

Family Law Series

Living  
Together

**Opposite-Sex  
and  
Same-Sex  
Common-Law  
Relationships**

## Introduction

When two people live together in a “conjugal” (marriage-like) relationship without being legally married to each other, they are often referred to as living “common-law”. Over the years, the law has changed its treatment of these relationships. In most Ontario legislation, both same-sex and opposite-sex common-law couples are referred to as “spouses”. They have many, but not all, of the same rights and obligations as married couples.

In most federal laws, only legally married couples are called “spouses”. All other couples who live together in a conjugal relationship, whether they are same-sex or opposite-sex, are referred to as “common-law partners”. For most purposes they are given the same rights and responsibilities as married spouses after living together for at least one year.

Even though different laws use different terms, in this booklet we use the term “common-law” to refer to couples who are not legally married to each other. Also, we use the term “spouse” to refer to both common-law and married partners. In most cases, the law is the same whether the two people are of opposite sexes or the same sex. This booklet will point out any differences.

## How is a common-law relationship different from a marriage?

To be married, you must go through a legally recognized marriage ceremony with another person. The ceremony can be a religious or a civil ceremony. But it must be conducted by someone who is legally authorized to perform and register marriages, such as a judge, a justice of the peace, or a member of a clergy.

Recent court decisions in Ontario, and some other provinces and territories, have given same-sex couples the right to legally marry. Federal legislation has now extended that to everywhere in Canada.

Once you are married, you stay married until one of you dies, you divorce, or your marriage is annulled. You are married whether or not you live together. Even if you separate and decide to end your relationship, you are still married until you take the legal steps to formally end the marriage.

But a common-law relationship is defined by two people living together as a couple. If you do not live together, you are not considered to be in a common-law relationship. If you have been

living together but then stop, you are no longer common-law spouses. You do not have to take any formal steps or legal action in order to end the relationship. Also, no matter how long you live as a couple in a common-law relationship, your common-law status does not change. You never become married unless you go through a legally recognized marriage ceremony.

If you live with someone in a common-law relationship, it is important to know the similarities and differences between that and marriage. For example, to secure some things such as an inheritance, or division of property if you separate, you must take extra steps that are not necessary if you are married.

### How does the law recognize a common-law relationship?

Once a couple is married, they immediately have all the legal rights and responsibilities that come with marriage. But this is not true for common-law couples. There are some rights and responsibilities that people in common-law relationships are never given. Each right they receive is separately granted by a particular piece of legislation. Each responsibility is imposed in the same way.

Some Ontario legislation *immediately* recognizes couples living together in a conjugal relationship outside of marriage as common-law spouses. For example, the Human Rights Code offers protection against discrimination on the basis of “marital status” to anyone living with someone in a conjugal relationship outside of marriage, for any length of time. And in many other laws, you are considered common-law spouses as soon as you have a child together, no matter how short a time you have been living together.

Other legislation recognizes the relationship only after a certain length of time. For example, in Ontario family law, you must live together for three years to be considered common-law spouses, unless you have a child together. In most federal laws, the length of time is one year.

## How does family law in Ontario affect common-law couples?

### **Names**

You can call yourself by any name you choose, as long as you do not do it in order to break the law. You are free to take your spouse’s surname, or to use a combination of both your names.

You can do this informally simply by using the name. This will be accepted for many purposes. Or you can make the name official by filing a form called a “Joint Declaration of Conjugal Relationship” with the Registrar General. For more information or to get this form, call **1-800-461-2156**. In Toronto call **416-325-8305**. You can continue to use the name even if the relationship ends. This is no different than it would be if you were married.

If you and your common-law spouse have different surnames, and you have a child together, you can give your child either surname, or a combination of both.

If you have a child from a previous relationship, you can apply to change the child’s surname to that of your present spouse, or to a combination of both your surnames. In some circumstances, the consent of the child’s other parent might be required. The forms for changing a child’s name are also available from the Registrar General. See the contact information at the top of this page.

## Children

There is no legal distinction between children whose parents are married and those whose parents are not. The terms “legitimate” and “illegitimate” no longer apply to children in Ontario law. A child’s right to be supported, to inherit, to use their parent’s name, or to receive survivor’s benefits, does not depend on the marital status of their parents.

When the birth of a child is registered in Ontario, the birth mother’s name must be given and the father’s name may or may not be given. If the father is not named on the birth registration, it is possible for a man to be named later as the father.

In some laws, the birth mother and the man named as the father, if any, are called the “natural parents”. Some people do not like to use this term because it suggests that other ways of becoming a parent are unnatural. Sometimes the term “biological parents” is used. But this term is not always accurate. One or both of the parents named may not be genetically related to the child. For example, a birth mother may have been given a fertilized egg cell from another woman. Or the sperm cell may not have come from the man named as the father.

In this booklet we use the term “birth parent” to refer to:

- the birth mother, and
- the man named as the father, if any, when the birth is registered or at some later time.

If you have a child in an opposite-sex common-law relationship, make sure that both parents’ names are on your child’s birth registration. This is to acknowledge parentage and protect both your child’s rights and your rights as parents.

The situation is more complicated for same-sex couples because the current law does not usually recognize more than one mother and one father when a child is born. But the same-sex spouse who is not the birth parent can legally become the child’s parent through adoption. The law in this area is still developing. It is a good idea to consult a lawyer if this is your situation.

If you are not the birth parent and you do not legally adopt your common-law spouse’s child, you still might have a step-parent’s obligation to pay child support. You also might be given custody or access rights as a step-parent, but you have no other legally recognized relationship with

your child. For more information about what this can mean, see the section under “Children” on pages 19-20 of this booklet.

### *Child Support*

Both birth parents and adoptive parents have a legal responsibility to support their child at least until the child turns 18 years of age. Sometimes it can be longer if the child continues to be dependent. It makes no difference whether the parents are married or whether they live together. The Child Support Guidelines are a set of rules and charts for calculating the amount of support that should be paid. The amount of support depends on the paying parent’s income, the number of children to be supported, and other factors. The Guidelines can help parents who are separating to reach an agreement about child support. If parents cannot agree and have to go to court to get a judge’s decision, the judge will apply the Guidelines.

If you have not adopted your common-law spouse’s child, and you treat that child as a member of your own family, you might have a legal responsibility to support the child if you and your spouse separate. This can be the case even if the child has another parent who also provides support.

“Child Support and the Child Support Guidelines” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

### *Custody and Access*

Parents who live together share custody of their child. If they separate, they can agree on custody arrangements. If they cannot agree, the court will make a decision about custody and access based solely on what arrangement is in the child’s best interests. Any parent who does not have custody usually has the right to spend time with his or her child. This right is not affected by the marital status of the parents. Nor is it based on the payment of child support. The issues of support and of custody and access are completely separate.

“Custody and Access” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

### *Adoption*

A couple in a common-law relationship can adopt a child together. One spouse can also adopt the child of the other spouse, as long as any other parent consents or the court says that consent is not necessary.

## **Property**

Property includes everything you own. This includes your:

- home, cottage, and other real estate,
- car and other vehicles,
- personal items, such as clothing, jewellery, books, and CDs,
- household items, such as furniture, appliances, electronic equipment, and art,
- financial assets, such as bank accounts, RRSPs and other investments, insurance policies, and pension benefits,
- businesses, and
- debts.

Since family law in Ontario was first changed to give some recognition to common-law relationships, there has been confusion about what this change means for property rights. Some people think that by living together as a couple they have a legal right to claim a share of each other's property. This is not true. Only legally married couples automatically share the value of their property when they separate.

Living in a common-law relationship does not automatically give you a right to a share of your spouse's property.

In a common-law relationship, the property that you bring into the relationship normally continues to belong to you alone. If you and your spouse separate, there is no automatic right to divide it or share its value. Anything you buy for yourself with your own money during the relationship and hold in your name usually belongs only to you. But things that you and your spouse buy *together* during the relationship belong to you jointly. If you separate, these things, or their value, will be divided.

If there is any disagreement about who owns something, you may have to go to court to have a judge decide. You should keep receipts, registrations, and other proof of ownership in case they are needed.

### *Family Home*

Married spouses who separate have an equal right to stay in the family home until it is sold, even if the legal title to the property is in only one of their names. Common-law spouses do not automatically have this right. And if the family

home is in their common-law spouse's name, they are not protected from their spouse selling or mortgaging the home without their written permission.

The general rule is that each common-law spouse owns what he or she brings into the relationship. But there are two exceptions:

- contributions, and
- written agreements.

### **Contributions**

If the common-law spouse who does not own the property made a contribution toward it, a court might say that spouse has a right to a share in it.

Sometimes the contribution can be money. For example:

- you bought property with your money, but the property is in your common-law spouse's name, or
- your common-law spouse paid the everyday bills and expenses so you could use your money to buy a house or develop a business.

Sometimes, instead of money, one spouse contributes time and labour towards acquiring or improving property owned by the other.

For example:

- your common-law spouse worked in the business you own without being paid, or
- you built or renovated part of the house that is in your common-law spouse's name.

In situations like these, if the common-law spouse who owns the property does not agree to compensate the other spouse, the other spouse will probably have to go to court to prove their contribution. If the contribution was significant, the court may say the other spouse has a right to a share in the property. How great that share will be depends on the size of the contribution. In any of these situations, it is the contribution, not the relationship, that entitles the other spouse to a share.

### **Written agreements**

If you and your common-law spouse want to make other arrangements for sharing or dividing your property in case your relationship ends, you can sign a cohabitation agreement. In the agreement, you can clearly say how you intend to arrange your finances during your relationship and how you want to deal with your property and debts if you separate.

When two people share their lives for any significant length of time, their property often becomes intermixed. If the relationship ends, disagreements can arise about what each person should get. A written agreement can make it much easier to settle the dispute.

#### *Canada Pension Plan Credits*

The Canada Pension Plan (CPP) is a federal benefit plan for workers. Most workers and their employers make regular CPP contributions so that when the worker retires, or can no longer work because of disability, they can get a pension. The amount of this pension depends on the size of the contributions.

When couples separate, the pension credits that each of them earned while they were a couple can be added together and then divided evenly between them. This is true for common-law spouses as well as married couples. If you earned less than your spouse, this may help you qualify for a pension. Or, it may increase the amount of your pension if you already qualify. To get a division of pension credits from a common-law relationship, the following three things must *all* be true:

- you lived with your spouse for at least one year,
- you have been separated for at least one year, or your spouse died less than one year after you separated, and
- you applied within four years after separating.

“CPP Benefits: Are you entitled? Separated? Divorced?” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

### *Debts*

In a common-law relationship, most debts are treated the same way that property is. Unless you have a cohabitation agreement setting out who is responsible for which debts, each spouse is responsible for repaying only his or her own debts.

But if you both sign a loan agreement, you are both responsible. Either one of you can be held responsible for repaying the entire debt. Even if one spouse does not have the benefit of what the loan paid for, they might have to repay the entire loan if the other spouse is unavailable or unable to pay.

## **Spousal Support**

Under the Family Law Act, common-law spouses in Ontario have the same responsibility to financially support themselves and each other as married couples have. This responsibility may go on after the relationship is over, if one spouse needs support and the other is able to provide it.

Many factors affect whether a court will order one spouse to support the other after the end of the relationship, and for how long. Some of these factors are:

- the length of the cohabitation,
- whether one spouse was financially disadvantaged by the relationship,
- the ability of each spouse to be financially self-sufficient, and
- whether either spouse has other dependants.

This legal responsibility to provide support does not begin as soon as you start living together as a couple. It applies only to couples who:

- are married to each other, or
- have lived together continuously for at least three years, or
- are in a relationship of “some permanence” and have had a child or adopted a child together.

## **Cohabitation Agreements**

A cohabitation agreement is a legal contract that enables common-law spouses to make legally binding decisions about their relationships. You can use a cohabitation agreement to set out your rights while you are in the relationship and to protect them if it ends. The agreement can describe how you want to arrange your finances and other aspects of your life together. It can also say how your property will be divided and what support will be paid, if you separate.

The agreement cannot determine who will get custody of your children if the relationship ends. This can be decided only when the relationship is over.

Before making the agreement, you should each consult a separate lawyer. Each of you should also make a detailed and complete statement of your present financial situation.

To make the agreement legally enforceable, both of you must sign it in front of a witness who must also sign it.

## What happens if a common-law spouse dies?

### **Inheritance**

People in common-law relationships have no right to inherit any of their spouse's property unless it has been specifically left to them in a will. If your spouse dies without having made a will, their property will go to their relatives. It is very important for each of you to make a will if you are in a common-law relationship.

The instructions you leave in your will make it clear what you want done with your property when you die. They override most of the legal rules that say who inherits when there is no will.

But there is one exception. When you die, if you have a legal obligation to support a child, a former spouse, or other dependants, your will must leave enough to take care of them. If it does not, they can go to court and ask for the will to be changed to provide support for them.

Even without a will, a surviving common-law spouse usually has a right to any money or property held jointly. If you survive your spouse, you usually have the right to all the money in any

joint bank account. You will also become the sole owner of any real estate that the two of you held in “joint tenancy”. Joint tenancy means that you both own the property equally and that, upon the death of one of you, the other owns the entire property. If you own property together and you want your common-law spouse to own the entire property when you die, make sure the title to the property says it is held in joint tenancy. Otherwise, your share of the property will go into your estate when you die. Your spouse will not automatically be entitled to your share unless that is stated in your will.

## **Children**

The inheritance rights of children are not affected by the marital status of their parents. If a parent dies without a will, all their children automatically get a share of their estate.

But if you are not a child’s birth parent or adoptive parent, the inheritance law does not consider him or her to be your child. The child will not inherit anything from you unless you have named him or her in your will. This is true even if you have always acted as a parent to the child.

Also, if you are not a birth parent or adoptive parent of your spouse's child, you have no automatic right to have the child live with you if your spouse dies, even if you and the child have always lived together as parent and child. You must go to court to apply for custody and guardianship. If your spouse named you as custodian and guardian in their will, you are more likely to succeed in court. This kind of provision in a will is valid for only 90 days after death. If you apply within the 90 days, it continues to be valid until the court makes an order.

## **Benefits**

There are a number of payments that you may be entitled to upon the death of your spouse.

### *CPP Survivor's Pension*

If your common-law spouse contributed for long enough, you may be entitled to a survivor's pension under the Canada Pension Plan (CPP). This is a monthly payment. In order to qualify, you must:

- have been living with your common-law spouse for at least one year at the time of his or her death, and

- be at least 35 years of age (you can be younger if you have a disability or have dependent children living with you).

Only one spouse can receive the survivor's pension. If your common-law spouse dies while legally married to someone else, only one of you can qualify. Whether it is you or the other spouse who qualifies will depend on the circumstances.

#### *CPP Orphan's Benefit*

CPP also has a monthly orphan's benefit for dependent children. Birth children and adopted children of a CPP contributor who has died can receive this. So can any other child who was in the care and custody of the contributor.

#### *CPP Funeral and Death Expenses*

In addition to monthly benefits, CPP also offers a one-time lump sum payment to help pay funeral and other expenses connected to a contributor's death. It goes to the person or people who pay those expenses. This might be the person who administers the estate of the contributor, or the surviving spouse, or next of kin.

To apply for any CPP benefit, call Social Development Canada at **1-800-277-9914** for an application package. You can also download the package from their web site at [www.sdc.gc.ca](http://www.sdc.gc.ca).

“CPP Benefits: Are you entitled? Survivor’s Benefits” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

### *Compensation Benefits*

Under Ontario law, you may also be entitled to other payments upon the death of your spouse, depending on the cause of death. If your spouse was killed on the job, you can apply for workers’ compensation benefits. If they died as a result of someone else’s criminal act, you can apply for criminal injuries compensation. Each of these types of compensation has different rules about who can qualify.

To find out more about workers’ compensation benefits, contact the Workplace Safety and Insurance Board (WSIB) at **1-800-387-0750**. In Toronto call **416-344-1000**. Or you can visit their web site at [www.wsib.on.ca](http://www.wsib.on.ca).

To contact the Criminal Injuries Compensation Board (CICB) call **1-800-372-7463**. In Toronto call **416-326-2900**. Or you can visit their web site at [www.attorneygeneral.jus.gov.on.ca/english/about/vw/cicb.asp](http://www.attorneygeneral.jus.gov.on.ca/english/about/vw/cicb.asp).

For more information and help contact your community legal clinic. To find the community legal clinic nearest you, look under “Legal Aid” or “Lawyers” in your phone book. Or you can call Legal Aid Ontario at **1-800-668-8258**. In Toronto call **416-979-1446**. You can also check their web site at [www.legalaid.on.ca](http://www.legalaid.on.ca).

### *Life Insurance*

One way of making sure that your spouse will be provided for after you die is to specifically name them as a beneficiary in your life insurance policy. You can name anyone you choose as a beneficiary of your policy. Be sure to use his or her full name, not just “husband”, “wife”, or “spouse”.

What other legal rights and responsibilities do common-law spouses have?

### **Taxes**

Federal income tax rules that apply to married couples also apply to common-law couples who have been living together for at least one year. For example, if you pay taxes you can claim a spousal amount if your spouse’s income is low enough. It also means that if you earn more than your spouse, you can take a deduction

for contributing to his or her RRSP. But being treated the same as married couples for tax purposes is not always to your benefit. For example, if you are your child's primary caregiver and you apply for a Canada Child Tax Benefit, the income of your spouse will be taken into consideration when deciding eligibility.

## **Car Insurance**

Under Ontario's Insurance Act, common-law spouses are treated the same as married spouses in relation to car insurance policy coverage and benefits.

## **Employment Insurance**

### *Regular Benefits*

Usually, if you quit a job voluntarily you cannot get Employment Insurance (EI) benefits. But if you quit in order to move to another place because your spouse has to relocate for work, you may be able to get benefits. This rule is the same for common-law and married couples.

This does not mean that your claim will be successful. Employment Insurance staff will look at your individual circumstances and other choices that might have been available to you.

For instance, they might decide that you could have continued in the job you had by commuting, or that you could have lived apart temporarily until you were able to find a new job in the place your spouse moved to.

If your EI claim is refused, you can appeal. Your community legal clinic may be able to help you. See page 23 of this booklet for information about how to find the community legal clinic nearest you.

“Employment Insurance” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

### *Parental Benefits*

If you and your common-law spouse have a baby or adopt a child, you can get the same parental benefits as you would if you were married.

If you have worked enough hours in the past 12 months, you may be eligible to get pregnancy or parental EI benefits while you are on leave from your job. These benefits are usually 55% of your regular insurable earnings, up to a maximum of \$413 per week. There is a two-week waiting period. Birth mothers can receive pregnancy benefits for up to 15 weeks, and parental benefits

for up to 35 weeks. All other new parents can receive parental benefits for up to 35 weeks. Both parents of the same child can receive benefits, but they have to share the total available weeks of parental benefits.

If you have worked for your present employer for at least 13 weeks, under Ontario law, you can each take unpaid parental leave when you have a newborn baby or a recently adopted child. This law applies even if the adoption is not a formal legal one. Birth mothers can take up to 17 weeks of unpaid pregnancy leave, plus 35 weeks of unpaid parental leave. All other new parents can take 37 weeks of unpaid parental leave. Each parent of the same child can take full parental leave, either at the same time or at different times.

“Taking time off work: Pregnancy and Parental Leaves and Benefits” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

## **Pension Benefits**

Federal pension programs recognize common-law spouses who have lived together for at least one year. For example, common-law spouses who

qualify can receive the Guaranteed Income Supplement (GIS) as a couple. And someone who is 60 to 64 years old whose common-law spouse is eligible for an Old Age Security (OAS) pension, might be eligible for a monthly allowance.

## **Immigration**

### *Sponsorship*

Under the Immigration and Refugee Protection Act, Canadian citizens and permanent residents who are at least 18 years of age may be able to sponsor their married spouse or “common-law” or “conjugal” partner as a member of the family class.

In this law, conjugal partner is someone who is outside of Canada and with whom you have had a conjugal relationship for at least one year. A common-law partner is someone whom you have lived with in a conjugal relationship for at least one year. If you and your partner could not live together because of persecution or punishment in another country, you can still be considered common-law partners. Your spouse or partner can be of the same sex or the opposite sex, and must be at least 16 years of age.

Most family class members must be sponsored from outside Canada, but a married spouse or common-law partner can sometimes be sponsored from within Canada.

In certain situations, sponsorship applications will not be approved. For example, if you are on social assistance for a reason other than disability, or if you are in default of court-ordered support payments, you will not be allowed to sponsor someone. In most cases, you can appeal the refusal of a sponsorship application.

If you are sponsoring your married spouse, common-law or conjugal partner, or adopted child, you must show that the relationship is genuine and that you did not enter into it for immigration purposes.

If you did not list your married spouse, common-law or conjugal partner, or dependent child on your own application for permanent residence, you will *not likely* be able to sponsor them later. If this is your situation, you need to get legal advice. *Your own status in Canada could be at risk.*

“Sponsoring a member of the family class” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

### *Refugee claims*

It is also possible for someone who fears persecution in their country of origin because of their sexual orientation to make a claim for refugee protection. It is a good idea to get legal advice if you are making a refugee claim. “Making a refugee claim” is another publication produced by CLEO. See the back cover of this booklet for ordering information.

For advice about immigration options, or help with an application or an appeal, contact a community legal clinic or a lawyer. See page 23 of this booklet for information about how to find the community legal clinic nearest you.

### *Conclusion*

The law has been changing dramatically in recent years in relation to people in common-law relationships. They are being given many of the same rights and benefits as married couples, and have many of the same responsibilities.

If you are not sure if a right, benefit, or responsibility applies to you because you are not married, get legal advice.

This publication contains general information only. It is not a substitute for getting legal advice about your particular situation.

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Community Legal Education Ontario (CLEO)

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CLEO

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