

Financial Advisor

December 2014

The definition of a legal spouse

Clients should take the time to understand how their familial relationships impact their financial planning and obligations. These rights and responsibilities are key to planning success. What's meant by spouse can vary based on the jurisdiction and the issue at hand – a spouse for income tax purposes may not qualify as the same under family law. This article highlights some of the key differences and gives an overview of factors that should be considered in any type of planning context.

Marriage available to all, but not all spouses equal

Marriage is a contract creating rights and imposing obligations, which must be voluntarily entered into. The Supreme Court of Canada has repeatedly confirmed that provincial law can validly distinguish between the rights of people who formally marry and those who don't. In most Canadian provinces, unmarried spouses don't have the same rights or obligations as married ones.

Reasons for defining spouse

There are generally four key planning reasons for which knowing and understanding the legal status of a partner is important:

- Income tax administration and planning.
- Planning involving marriage and divorce, and their effects.
- Property division during life and after death.
- Support obligations during life and after death.

Each of these can have a drastically different definition of who qualifies as a spouse. For example, a couple may be considered spouses for income tax purposes, but not be entitled to property rights on separation under the definition of spouse in provincial legislation.

Four types of couples

The law defines four main types of relationships:

- Married couples
- Common law couples
- Income tax couples
- Civil unions in Quebec and registered domestic partnerships in Nova Scotia

An adult interdependent relationship is a fifth relationship type specific to Alberta. But it's radically different from the others which focus on cohabitation in a conjugal relationship. While there are many similarities between an adult interdependent relationship and a common law relationship in terms of rights and obligations, the status can also apply to non-conjugal persons. In Alberta, even friends and relatives living together in mutual financial dependency may create financial and property obligations.

What is a married spouse?

Legislative jurisdiction for family law matters is split between the federal and provincial governments (commonly referred to as division of powers), as set out in the *Constitution Act, 1867*.¹ Before 2005, there was no statutory definition of marriage at the federal level. Provincial legislation laid out various requirements, but the *Constitution Act* places the authority for the definition of marriage with the federal government.² Provinces are given the authority for the "solemnization of marriage," which generally refers to marriage licenses and formal rules for marriage ceremonies.³ The provinces also have authority for passing laws about support, property division and inheritances, many of which are based on spousal status.

Despite the division of powers, the definition of marriage was often referenced by provincial legislation since there was no formal definition at the federal level. Following several challenges related to same-sex marriage in several provinces, the federal government stepped in and introduced *Bill C-38: The Civil Marriage Act*. This law defines marriage as "the lawful union of two persons to the exclusion of all others."⁴

A person can have more than one spouse at the same time, but only one married spouse. For example, a not-yet-divorced person might die while cohabiting with someone else. Who gets what from whom varies according to provincial law.

Common law spouse

Common law spouses for family law purposes are typically recognized following some duration of cohabitation in a conjugal relationship, which usually includes publicly representing someone as a spouse or partner. The time frame for cohabitation can vary by province. For example, the *Family Law Act* in Ontario requires 3 years,⁵ but in Saskatchewan common-law status begins after 2 years.⁶ Usually if you live together and have a child together, minimum time frames are disregarded.

Common law couples in Quebec (who have no legal recognition in the province), can go through a legislated form of Civil Union creating a sort of provincial "marriage". In Nova Scotia, couples can register a Domestic Partnership and gain some of the provincial rights given to married persons (for example, pension benefits or property division rights at separation or death).

¹ Originally enacted as the *British North America Act, 1867*.

² Section 91(26) of the *Constitution Act, 1867*.

³ Section 92(12) of the *Constitution Act, 1867*.

⁴ Section 2 of the *Civil Marriage Act*.

⁵ Section 29 of the Ontario *Family Law Act*.

⁶ Section 2(1) of the Saskatchewan *Family Property Act*.

Tax spouse

There is an expanded definition of spouse in the *Income Tax Act* that attracts the same tax rules that apply to married spouses. This type of common law status is created with only one year of living together in a conjugal relationship, or a shorter period if the spouses have a child (born or adopted). Many tax couples don't even realize they should be filing income tax returns on a spousal basis.

Being spouses for tax purposes comes with both benefits and drawbacks. It opens up opportunities for spousal RRSP contributions and tax-free rollovers of property and registered plans. At the same time it limits the claim for a principal residence exemption (one per couple) and also raises issues about attribution of income and capital gains.

Same sex couples

In 2005, when the federal government enacted the *Civil Marriage Act*, it gave same sex couples equal rights to marry. While many provinces had already faced court challenges on this topic and had been granting marriage licenses to same sex couples, the legal status of these marriages was uncertain. The reason is the definition of marriage falls under the exclusive authority of the federal government. The Supreme Court of Canada ruled in *Re Same Sex Marriage* that same sex marriage is constitutional and confirmed that the definition of marriage falls under the federal government's authority.

All provinces recognize same sex couples for common-law purposes as well.

Property and inheritances

Varying provincial legislation means that not all spouses are equal under the law. For example, in Ontario, only married spouses are automatically entitled to a division of family property or property values once the marriage ends. This also carries through for automatic inheritance in the absence of a will. Other provinces recognize common law spouses as beneficiaries of estates even when there is no will.

Common-law spouses can also be recognized for support obligations under provincial law (dependants' relief or matrimonial law). Typically, this occurs after two or three years of living together (or earlier if a child is born or adopted), in which case the paying spouse may be required to provide spousal and child support. Support is based on need and ability to pay and usually binds the paying spouse's estate but is separate from property rights.

Planning advice

As an advisor, you can help clients plan ahead by knowing the facts for the client's jurisdiction.

- Plan for opportunities and obligations based on legally defined relationships.
- The law varies by province and is constantly changing, so check the client's jurisdiction for the definitions and the potential impact on clients' financial affairs.
- Good planning can mean common law spouses may deliberately decide not to marry and avoid marital property rights being imposed.
- Build a relationship with some family law specialists in your province.

Not all clients will be aware of the impact their relationship status can have on their planning. It's important to raise potential relationship status issues with clients, and refer them to the appropriate professionals.

Any examples presented in this article are for illustration purposes only. No one should act upon these examples or information without a thorough examination of the tax and legal situation with their own professional advisors after the facts of the specific case are considered.

This article is intended to provide general information only. Sun Life Assurance Company of Canada doesn't provide legal, accounting or taxation advice to advisors or clients. Before a client acts on any of the information contained in this article, or before you recommend any course of action, make sure that the client seeks advice from a qualified professional, including a thorough examination of his or her specific legal, accounting and tax situation. Any examples or illustrations used in this article have been included only to help clarify the information presented in this article, and should not be relied on by you or by clients in any transaction.

Author: Jeffrey H. Waugh, LLB, CLU, Director Tax & Insurance Planning

First published: August 2003

Last revised: December 2014

Life's brighter under the sun

© Sun Life Assurance Company of Canada, 2014.
Sun Life Assurance Company of Canada is a member of the Sun Life Financial group of companies.

810-4254-Digital-12-14