

Why I Need a Divorce Lawyer – Take Two

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I have been asked about the applicability of my article about using a divorce lawyer in Victoria and all of British Columbia. You can find my first article here:

http://www.islandfamilylawyers.com/documents/do-it-yourself_divorce.pdf

Paragraph 1 of that article deals with the Matrimonial Property Act of Alberta; what about the Family Relations Act of British Columbia?

The Family Relations Act (“FRA”) reserves the right of a Court to re-apportion the division of marital property if a marriage agreement is found to be unfair. The factors that are considered when determining if an agreement is unfair are set out in Section 65(1) of the FRA; you can find it here:

http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96128_01

This means that if an agreement reached by two separating individuals is so outside of what they would be entitled to under the FRA, the Court can come in and change the agreement, so that the ultimate division of property is closer to what the law would require if the parties were in dispute.

However, consider the Clarke case from the British Columbia Court of Appeal:

“In our view, parties who negotiate settlements of family matters on an adversarial basis must accept the risk that the Court will exercise its jurisdiction to review the results of these negotiations objectively as of the date of” settlement. Parties must anticipate that a settlement which will likely permit one party to live the rest of his or her life in dignity, while the other becomes dependent upon the state, may not withstand judicial scrutiny.

This is not to say that the Court will readily or easily reapportion assets which have been divided in an agreement, particularly where the parties have been represented by counsel. Lawyers cannot always be expected to insist that their clients accept their advice and there may often be reasons too subtle or numerous to speculate about which will persuade a lawyer not to repudiate a client who wishes to complete a bad bargain. After all, spouses often know better than any one else what can be accomplished by negotiations, and not all clients wish to prolong a battle.

Thus the Courts must proceed cautiously, recognizing that compromises are much to be desired. But compromise cannot always be equated to fairness, particularly in a case of a long traditional marriage like this one where, after 28 years, the wife received little or nothing on account of what she needed most which was her reasonable and valuable right to maintenance. While seeking to uphold bargains wherever possible, the Court cannot abdicate its

responsibility to respond to unfairness as required by the Act. The risk of reapportionment must rest on the party who benefits from unfairness.”

(I added the bold to the above; read the full case here:

<http://www.canlii.org/en/bc/bcca/doc/1991/1991canlii885/1991canlii885.html>

We can take away the following principles from the above case:

1. Agreements reached with the benefit of legal advice are not necessarily as easily reapportioned by a Court if they are challenged as unfair as those agreements reached without the involvement of lawyers.
2. An unfair agreement may be reapportioned by a Court whether the parties received legal advice or not.
3. Lawyers can assist parties in negotiating their agreement in such a way that it can survive a challenge of being unfair.
4. The ultimate responsibility for the terms of a negotiated settlement falls on the individuals themselves.

Individuals are free to negotiate the terms of their separation agreement themselves, or with the assistance of professionals, including mediators and lawyers. However, having lawyers provide legal advice on the terms of an agreement can and will be a factor considered if one party later challenges the agreement as unfair. The purpose of negotiating a separation agreement is to provide finality and certainty; obtaining legal advice on the terms of your agreement is an important step in ensuring your agreement is and stays binding on both parties.

I can help you with this; give me a call. I successfully help people work through their separation and resolve their disputes in a way that respects individual interests and maintains dignity.

Warren is a family law lawyer who practices in Victoria, British Columbia and in Calgary, Alberta. Warren’s approach to family law emphasizes effective and dignified problem solving, empowering his clients to deal with their legal issues at separation. Read more at Warren’s webpages: www.islandfamilylawyers.com, and www.calgaryfamilylawyers.com.

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