who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit, or on death, including:

a) ownership in or division of property
b) support obligations
c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children
d) any other matter in settlement of their affairs."

To be valid, a cohabitation agreement must be in writing, signed by the parties, and witnessed. If the parties to a cohabitation agreement subsequently marry, in the absence of specific words to the contrary, their agreement becomes a marriage contract.

This article has been edited and excerpted with permission from the seventh edition of **Canadian Family Law** *by Malcolm Kronby, LL.B., Q.C. This book is invaluable for anyone who needs to understand the current laws regarding marriage, separation, divorce, child custody, support, property rights, and much, much more. Malcolm Kronby is a respected Toronto lawyer with Epstein Cole, and an instructor in family law at Osgoode Hall.*