



How to answer questions about your client's separation

Family Law 101

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Presented by:

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The Premise: You deal with clients and their money. Clients are people, and things happen in life. One of the most difficult life events is the breakdown of the family. A whole area of law has been dedicated to ensuring that the fallout from family breakdown is addressed in a way acceptable to society, in general. Lawyers spend years training to become knowledgeable about “Family Law” so to better help clients navigate the complex rules that are set out in federal legislation, provincial legislation, and in case law. The client is calling you.

The Point: You are on the spot. You are being asked for advice from someone who really needs it. You are a financial advisor, and not a lawyer. But you need to tell your client an answer – an answer better than ‘go talk to a lawyer.’ This can be your cheat sheet.

How to use this handout: This is not a substitute for legal advice. The purpose of this handout is to give you enough to provide some comfort to your client, and to point them in the right direction. This is not simply a scheme for referrals – you can use these answers to assist your clients in the amicable, dignified, and cost effective resolution of their separation that keeps their assets where they belong – in their hands, so that they may continue to use them, invest them, and hold them for the benefit of their family.

What to do if the question / answer is not in this handout: No problem – call me. I am happy to talk to you about the situation your client is in. (403) 264-9480 is my direct line. If you get my voicemail, call my assistant Tanya at (403) 513-9653. I will call back.

Question: “Do I have to tell my wife / husband about my investments / income?”

The Law:

The law mandates full financial disclosure, so that both spouses have the same information, and sufficient information to make an informed decision. Both spouses are entitled to documents, appraisals, verification, statements, sworn testimony, and many other methods of determining the financial situation of the family.

The Federal Child Support Guidelines sets out the disclosure requirements for determining child support at sections 21 and 22, and includes: income tax returns, notices of assessment, paystubs, corporate financial statements, trust financial statements, and any other sources of income such as EI benefits, social assistance, Workers Compensation, and disability insurance.

The Spousal Support Advisory Guidelines requires the same disclosure as the Federal Child Support Guidelines.

The Matrimonial Property Act requires the disclosure of a statement of property, verified by oath, pursuant to section 31.

The Alberta Rules of Court mandates the disclosure of ‘standard’ financial information by way of application. The list of disclosure is summarized in my article “Financial Disclosure Required in Alberta” which is on my webpage, and a copy is attached to this handout.

Disclosure is typically the first step, and the most important step, of a separation. If the spouses do not have complete and the same understanding of their financial situation, any agreement reached is subject to challenge due to the failure to disclose and the improper withholding of information. This principle has been confirmed by all levels of court, including the Supreme Court of Canada.

The Answer: “Both you and your spouse need an accurate understanding of the family finances in order to complete your separation and move forward with your lives. However, you do not want to be providing information without having a process in place to get you to a settlement. Some processes are confidential, and some are subject to being public. You should work with your spouse in determining this process, so that the financial information exchanged will be complete, and will assist you in reaching a settlement.”

Question: “Do I have to share my pension?”

The Law:

The general principle for the division of matrimonial property in Alberta is an equal division based on current, fair market value – Matrimonial Property Act, section 7(4). This includes pension plans.

There are a few exceptions to the rules. For example, property that has been inherited or was owned prior to the marriage may be exempt from sharing. A pension plan that has contributions from prior to the marriage will not be shared in totality – the amount that accrued prior to the marriage will be retained by the pension holder.

Pensions are sophisticated assets, and may require the assistance of an actuary to properly value. To complicate things further, defined benefit pension plans have limitations on what funds may be transferred from the plan to a separated spouse. In Alberta, all provincial pension plans require a Matrimonial Property Order if the division is to take place at source. Truly, this is an area where legal advice is required.

The Answer: “If you have contributed to your pension plan during your marriage, then yes, some or all of your pension will be considered sharable matrimonial property. Pension plans are very complicated assets, and have rules which regulate their valuation and division. You should contact a lawyer to assist you with this asset.”

Question: “How can I avoid paying child support?”

The Law:

Child support is the right of the child, and is not subject to the parent’s bargaining or negotiation. In other words, parents cannot agree to not pay child support. There is a lot of policy behind this, including the legislated objectives of treating all children in a similar fashion, and to prevent one spouse from avoiding an obligation due to his or her greater negotiation power.

Child support is mandated by the Federal Child Support Guidelines. There are two parts: a monthly payment and sharing of extraordinary expenses. The monthly payment is based upon income; the payor parent’s income determines the monthly payment. An online calculator of the monthly payment is available online on the Government of Canada, Department of Justice webpage. Google “Federal Child Support Guidelines”.

The children’s extraordinary expenses are summarized in Section 7 of the Federal Child Support Guidelines, and are shared proportionately to income. These are identified by type, and are summarized in the FCSG.

There are very few ways to change / vary / negotiate child support. The most common is to adjust the parenting plan; there are a few others. Most of them are not successful.

The Answer: “Child support has been standardized by the Federal Child Support Guidelines, so that there is less of a dispute over the cost of raising children. The Guidelines are the law, and so are applicable to all people who are separating. The child support payment is intended to ensure that the standard of living your children have enjoyed during the marriage is maintained, either directly or indirectly. Supporting your children is an obligation of all parents, whether they are married or not.”

Question: “How can I avoid paying spousal support?”

The Law:

Spousal support is a discretionary form of relief, meaning that absent an agreement, a judge decides based on entitlement.

There are two types of entitlement to spousal support:

Compensatory – based on decisions made during the marriage that caused an economic prejudice to one spouse, and

Needs – based on the need of one spouse for support to maintain or approach the standard of living enjoyed during the marriage.

Spousal support is a very complicated issue, and considers the roles played by the parties during their marriage, the decisions made during the marriage, the ability of the spouses to earn income, the resources available to the spouses after the division of property, the parties’ ages and health, and a practically infinite list of variables. Lawyers love spousal support.

The Spousal Support Advisory Guidelines were created to normalize the treatment of spousal support in Canada. They are of varying affect across the country – in Alberta, they are considered but not considered binding in any way. Contrast this with BC, where the SSAG are viewed almost the same way as the FCSG.

Ultimately, spousal support is subject to the parties’ agreement. The parties can agree to pay it monthly, pay a lump sum, pay for a limited period of time, pay for an unlimited period of time, etc. There is real art in negotiating spousal support.

The Answer: “Spousal support is a very difficult legal issue. You and your spouse can agree on how the issue is resolved, including not making any payments at all. If you cannot agree, a judge may impose payments if the circumstances are right. Usually it is best to negotiate a settlement that includes spousal support, so as to avoid taking a chance in a courtroom.”

Question: “What are the tax implications of spousal support?”

The Law:

Spousal support paid on a periodic basis is deductible by the payor, and taxed in the hands of the recipient. Periodic means at least more than one payment; CRA has challenged settlements that have ‘periodic’ payments that are really lump sum payments.

If the payment of spousal support is \$5,000.00 per month, then the payor will deduct \$60,000.00 from his / her taxable income, and the recipient shall add \$60,000.00 to his or her taxable income.

The payor can try to adjust his / her withholding taxes at source based on an agreement or order to pay spousal support, to increase cash flow by reducing deductions for income tax. Usually this requires an application by the HR department of the payor’s employer.

Lump sum payments are, by definition, not periodic. Therefore, they are typically calculated with a tax deduction considered.

The Answer: “Monthly payments of spousal support are tax deductible to the payor, and claimed as income by the recipient. Lump sum payments are not deducted or claimed as income, and are considered ‘after-tax’ payments. You can structure your settlement to consider the best method of making or receiving the payments, for tax and other considerations.”

Question: “Is it better for me to keep the house, or cash?”

The Law:

The Matrimonial Property Act does not give spouses interests in specific assets, but instead requires the equalization of net worth based on current fair market values. Everything is reduced to dollars, including the home.

Deciding what mix of assets / debts to keep in the division of property is really not a legal question, but more of a financial question. Is the client able to afford the home? Is the client better off with liquidity? Can the client handle risk? Does the client qualify for a mortgage?

For lawyers, a house is worth the value of its equity. The law is cold. But it permits people to structure their settlement in a way that works best for their interests.

The Answer: “This depends upon your circumstances, and your goals. We need to have a proper understanding of your financial situation, to see if keeping the home makes sense for you. We may be able to find a way to meet your goals for homes and living costs, but is better than keeping the home you currently have. Let’s put together a plan.”

Question: “Do I really need a separation agreement?”

The Law:

The Matrimonial Property Act requires certificates of independent legal advice for separation agreements – Sections 37 and 38. Without these certificates, any ‘agreement’ reached by spouses is subject to judicial intervention. To say that differently, without certificates of legal advice, the agreement is not worth the paper it is written on.

While there is no similar provision in the Divorce Act, case law is clear that without legal advice, agreements are not sufficient to prevent a court from doing something other than what was agreed upon. Having legal advice adds weight to the agreement, and increases its enforceability.

Having a proper separation agreement prepared and signed with lawyers adds to the legitimacy of the agreement, and lowers the risk of the agreement being challenged by someone who changes his or her mind.

The Answer: “Yes you do. A proper separation agreement will conclude your separation and ensure that your assets are no longer subject to claims by your spouse. You want to ensure that the agreement you reach is confirmed and enforceable, and the only way to do this is to have a proper separation agreement prepared with the assistance of lawyers.”

Question: “My husband / wife kept track of the finances. How am I supposed to learn it all so quickly?”

The Law:

The basis of a legal contract is informed consent. Informed consent does not mean the client understands all of the details of capital gains tax, source withholding tax, the difference between retained earnings and the value of a company, or a contingency discount when calculating spousal support. It does mean that the client is being assisted by professionals whose role is to ensure the client’s interests are being represented and advanced.

Knowledge is power; a client who has not been involved in the day to day family finances needs solid financial information more than the spouse who has been responsible for the finances. Getting full and complete disclosure will empower the client and start them down the road to handling their own financial affairs.

The Answer: “I can help you.”

Question: “Do I need a lawyer?”

The Law:

See above for the answer on “Do I need a separation agreement”.

Lawyers have three basic roles:

1. To educate the client about the law and how it applies to his or her circumstances,
2. To provide advice to the client on what decisions are to be made, and how they should be made, and
3. To advocate for the client, as the voice of the client.

Some clients need only one or two of the above roles that a lawyer provides. At the end of the day, however, legal advice is a component of informed consent.

The Answer: “At some point, you need to receive legal advice from a lawyer. Usually it is best to get this legal advice early, so that you know your entitlements when you are negotiating your settlement. At the end of the day, you will need a lawyer to prepare and sign off on a separation agreement. It is best to consult with a lawyer early, to avoid any surprises.”

Question: “Will I be okay?”

The Law:

There are two answers to this one. The law has rules in place to ensure that the spouse who is vulnerable has protection, should he or she choose to seek it.

Second, while separation is a significant life event, it too will pass.

The Answer: “Yes ...” Fill in the rest yourself.