

When Couples Separate

RIGHTS AND RESPONSIBILITIES



Public Legal Education
and Information Service
of New Brunswick

Public Legal Education and Information Service of New Brunswick (PLEIS-NB) is a non-profit organization. Its goal is to provide New Brunswickers with information on the law. PLEIS-NB receives funding and in-kind support from the Department of Justice Canada, the New Brunswick Law Foundation and the New Brunswick Office of the Attorney General.

This booklet answers some of the common questions that couples ask when they are thinking of separating or have separated from their spouse or partner. Whether you are married or living common-law, you will find information on your rights and responsibilities on matters such as division of property, custody and access, and support. This booklet reviews options and resources available to separating couples.

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Understanding Separation

What does separation mean?

Separation means that one person has left a relationship or a marriage with the intention of ending the relationship.



Do we have to live in different homes to be considered “separated”?

No, it is possible for people to live in the same house or apartment and yet live separately if each person leads an independent life. You must no longer perform any functions normally expected of a married couple such as eating and socializing

together. This includes having separate bedrooms and not having sexual relations.

Do we both have to agree to the separation?

Both people do not have to agree to the separation. When one person leaves a relationship with the intention of ending the relationship, the couple is then separated, whether the other person wants to be separated or not.

How do I get a “legal separation”?

As soon as you are no longer living together, you are considered separated. You need not take any further action to make it “legal”. Many people think they must get a court order to be “legally” separated. This is not the case. The law does not require you to have an agreement or a court order to be legally separated. Eventually you will need to work out family law matters such as child custody and access (if you have children), child and spousal support, division of property and rights to pensions. This usually means you will need a written agreement or court order for these family law matters. If you were legally married and want to end all your rights and obligations as a married person, you will have to apply to the court for a divorce to do this.

Legal Rights and Responsibilities After Separation

When couples separate they usually have to deal with some or all of the following family law issues:

Custody And Access

Custody means having the care and control of a child. During a relationship, children are in the custody of both parents unless there is a court order or written agreement otherwise. When a couple separates, the parents need to decide on arrangements for the care of the children. The parents may agree in a separation agreement or a consent order that the custody, care and physical control of the children will be the responsibility of one parent, or be shared by both parents. A parent who does not have custody of the child would generally have the right to reasonable access to the child. If parents cannot agree, either of them can apply to the court for an order setting out custody and/or access.

There is no waiting period to apply for custody. A court can grant a custody order at any time after a separation. The court must consider only the best interests of the child. The court will not consider past conduct, including abuse, unless the conduct is relevant to the person's ability to act as a parent. The court must give a child as much contact as possible with both parents if the contact is in the child's best interests. The court must consider whether a parent who wants custody is willing to encourage contact with the other parent for the child's benefit.



Although a separation is a breakdown of the relationship between two spouses, it does not end their relationship with their children.

Parents' responsibilities to their children continue. In any court matter dealing with children, the court tries to protect the children. In law, the **"best interests of the child"** and the rights of the children always come first.

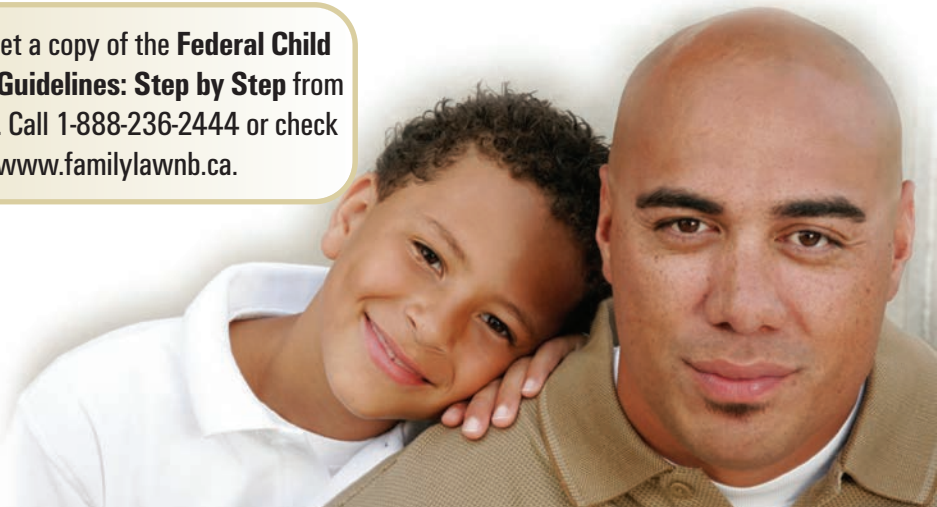
Child Support

Both parents have an obligation to support their children financially, according to each parent's income. When parents separate, the parent with custody usually receives child support payments from the other parent for the children's financial needs. Child support amounts are determined according to the **Federal Child Support Guidelines**, which have tables for each province and territory in Canada. You should use the table for the province in which the paying parent lives.

Calculating child support: Generally, the amount of child support paid is based on the paying parent's annual income and the number of children entitled to support. As a rule, you can tell what amount a court would possibly order based on the Child Support Guidelines. You can look up the basic amount of support in the table for the province where the paying spouse lives. The parents can agree on the amount of child support from the table plus each parent's share of special expenses. Special expenses may include costs for daycare, extracurricular activities, medical expenses, schooling, etc. They can also agree on some other amount if the court finds it is reasonable having regard to the Child Support Guidelines. If the parents cannot agree, the court will decide the amount of child support, by applying the Guidelines. If circumstances change, either of you can ask the court for a "variation" to change the amount of support.

When child support ends: Child support usually continues as long as the child is a dependant. This can be until the child reaches the age of majority on his/her 19th birthday. A judge may also order that child support continue for a longer period if necessary, for example, if the child is attending university or has a disability that prevents him or her from being self-supporting.

You can get a copy of the **Federal Child Support Guidelines: Step by Step** from PLEIS-NB. Call 1-888-236-2444 or check online at www.familylawnb.ca.



Spousal Support

Spousal support is money that is paid by one spouse to the other spouse after the relationship has ended. It is sometimes called alimony or maintenance. Spouses are not automatically entitled to receive spousal support. To decide if you should get spousal support, a judge will look at several factors including:



- Length of the relationship
- Age of both parties
- Education of both parties
- Income levels of both parties
- Net worth of both parties
- Employment history of both parties
- Financial consequences of separation
- Was one person financially dependent on the other during the relationship

Calculating spousal support: Justice Canada has released a set of guidelines entitled the *Spousal Support Advisory Guidelines* (SSAG). They are intended to simplify the process of calculating spousal support amounts. They were developed to assist lawyers, judges and individuals wanting to estimate spousal support. They include formulas for estimating spousal support – the formulas involve calculations that take into account different factors, including whether there are children of the marriage, both parties’ income, the length of the relationship, etc. There are no “tables” for you to use to calculate spousal support.

The SSAG are used in an **advisory capacity ONLY**. This means that unlike the Child Support guidelines, they are not mandatory. You should consult a lawyer to find out whether you might be entitled to spousal support and to estimate the amount of support.

When spousal support ends: The court can grant spousal support for a indefinite period or a definite period (i.e. for a period of two years). The judge will decide based on a number of characteristics such as how long it might take the dependent spouse to become self-supporting, get a better job or secure his or her financial safety.

Common-law relationships and spousal support: Under the *Family Services Act*, if you have been living in a family situation with another person for three years, or for one year if you had a child together during that time,

you may be entitled to support as a dependent. A judge will decide about spousal support by considering the same factors used when married couples divorce (i.e. how long you lived together, how dependent you are on your partner, your income, etc.). However, an ex-common-law partner must make the application for support within one year of separation.

Enforcing Support

New Brunswick's enforcement system is called the **Family Support Orders Service (FSOS)**. This service files and enforces court ordered support awards. It also enforces support agreements or pre-existing orders or agreements filed with the court for enforcement. Support payers make support payments to the court. FSOS then sends a cheque by mail to the person receiving support. When a payment is not made, FSOS immediately makes every effort to enforce the order.

Division of Property and Debts

Under the *Marital Property Act*, when married spouses separate or divorce, each spouse is entitled to an equal share of the marital property, and each spouse is responsible for an equal share of the marital debts, except in certain special circumstances.

The most common types of marital property are the marital home, household goods, money, personal investments, automobiles and recreational vehicles. Marital debts can include financial obligations that were incurred by either spouse during the marriage, including debts like mortgages, car loans, credit card bills, lines of credit, etc.

You can divide your marital property after separation. If you cannot agree, you can apply to the court for a division of your marital property. You do not need to be divorced to divide your property. **If you are legally married and you wait until after you get divorced, you only have 60 days to apply for a division of marital property from the date that your divorce takes effect.** In exceptional situations, you can ask the court to give you more time to apply.

Common-law relationships and property rights: Unlike a married couple, if you are leaving a common-law relationship, you do not have an automatic right to a share of the property. Generally, any property that you brought into a common-law relationship, or that you bought during the relationship, is your own. If you separate, the person who paid for the item or whose name is on the deed may be the only one entitled to it. If you felt

you should get more, you would have to apply to the court and ask for a division of the property because you contributed to it. Generally, common-law couples are not responsible for the debts of their partner unless you have co-signed for them or you have signed a contract agreeing to pay for them. In some cases, however, courts have held partners responsible for a portion of a debt incurred by a former partner when both partners benefited from the debt, or from the asset purchased by way of the debt.

Pensions

Am I entitled to part of my spouse's/partner's Canada Pension Plan if we separate?

Regardless of whether you were married or in a common-law relationship, when a relationship ends, either partner may apply for a division of unadjusted pensionable earnings under the Canada Pension Plan. You must have lived together for 12 consecutive months. It is not necessary for the person applying for the division to have contributed directly to the plan to be entitled to a division of the unadjusted earnings of his or her spouse. A division of pension credits may mean more money to you when you retire or if you become disabled. It could mean benefits for your children if you die or become disabled. Information on credit splitting of CPP credits is available from the federal government at www.esdc.gc.ca/en/cpp/credit_splitting.page.

What about my spouse's/partner's provincial pension plan?

If you were legally married, according to the *Pension Benefits Act* (PBA) in New Brunswick, you may apply for a division of your spouse's provincial pensions when you split up.

Under the PBA, common-law couples who have lived together continuously for two years are also entitled to pension benefits. This includes the following provincial pension plans: *Teachers Pension Act*, the *Public Service Superannuation Act*, the *Members Pension Act*, the *Members Superannuation Act*, and the *Provincial Court Judges Act*.

Note: If a legally married spouse and a common-law partner both apply for the same benefits under the PBA, the spouse has priority unless stated otherwise in a domestic contract.

Resolving Legal Rights and Responsibilities After Separation

After a relationship ends, you should consider your options for dealing with your family law matters. You and your partner can work out the details of your rights and responsibilities toward each other and your children and create a “separation agreement”. You may be able to do this by sitting down together and coming to an agreement, or you may need the help of a mediator or lawyers to help you resolve differences. (For more information on Separation Agreements, see the section below).

Once you agree on how to handle property division, custody and access and support issues, you should each take the agreement to be reviewed by separate lawyers. The agreement can then be filed with the court. The terms of the agreement will be considered binding (legally enforceable) if the judge approves of them.

If you cannot agree on some or all family law matters, you must apply to the court and a judge decides. In such contested cases, both parties usually are represented by lawyers. The court looks at the documents filed by both parties and hears verbal evidence, if any. The judge makes an order about custody, access, support and/or division of property and debts.

Separation Agreements

Some separating couples are able to write up an agreement about some or all of these legal issues. This written agreement is called a **separation agreement**. A separation agreement is a mutual understanding between spouses who are separated. It is usually a written agreement that both partners sign after getting independent legal advice (meaning each partner sees his/her own lawyer). It includes the couple’s arrangements for matters such as spousal support, division of property, custody and child support. Most separation agreements can be filed with the court for the purpose of enforcement of support.



Will a court always accept a separation agreement?

The court will **usually accept** a separation agreement unless it discovers that:

- One spouse was **forced to sign** the agreement;
- One spouse **tried to defraud the other** by making false statements or hiding assets;
- The agreement does not make appropriate provisions for child support;
or
- The spouses did not consult separate lawyers.

Do I need a lawyer for a separation agreement?

You should see each see a different lawyer about the separation agreement. Seeing your own lawyer is called getting independent legal advice. The same lawyer should not advise two people with different interests. **If you do not receive independent legal advice, you may not be aware of all of your rights and your agreement may not stand up in court.** Your lawyer will explain how the agreement may affect you. If your lawyer advises you not to sign, that is not just a suggestion. It is a serious warning.

Be informed....

It is a good idea to learn more about family law issues and your options. Explore some or all of these options to decide how you should proceed depending on your situation:

- Call PLEIS-NB's bilingual, toll free **Family Law Information Line** at 1-888-236-2444 for general information about family law issues. You should also review PLEIS-NB's many family law publications - see list on page 10. You can call the toll-free number to order copies or go on our websites at www.familylawnb.ca or www.legal-info-legale.nb.ca.
- Check whether there are any **free legal advice clinics** in your area that might offer information about your legal situation.

Take a free parenting after separation course "For the Sake of the Children". It will help you learn about legal issues and the impact of separation on children. To register call 1-888-236-2444.



- Use the **services of a mediator** to help resolve your family law issues. In mediation, a third person, such as a lawyer or a social worker, helps you resolve conflicts and negotiate a **“separation agreement”**. They are trained to help people. Most separation agreements can be filed with the court for the purpose of enforcement of support.
- If you wish, you can ask to have your separation agreement filed with the court as a **consent order**.

- Use a **collaborative law process** to settle your family law issues. This is a process where you and your spouse each have a collaborative law lawyer and the four of you work as a team to understand each other’s needs and come up with the best solution for both of you and your children. Once both parties reach an agreement, the collaborative lawyers can assist with the process of filing the agreement with the court. For more information, including a list of lawyers trained in



Collaborative Law, check out the Canadian Bar Association-New Brunswick Branch’s website: <http://www.nb-cba.org/Sections/Collaborative-Law-Lawyers.aspx?lang=EN>

- Get **legal advice** from a **lawyer** no matter how you decide to settle your family law matters. A family law lawyer may be able to help you resolve matters out of court. It is important to choose the right lawyer for your legal problem. The best references generally are other people who have used that lawyer. You can also check out the **Law Society** website (www.lawsociety-barreau.nb.ca) which offers a list of lawyers licensed to practice in N.B. Look under “Lawyer Search” on the navigation bar at the top of the webpage. You can see a lawyer’s status or search for a lawyer by city. Or, look in the Yellow Pages of the telephone directory, under **“Lawyers”**. Lawyers and law firms in your community are listed in alphabetical order.
- If you cannot agree on the issues, **consult with a lawyer** and **apply to the court**. A judge will decide and issue a **court order**.
- If you cannot afford a lawyer, you may be eligible for family legal aid for certain family law matters. You will be assessed on financial criteria, and if you qualify a Family Solicitor would handle your case. You can check the Legal Aid website at: www.legalaid.nb.ca.

Useful Family Law Resources

For copies of these publications, please check out PLEIS-NB's websites - www.familylawnb.ca and www.legal-info-legale.nb.ca or email us to request a copy at pleisnb@web.ca.

- *Marital Property in New Brunswick* (free)
- *Parenting: Rights and Responsibilities of Young Parents* (free)
- *Custody & Access in New Brunswick* (free)
- *For the Sake of the Children* (free): A free information program for parents living separately – 1-888-236-2444
- *Family Support Orders Service* (free series of booklets)
- *Court-ordered Evaluations Support Program (C-OESP)* (free)
- *Living Common-Law* (free) (Explains rights and responsibilities of common-law couples)
- *Child & Spousal Support* (free)
- *Doing Your Own Divorce in New Brunswick* (\$10) A guide explaining the procedures for applying for an uncontested divorce.
- *How to Apply for Custody, Access & Support in New Brunswick* (\$10) A guide to the procedure for applying for custody, access and support.
- *New Brunswick Child Support Variation Kit* (free 1 copy): A kit for parents with an existing child support order, who wish to vary support because of substantial change in circumstances.
- *Financial Statement and Income Information* (free): Explains income information and how to complete a Financial Statement (Form 72J).

Check out these helpful Justice Canada publications at www.justice.gc.ca:

- *What Happens Next? Information for Kids About Separation and Divorce*
- *The Federal Child Support Guidelines: Step-by-Step*
- *Divorce Law: Questions and Answers*