

**International
Comparative
Legal Guides**



Practical cross-border insights into family law

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1 Divorce

1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc.?

Divorces in Ontario are governed by the federal Divorce Act. An Ontario court has jurisdiction where either spouse has been ordinarily resident in the province for at least one year immediately before commencing the proceeding. The residency requirement is a question of fact. The court considers such factors as whether the spouse resided in the province as a customary mode of life as opposed to merely casually or occasionally, and whether the spouse had the intention of making a home in that province for an indefinite period. This is not dependent on citizenship, domicile or immigration status. The other spouse may argue that another jurisdiction presents a more convenient forum.

If neither spouse resides in Canada at the time of the application and each of the spouses is residing in a foreign jurisdiction that does not recognize the validity of their marriage, the federal Civil Marriages Act provides that a court in the province where the spouses were married may grant a divorce.

1.2 What are the grounds for a divorce? For example, is there a required period of separation; can the parties have an uncontested divorce?

A court may grant a divorce where there has been a breakdown in the marriage. A breakdown in the marriage can be established only in the following circumstances:

- the spouses have lived separately and apart for a period of not less than one year immediately before the divorce is granted;
- the other spouse has committed adultery; or
- the other spouse has been physically or mentally cruel to render a continuation of cohabitation intolerable.

1.3 In the case of an uncontested divorce, do the parties need to attend court and is it possible to have a “private” divorce, i.e. without any court involvement?

Parties need not attend court to obtain a divorce. Once the 30 days for a response to the divorce application has lapsed,

the spouse applying for the divorce can proceed to file written documentation for a Divorce Order. It is not possible to have a private divorce.

1.4 What is the procedure and timescale for a divorce?

The timeline for obtaining a divorce depends entirely on whether the divorce application is contested and whether other relief aside from a simple divorce is being requested.

The first step to obtaining a divorce is to prepare a divorce application. This document will be relatively straightforward where the only claim is for a divorce. This application can be jointly prepared and submitted by the parties. If other relief is sought (such as property division, support, parenting orders), a more detailed application will be required along with additional documents.

The application must then be issued by the court. The application will be served on the other party, who has 30 days to respond. The other party may make claims for other relief in their answer.

The next steps will depend on whether the other party files responding material and whether claims for additional relief have been made. If they do not file any responding material, and the only claim being made is for a divorce, a divorce may be granted within months. If other claims are made, the next step may be an uncontested trial without an oral hearing, which can occur relatively quickly.

If the other party does file responding material, the next step is for the parties to schedule a case conference with the court, which is a relatively informal court appearance designed to allow both parties to appear before a judge and explore the issues, discuss possible settlement and determine the next steps in the case. If the matter does not resolve at the case conference, either party will be free to bring a motion on any issues in the case and the matter will eventually proceed to trial, following further court conferences.

1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Before a court will grant a divorce in Canada, it needs to be satisfied that reasonable arrangements have been made for the support of any children.

1.6 Are foreign divorces recognised in your jurisdiction? If so, what are the procedural requirements, if any?

Canada will recognize a foreign divorce so long as the divorce is valid in the other country and one or both of the spouses was ordinarily resident in the other country for at least a year immediately before applying for a divorce. To remarry in Ontario, the couple must provide a legal opinion from an Ontario lawyer to confirm that the foreign divorce should be recognized and they must jointly sign a statement of sole responsibility that their foreign divorce will be recognized in the province.

1.7 Does your jurisdiction allow separation or nullity proceedings?

A nullity, or annulment of the marriage, can be sought in circumstances where one of the requirements for the validity of the marriage does not exist or where there are allegations of fraud. Some of the requirements for a valid marriage include age, capacity to consent, and solemnization.

1.8 Can divorce proceedings be stayed if there are proceedings in another country?

A divorce proceeding commenced in Canada can be stayed where a court determines that the foreign jurisdiction is the more convenient forum. Some of the factors a court will consider in making this determination include:

- the location of the parties;
- the location of the key witnesses and evidence;
- the avoidance of a multiplicity of proceedings;
- contractual provisions that specify applicable law or accord jurisdiction;
- the application law and its weight in comparison to the factual questions to be decided in the case;
- geographical factors suggesting the natural forum; and
- whether declining jurisdiction will deprive the spouse who commenced the proceeding in Canada of a legitimate juridical advantage available in the domestic court.

2 Finances on Divorce

2.1 What financial orders can the court make on divorce?

The court can make orders in respect of child support, spousal support and property division.

2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default matrimonial regime?

In Ontario, the Family Law Act deems all marriages to be economic partnerships. At the end of the marriage, whether by separation or death, a spouse may seek an equalization payment from the other. The equalization calculation provides for the parties to share an increase in wealth during the marriage. All forms of property are valued at the date of marriage and the date of separation, with certain assets unrelated to the partnership, such as inheritances during the marriage, being excluded. In rare cases, a court may order unequal division where equalization would be unconscionable.

2.3 How does the court decide what financial orders to make? What factors are taken into account?

A court will consider factors related to the financial circumstances of the parties, including income, assets and liabilities both during the marriage and following separation. The circumstances and actions of the parties around the time of separation may also be relevant depending on the claims being made. In spousal support claims, the length of the marriage, the impact of childcare responsibilities, and the financial consequences of marriage breakdown to the parties are considered.

2.4 Is the position different between capital and maintenance orders? If so, how?

Maintenance orders in Canada are termed spousal support orders. Spousal support orders are distinct from property orders. They are covered by different legislative provisions and are more discretionary in nature. However, a court may consider the amount a party receives by way of an equalization payment when deciding on the issue of support.

2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

If the parties reach an agreement on the financial issues, they do not need to attend court and obtain a court order. The parties can simply execute a written agreement, which will be recognized and enforced by the courts as long as it complies with formalities of a domestic contract as prescribed by the Family Law Act.

2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal support orders are commonplace in Ontario and can be time-limited or indefinite depending on various factors, such as the length of the marriage and the age of the parties at the time of separation.

2.7 Is the concept of matrimonial property recognised in your jurisdiction?

In Ontario, there is no special category of matrimonial property. All forms of property are equalized under the Family Law Act.

2.8 Do the courts treat foreign nationals differently on divorce? If so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are not treated differently assuming jurisdiction is found. In very restricted circumstances, foreign law may apply with respect to property rights if the parties separated while living in another jurisdiction.

2.9 How is the matrimonial home treated on divorce?

In Ontario, any home that the parties ordinarily occupied at the time of separation has special treatment in equalization. The owner of the home may not claim a deduction for the same property at the date of marriage. Moreover, regardless of

legal ownership, both parties have a right of possession to the home until divorce or court order and neither party can sell or encumber the property without the other party's consent.

2.10 Is the concept of “trusts” recognised in your jurisdiction? If so, how?

Trusts are recognized in Ontario.

2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

Ontario courts do not have jurisdiction to hear and determine spousal support claims following a valid divorce in another jurisdiction. An Ontario court may have jurisdiction under the Family Law Act to determine child support and family property claims.

2.12 What methods of dispute resolution are available to resolve financial settlement on divorce, e.g. court, mediation, arbitration?

Parties may resolve their disputes by negotiation, mediation, arbitration or litigation.

3 Marital Agreements

3.1 Are marital agreements (pre- and post-marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Parties may enter domestic contracts disposing of support and property rights before, during or after a marriage. A foreign contract governing such rights will be enforceable if it meets the formal validity requirements set by the Family Law Act. Domestic contracts concerning parenting will not be enforced if they are not in the child's best interests. Domestic contracts concerning child support that depart from Child Support Guidelines will not be enforced. Domestic contracts may be set aside if the parties did not make comprehensive financial disclosure, did not understand the nature and terms of the contract, or otherwise under the law of contract.

3.2 What are the procedural requirements for a marital agreement to be enforceable on divorce?

A marital agreement must be in writing, signed by both parties, and witnessed.

3.3 Can marital agreements cover a spouse's financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime? Can they deal with financial claims regarding children, e.g. child maintenance?

Marital agreements can cover all financial claims for property and support. Agreements concerning child support that depart from the Child Support Guidelines will not be enforced.

4 Cohabitation and the Unmarried Family

4.1 Do cohabitants, who do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

In Ontario, cohabitants have rights to support and may make equitable claims for relief in relation to property but do not have the right to equalization.

Unmarried spouses have spousal support rights if they have cohabited for at least three years. They may make common law property claims or equitable claims for unjust enrichment, other restitutionary claims or resulting trust claims.

4.2 What financial orders can a cohabitant obtain?

Cohabitants may claim child support, spousal support or assert common law or equitable property claims.

4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

There is no formal partnership status.

4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Same-sex couples may marry throughout Canada.

5 Child Maintenance

5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

A parent may claim child support on behalf of his or her child following separation where that parent is the child's primary caregiver or there is a shared parenting arrangement.

5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child support is determined under the Child Support Guidelines, which calculate monthly child support based on the parenting arrangements, income and the number of children. In addition, a parent may seek contribution to special or extraordinary expenses including childcare, private school or university expenses.

Where the payor spouse earns over \$150,000 per year, the court has discretion to order an amount of support that differs from the Guidelines after considering the condition, means, needs and circumstances of the parties and the children.

5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Parents must pay child support as long as the child is a dependent, even if over the age of majority, if that child is unable to withdraw from parental control because of illness, disability or education.

5.4 Can capital or property orders be made to or for the benefit of a child?

Family property rights are reserved for parents.

5.5 Can a child or adult make a financial claim directly against their parents? If so, what factors will the court take into account?

A dependent child, whether a minor or a legal adult, may apply for support from a parent but this is rare.

Child support is determined under the Child Support Guidelines. An adult child will need to demonstrate that he or she is still a dependent and unable to withdraw from parental control because of illness, disability or education.

6 Children – Parental Responsibility and Custody

6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried.

All parents, whether married or unmarried, may make claims for parenting orders with respect to decision-making and/or contact with a child. Newly proclaimed legislative amendments at the federal and provincial level have removed the use of the term “custody”.

6.2 At what age are children considered adults by the court?

A child is considered an adult at 18 years old.

6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

Parenting orders do not operate once a child reaches the age of 18 years or marries.

6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

A court can make parenting orders. Contact orders address the time a parent is scheduled to be with a child and the right to make inquiries and be given information concerning the child's health, education and welfare. Decision-making orders address the right to make major decisions for a child in relation to health, education, and welfare. A court can either grant sole or joint decision-making. A court can also make orders about the physical residency of a child. This physical residency can either be granted primarily to one parent, or can involve a sharing of time between parents.

Parents are free to reach their own agreement about the parenting arrangements following separation and this agreement will be respected by the court so long as it accords with the best interests of the child.

6.5 What factors does the court consider when making orders in relation to children?

The primary consideration when making a decision in relation to children is the best interests of the children in the

circumstances. In Ontario, a court will consider the love, affection and emotional ties between the child and the parties, the child's views and preferences, and the ability and willingness of the parties to meet the needs of the child. A court will also consider the willingness of a parent to facilitate contact between the child and another parent.

6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Without a court order or written agreement in place in respect of decision-making, parents may have difficulty unilaterally registering a child for a school-related program, counselling or medical treatment absent proof of the consent of the other parent. A parent should not remove a child from the jurisdiction without the other parent's consent.

6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

There is no set presumption in the law for an equal division of time between separating or divorcing parents.

6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?

Regardless of whether a claim is being made by a married or unmarried parent, the legal test and the considerations are the same: the best interests of the child.

6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?

A court may order an assessment to report on the needs of the child and the ability and willingness of the parents to meet these needs by a qualified third-party professional. The author of this report must be appointed by the court prior to starting the assessment process and will typically be an independent mental health professional with experience in the area of family disputes. The court will consider the final assessment report prepared by this professional when making a decision about parenting of a child. A court may also obtain the views and preferences of the child by way of a judicial interview or by appointing legal representation for the child.

6.10 Is there separate representation for children in your jurisdiction and, if so, who would represent them, e.g. a lawyer?

An independent branch of the Ontario Government called the Office of the Children's Lawyer provides legal representation to children and youth in child welfare and custody/access matters across the province.

In parenting cases, the court has the discretion to order legal representation for the child under the Children's Law Reform Act. Once this order is made, the Office of the Children's Lawyer will then determine whether to actually appoint a lawyer to act for the child. This decision will be made based on the circumstances of the case and available resources.

6.11 Do any other adults have a say in relation to the arrangements for the children? E.g. step-parents or grandparents or siblings. What methods of dispute resolution are available to resolve disputes relating to children?

Any person including a grandparent or step-parent may apply for parenting orders for a child. The parties may resolve parenting disputes by negotiation, mediation, arbitration or litigation.

7 Children – International Aspects

7.1 Can the custodial parent move to another state/country without the other parent's consent?

A parent with decision-making authority may move a child to another jurisdiction if the other parent does not object despite notice or with a court order.

7.2 Can the custodial parent move to another part of the state/country without the other parent's consent?

A parent with decision-making authority may move to another part of Ontario or another Canadian jurisdiction if the other parent does not object despite notice or with a court order.

7.3 If the court is making a decision on relocation of a child abroad, what factors are taken into account?

A court must consider the child's best interests, considering:

- the reasons for the relocation;
- the impact of the relocation on the child;
- the amount of time spent by each parent with the child and level of involvement in the child's life;
- provision of notice of the relocation;
- existence of a court order, arbitral award or agreement with respect to the child's place of residence; and
- reasonableness of the proposal for parenting time following the move and compliance with existing obligations under a court order, arbitral award or agreement.

7.4 If the court is making a decision on a child moving to a different part of the state/country, what factors are taken into account?

The factors are the same whether the proposed move is abroad or within Ontario or Canada.

7.5 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?

These cases are highly fact-driven. It is fairly common for relocation applications to be approved.

7.6 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?

Canada is a signatory to the Hague Convention. Ontario has incorporated the terms of the Convention into provincial legislation (the Children's Law Reform Act) and made it clear that these terms override any conflicting provincial legislation.

8 Overview

8.1 In your view, what are the significant developments in family law in your jurisdiction in the last two years and anticipated in the next year?

The Divorce Act and the provincial Children's Law Reform Act have been amended to modernize parenting provisions, require courts to consider domestic violence in making parenting determinations, and to prescribe the relevant factors for relocation cases.

8.2 To what extent and how has the court process and other dispute resolution methods for family law been adapted in your jurisdiction in light of the COVID-19 pandemic – e.g. virtual hearings, remote access, paperless processes? Are any of these changes likely to remain after the COVID-19 crisis has passed?

In response to the COVID-19 pandemic, the courts implemented electronic filing and remote hearings including conferences, motions, and trials. It seems likely that many of these changes will be permanent as they have enhanced access to justice and reduced costs.

8.3 What are some of the areas of family law which you think should be considered in your jurisdiction, i.e. what laws or practices should be reformed?

Under Ontario's current laws, unmarried spouses only have equitable property claims and do not have access to the family property regime that applies to married spouses. This causes confusion and merits review.



Sarah Boulby has practiced family law since 1993. She advises clients located in Ontario and internationally on complex support, property and parenting issues. She negotiates agreements and represents clients in court at the trial and appellate level as well as in mediations and arbitrations. Sarah acts for clients based in Ontario and internationally.

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Sarah graduated from Queen's University with an Honours Bachelor of Arts in 1986 and a Master of Arts in 1989. She graduated with an LL.B. from the University of Toronto in 1991. Sarah served as Law Clerk to Mr Justice Peter Cory at the Supreme Court of Canada in 1991–1992 and was called to the Ontario Bar in 1993. She was counsel to the Ontario Law Reform Commission and since 1993 has practiced as a family lawyer.

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