



Clarifying the Rights of Common-Law Spouses

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Similar to questions addressed in [last month's Solicitor's Tip](#) regarding the rights of individuals related by marriage and half-relations, we are often asked about the rights of common-law spouses.

Currently, a common-law spouse has no automatic right to share in the estate of his or her partner in the event of an intestacy. The relevant provisions of the [Succession Law Reform Act](#) [SLRA] define "spouse" as "two persons who ... are married to each other" or are in a void or voidable marriage. Accordingly, relief available to a common-law spouse is often limited to a claim against an estate for support as a dependant under Part V of the SLRA.

To bring a claim for support as a dependant, a spouse must be able to prove that they cohabitated "continuously for a period of not less than three years, or ... in a relationship of some permanence, if they are the parents of a child". These requirements are imported from [section 29](#) of the [Family Law Act](#) [FLA]. [Section 1](#) of the FLA also defines "cohabit" as "to live together in a conjugal relationship".

Since the term conjugal relationship is not defined in either the FLA or SLRA, it is necessary to turn to caselaw to identify the circumstances under which a spousal relationship may be recognized. Justice Dunn addressed this issue in [S\(Y\) v B\(S\), 2006 ONCJ 162](#) as follows:

When does a person become a "spouse" within the meaning of the Act? It is not just in living together or having sexual congress or sharing expenses or providing childcare. These acts, taken alone, or even together, will not unequivocally create spousal relations ... for a spousal relationship what is needed is a consensual acceptance by two people of each other as spouses and so declared by each person to the other by his or her words and actions.

A non-exhaustive list of pertinent factors for determining whether a relationship is conjugal was set out in [Molodowich v Penttinen, 1980 CanLII 1537](#) (ON SC), and is set out in an appendix at the end of this Tip. Seven categories were identified in that case for assessing whether two parties have cohabitated – shelter, sexual and personal behaviour, services, social, societal, support and children. The list of factors was confirmed by the Supreme Court of Canada in [M v H, 1999 CanLII 686](#) (SCC) and is still used today.

During estate planning, it would be prudent to address whether a client is in a spousal relationship if the client is unmarried but has cohabited with a partner, particularly if they have been living together for approximately three years, or the client and his or her partner have a child together. If it is unclear whether a spousal relationship exists, the client could be referred to another lawyer to obtain an opinion regarding the nature of the relationship. The client's perspective as to whether he or she is in a spousal relationship may not be determinative – in [Derakhshan v Narula, 2018](#)

[ONSC 537](#), the court held that whether a spousal relationship exists cannot rest on “subjective perceptions but must be determined by an objective standard”.

That said, whether the client consensually accepted or viewed his or her partner as a spouse ought to be relevant if an application is made for dependant’s support after the client has passed away. As such, if the client believes that his or her partner is not a spouse, it would be advisable to document that belief and the basis for that belief in case the partner brings an application for dependant’s support from the estate.

Alternatively, documenting a client’s belief that he or she is in a spousal relationship is also advisable if the client is aware or suspects that other family members will contest the validity of the client’s will and/or an application for support from the estate on the basis that the client’s partner was not a spouse. For example, in [Ly v Chiofalo, 2017 ONSC 2444](#), the family of the deceased contested the applicant’s claim that she was in a common law relationship with the deceased, arguing that she was simply a girlfriend. Due to the conflicting evidence, the court found that the applicant was unable to establish a *prima facie* case for dependant’s relief.

Of course, concerns about whether a client’s partner can bring a claim for dependant support from the estate after the client has passed away could be avoided by the client leaving a bequest to the partner. However, even if the partner receives a bequest, he or she is not prevented from bringing a claim for support under Part V of the *SLRA*.

APPENDIX
Molodowich Factors

1. Shelter:

- a. Did the parties live under the same roof?
- b. What were the sleeping arrangements?
- c. Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour:

- a. Did the parties have sexual relations? If not, why not?
- b. Did they maintain an attitude of fidelity to each other?
- c. What were their feelings toward each other?
- d. Did they communicate on a personal level?
- e. Did they eat their meals together?
- f. What, if anything, did they do to assist each other with problems or during illness?
- g. Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

- a. Preparation of meals,
- b. Washing and mending clothes,
- c. Shopping,
- d. Household maintenance, and
- e. Any other domestic services?

4. Social:

- a. Did they participate together or separately in neighbourhood and community activities?
- b. What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community towards each of them and as a couple?

6. Support (Economic):

- a. What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)?
- b. What were the arrangements concerning the acquisition and ownership of property?
- c. Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning children?