

## What does it mean to be living common-law in Ontario?

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Are you living in a common-law relationship? Do you know what that means from a tax and legal perspective? Many individuals involved in these types of relationships do not understand what their rights may or may not be. The following is a brief synopsis of some of the more important personal planning issues you should consider. However, it is always important in these situations to confer with a lawyer in your jurisdiction to ensure that you receive advice that is relevant to your personal situation.

All references in this article to common-law couples will include both opposite-sex and same-sex couples.

### Tax Planning

If you meet the definition of “common-law partner” under the federal *Income Tax Act*, you will effectively be taxed in the same manner as a married spouse. The definition of “common-law partner” means a person who cohabits with another person in a conjugal relationship, for either:

- ▶ A period of 12 months; or
- ▶ A shorter period of time, but while raising a child together. (Simply having a child together is not sufficient to be considered to be living common-law – you must also be living in a conjugal relationship.

Also, the child either has to be the natural or adopted child of both partners, or if one partner is not a parent, then the non-parent must be providing support to the child).

If you meet either of the above two tests, you must indicate that you are living common-law on your tax return. If you have filed a fraudulent tax return, you may be denied CPP or other pension survivor benefits, or alternatively, you may be reassessed for unpaid taxes, interest and penalties.

There are a number of advantages and disadvantages to being considered a couple under the *Income Tax Act*, depending upon your situation. Some of the advantages include the ability to allocate certain types of pension income to a lower income-earning spouse, and the ability to transfer certain types of personal tax credits in order to ensure that none of them go unused. However, some of the disadvantages include the loss of the eligible dependant credit, which one or both partners may be claiming if they are raising a child, as well as the potential loss of some social assistance benefits, as the income for both partners must be pooled for the purposes of determining eligibility for certain amounts, including the Guaranteed Income Supplement and

the Allowance (offered under the Old Age Security program), the GST credit and the Canada Child Tax Credit. If both partners are earning an income, the ability to receive these amounts or claim these credits will decrease more quickly.

### Family Law Issues

Many common-law couples assume that since they are treated the same as married couples under the *Income Tax Act*, they will be treated the same as married couples for all purposes. However, that is not the case. The ability to make certain family law claims against a former common-law partner is determined by provincial legislation, not the federal *Income Tax Act*.

*Family Property* – In Ontario, only married spouses are entitled to a division of family property under the family property legislation. Common-law couples are only required to divide their property in the same manner as a married couple if they have signed a cohabitation agreement providing for that. If you and your common-law partner have not signed any sort of domestic contract regarding the division of family property, you will not have any right to apply for a division of property under the provincial family law legislation.



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**Unjust Enrichment** – If you have not signed an agreement which gives you any right to a division of family assets at the time of relationship breakdown, this does not mean that you will not be entitled to any of your partner’s property under any circumstance. You may be able to file a lawsuit arguing that there has been an “unjust enrichment” on your partner’s part, and therefore you should either be awarded damages, or a part of the property, using the argument that your partner is holding the property for you under what the courts refer to as the “constructive trust” doctrine. For example, you may be able to rely on this principle if you have contributed towards the mortgage payments for a home which is in your partner’s name. However, since litigation is a very uncertain process, relying on a future lawsuit is generally not advisable. Even if you do “win”, it will generally only be after a long and expensive legal process. If you want to protect your property, it is usually better to have a written agreement setting out your rights and responsibilities.

**Jointly-Held Property** – Common-law couples should also carefully consider how to hold title to their assets. Adding your common-law partner as a joint owner to an investment or property will generally make the

property shareable upon separation, which may or may not be what you intended. In some cases, a couple may decide to take title to real property or financial investments in joint names simply to save probate fees at the time of death. However, probate fees in Ontario are relatively small and generally should not be a major consideration in your financial plan.

**Spousal Support** – In Ontario, individuals who have cohabited with another individual in a conjugal relationship for a period of at least three years, or who are in a relationship of some permanence and they are the natural or adoptive parents of a child, may be entitled to receive spousal support, although the amount ordered will vary depending upon the facts of the case. Speak to your lawyer if you feel you are entitled to apply for spousal support, or would like to protect yourself from having to pay spousal support.

**Child Support** – Individuals who enter into a common-law relationship with a person who has a dependent child must be prepared for the possibility that they may be required to provide ongoing support to that child (even if they are not the biological or adoptive parents of the child). Even if the child has two natural or adoptive parents who provide support to the child, it may still be possible for a former

common-law partner to have a child support order registered against him or her. Common-law partners must be prepared for this responsibility, as in some cases, the obligation can extend into the child’s adulthood.

**Cohabitation Agreements** – The above discussion illustrates the reasons why individuals in common-law relationships are well-advised to enter into a cohabitation agreement with their partners to ensure that disputes are minimized in the event the relationship breaks down. However, you may not be able to contract out of all of these obligations, particularly child support, as a court is likely to overlook any contract which is not in the best interests of the child. Individuals should seek the advice of a licensed professional with experience in the area, and in all cases, each partner should receive independent legal advice.

### Estate Planning

Your ability to make a claim against a deceased partner’s estate is also generally governed by provincial legislation.

**Right to Inherit** – In Ontario, if a common-law partner dies without a will, the surviving common-law partner is not entitled to inherit any part of the estate under the current provincial intestacy legislation.

If the deceased common-law partner died without a will, or died with a will which did not leave a sufficient amount to the surviving common-law partner, the surviving common-law partner may be entitled to make a dependant’s relief application against the estate of the deceased partner, but the amount awarded (if any) will depend upon the facts of the case. Therefore, it is very important for individuals who are involved in common-law relationships in Ontario to review their wills to ensure they contemplate their partner.

**Effect on Previous Wills** – Unmarried couples should also be aware that if you currently have a will, it will be rendered void when you get married. Any wills signed by individuals in a common-law relationship will continue in effect, meaning that an estate could go to a former spouse, if they are still the person indicated as being entitled to the estate.

**CPP Survivor Benefits** – A surviving common-law partner will be entitled to receive survivor benefits under the Canada Pension Plan to the same extent as a married spouse if they lived with the deceased in a conjugal relationship at the time of death, and had been living with the deceased in a conjugal relationship for a continuous period of at least one year.

### Things to Keep in Mind

**Make a Note of the Date When You Started Living Together** – It may be important to determine the date on which you began to live common-law, since many rights and obligations start once you have lived together for a specified time. Keeping a record of when you began to live common-law can help to avoid disputes.

**Implications of Marriage at a Later Date** – Given that wills are rendered void at the time of marriage, it may be worthwhile to put a clause in your will indicating that the will is being drafted in contemplation of marriage (if, in fact, marriage is being contemplated at some point in the future). This will allow you to avoid having to re-write your will after you marry.

**Moving to Another Jurisdiction** – You need to be aware that your rights as a common-law couple could change every time you move to a new province or territory, let alone to another country, so be sure to consult with an advisor in your new jurisdiction to ensure that the plan you currently have in place is still consistent with your goals, and the governing legislation of that jurisdiction.

**Property in Other Jurisdictions** – If you have property in more than one jurisdiction, it will be very important for

you to have a properly drafted will. If a common-law partner dies without a will, then all of your personal property will be distributed according to the laws of the jurisdiction where you were domiciled when you died, and real property will generally be distributed according to the jurisdiction where the property is located. Therefore, if you have real property located outside of Ontario, your common-law partner may or may not be entitled to receive it at the time of your death if you die without a will.

### Seek Professional Advice

As the above illustrates, the laws regarding the rights and obligations of a common-law partner are quite complex and can sometimes work in unintended ways. Be sure to speak with your Consultant about your situation, as well as a lawyer who has experience with these types of matters and who can help you prepare the appropriate legal documentation to protect your property and provide security to you and your family in the future.