



# Common-Law Marriages: Do they Exist?

**R**ecently, this contributor was asked to discuss the status of “common law marriages,” their definition, and property entitlement of those involved in marriage-like relationships.

Many people are under the impression that if two people live together for seven years, they are in a common law marriage. Nothing could be further from the truth.

Common law is the body of law that has grown out of judicial interpretation of statute law and other unwritten laws, most usually, but not always, those laws that deal with the constitution of a country; they are called constitutional conventions.

If the legislature passes a law intended to replace the common law, the statute law supercedes the common law and is the law, subject to judicial interpretation of the wording of the statute.

The British Columbia legislature passed the *Family Relations Act* in 1979. There have been a number of amendments to it since then.

Currently, the *Family Relations Act*<sup>1</sup> defines the word “spouse” as a person:

- (a) who is married to another person; or
- (b) who lived with another person in a marriage-like relationship for a period of *at least two years*, and for the purposes of this Act, the marriage-like relationship may be between persons of the same gender.

Because the *Family Relations Act* definition of spouse exists in British Columbia, there is no such thing as a requirement to have to live with someone for seven years before one is considered married. In any event, parties who have lived together for a period of at least two years are not considered married and never acquire that status unless they go through a marriage ceremony. Otherwise, they are “spouses” only by definition in the *Family Relations Act*.

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## When do assets become “family assets”?

The definition of “family asset” only applies to assets owned by married couples, not spouses who live in marriage-like relationships. The definition of spouse specifically excludes the operation of parts 5 and 6 of the *Family Relations Act* from marriage-like relationships. Part 5 of the Act deals with Matrimonial Property; Part 6 deals with pension entitlement and division of pensions.

With some exceptions, the definition of “family asset” in section 58 of the *Family Relations Act* is property owned by one or both (married) spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose. Further subparagraphs of section 58 set out some of the items specifically included in the definition of family asset, such as:

- money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
- a right of a spouse under an annuity or a pension, home ownership, or retirement savings plan;
- a right, share, or an interest of a spouse in a venture to which money or

money's worth was, directly or indirectly, contributed by or on behalf of the other spouse;

- corporately owned property or trust that would be a family asset if owned by a spouse, i.e., if used or resorted to for a family purpose.

Until a relatively recent amendment to the *Family Relations Act*, unmarried spouses could only make a claim to property owned by the other spouse by using equitable principles of law and claiming a constructive or resulting trust or *quantum meruit*.

In the former, the non-property-owning spouse would seek a declaration from the Supreme Court of BC that the other spouse holds property in trust for him/her. Before the court would make such a declaration, the spouse seeking the declaration would have to prove that he/she made a contribution to the acquiring of, or improvement of, the property such that an increase in the value of the property would have occurred. In the latter, the spouse making the application would be seeking to be reimbursed for his/her labours on the property.

In any event, these equitable remedies would still not entitle the non-owning unmarried spouse to an interest in a family asset or to a reapportionment of the assets. Reapportionment is determined by certain criteria, depending upon the duration of the marriage; the extent to which property was acquired by one spouse through inheritance or gift; the needs of each spouse to become or remain economically independent and self-sufficient; and any other circumstances relating to the acquisition preservation, maintenance, improvement, or use of property or the capacity or liabilities of a spouse.

The amendment that is now section 120.1 of the *Family Relations Act* permits spouses who are not married to each other to make an agreement such that Parts 5 (property) and 6 (pensions) of the Act apply to them. In this section, the word "agreement" is defined as an agreement that would be:

- a marriage agreement for the purposes of Part 5 if the spouses were married to each other; or
- a separation agreement if the spouses were married to each other or separated after marriage.

The effect of section 120.1 is to allow unmarried spouses to opt-in to the provisions of the *Family Relations Act* that relate to property and pensions, that their status of unmarried spouses would not otherwise permit them to do. Obviously, both spouses would have to want to do this in order to sign the agreement. Without the agreement, an unmarried spouse would only have a remedy for his/her contribution to the relationship by way of the equitable remedies of constructive or resulting trust or *quantum meruit*.

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Of continuing concern to a property-owning person considering a marriage-like relationship with a non property-owning individual is how to protect one's property in the event the relationship doesn't last. In either "the married spouses" scenario or "the unmarried spouses" situation, both parties to the relationship can enter into an agreement to limit the entitlement of one of the parties to the other party's property on the demise of the relationship. For married spouses, the agreement is called a Marriage Agreement, so long as it abides by the requirements of section 61 of the *Family Relations Act*. (Currently, the definition of marriage agreement relates only to opposite-gendered married partners because the Act has not yet been amended to take into account the fact that same-sex marriages are now allowed in British Columbia.)

For unmarried spouses (who actually do not become spouses until they have lived together for at least two years), the parties can enter into a cohabitation agreement to determine what happens to the assets each partner brought into the relationship as well as those assets acquired jointly while in the relationship. It would be important to each of the parties to set out what expectations each would have if one of them made major

financial or labour-intensive contributions to the other's assets.

It must be remembered that in every case where the partners enter into an agreement, the court has jurisdiction to determine if the terms of the agreement were fair to both parties at the time the agreement was entered into and fair in its effect. This will only happen if one party to the agreement asks the court to make a determination regarding the agreement.

Without agreement, non-married partners living in a marriage-like relationship have no claim to the other's assets unless he or she can show the court that there has been a financial contribution to the property such that the partner owning the property would have an unjust enrichment to the detriment of the contributing party. If this is the case, the contributing partner could make an application for a declaration that the property-owning partner holds some of the asset in trust for him or her. In the past, these applications have been made for real property, pension funds, vacation time, shares, and corporate assets.

## Summary

Common law marriages do not exist in British Columbia.

The *Family Relations Act* defines "spouse" as either married spouses or persons who have lived in a marriage-like relationship for at least two years. The definition of "spouse" also includes persons of the same gender.

Family assets are only available to married spouses, unless unmarried spouses sign an agreement to opt-in to the operation of the *Family Relations Act*. ▲

<sup>1</sup>R.S.B.C. 1996, Chapter 128 [as amended to S.B.C. 2003, c. 37, s. 19]

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