

Living Common-Law

RIGHTS AND RESPONSIBILITIES

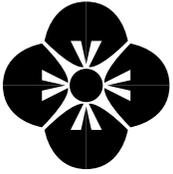


Public Legal Education
and Information Service
of New Brunswick

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 about the law. PLEIS-NB receives funding and in-kind support from the federal Department of Justice, the New Brunswick Law Foundation and the New Brunswick Office of the Attorney General.

The aim of this booklet is to answer some general questions about living in a common-law relationship. It looks at some, though not all of the legal rights and responsibilities of common-law couples. It does not contain a complete statement of the law in the area. Anyone who needs specific advice about his/her own legal position should contact a lawyer.

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Many people choose to live together instead of getting married. The purpose of this pamphlet is to tell you about a couple's legal rights and responsibilities when they live together, when they break up, and when one partner dies.

RIGHTS AND RESPONSIBILITIES

What is a common-law relationship?

Traditionally, a common-law relationship was one where a man and a woman live together, but are not legally married to each other. More recently, same-sex common-law relationships have also been recognized.

How long must we live together before we are recognized as a common-law couple?



The amount of time you must live together before you are entitled to particular rights can vary. Some provincial laws recognize a common-law relationship after one year of living together. In other situations, you must live together for two years, or even three years. Federal laws, employers and insurance

plans may set out different criteria for recognizing common-law relationships. You should look at the different laws and policies to determine how they define a common-law relationship.

If we live together long enough, will we be legally married?

No. You will never be considered legally married to your partner until you go through a legal marriage ceremony.

If my partner is unable to make health care decisions, can I decide?

In some instances when a person is unable to consent to health care treatment, someone designated as next of kin may be asked to sign a consent form. However, common-law partners are not included. If you want your common-law partner to make personal health care decisions when you cannot, you must name him/her as your attorney in a Power of Attorney for Personal Care.



If we have children, will they be considered “illegitimate”?



No. In New Brunswick, all children are legitimate – including children born to unmarried parents. Your children will have the same legal status as children of married couples.

Whose last name will our children have?

You will probably have some choice in the last name you can give the children of your relationship. If the father’s name is on the birth registration, then the child can have the father’s name, the mother’s name, or a combination of the two. Once a last name is chosen, all children of the same parents must use that same last

name. If no information about the father is given on the birth registration, then the mother’s last name must be used. For more information on naming your child, you can go to the Vital Statistics Office, Service New Brunswick website at <http://www.snb.ca/e/1000/1000-01/e/index-e.asp>

Am I responsible for the debts of my partner?

No. Unlike a married couple, you are not responsible for the debts of your common-law partner unless you have co-signed for them or you have signed a contract agreeing to pay for them. However, if a court is asked to make a division of property and debts they may order you to contribute based on your specific situation.

If I’m on social assistance and we live together, what will happen?

If your partner moves in with you, he or she will be considered part of the economic household unit. This may affect the amount of social assistance your household may be able to get. The social assistance cheque will be paid to the person considered the head of the household unit.



If we live together, will I be able to make deductions on my income tax return?

Yes. If you have a common-law partner, you can claim the same credits as someone who is married. For tax purposes, a common-law partner is defined as someone of the opposite or same-sex who has lived or is living with you as a spouse for at least 12 continuous months OR who has been living with you and is the natural or adoptive parent of your child.

Can I be forced to testify against my partner in a criminal trial?

Although a married person generally cannot be forced to testify against his or her spouse in most criminal cases, this does not apply to common-law couples. You may be required to testify.

OTHER RELATIONSHIPS

Do same-sex partners have rights as a common-law couple in New Brunswick?

In New Brunswick, same-sex couples now have the same right to certain entitlements as other people who are living together in a family relationship. You should look at the specific legislation to determine how common-law is defined for the purposes of that law, since the length of cohabitation varies.



What about other people who choose to live together. Do they have legal rights and responsibilities to support one another?

The *Family Services Act* was amended in New Brunswick to extend support obligations beyond married and common-law couples. Support obligations may now arise when two persons, not being married to each other, have lived together continuously in a family relationship for three years and one person was substantially dependent on the other for support.



COHABITATION AGREEMENTS

If I am in a common-law relationship, how can I protect myself legally?

While you are living together, the best way to protect your interests is to enter into a domestic contract with your partner called a cohabitation agreement. This is a written agreement between partners that sets out their rights and responsibilities towards each other. The agreement cannot include who will have custody of or access to the children of the relationship. However, it can deal with issues such as:

- who owns the property
- how property will be divided if you separate
- support obligations

To be legally binding, the agreement must be in writing, signed by both parties, and witnessed. You should each talk to a different lawyer. Your lawyer will explain how your agreement will affect you rights and responsibilities. For more information, see the PLEIS-NB booklet called *Domestic Contracts*.

Why should we have a cohabitation agreement?

If you have lived together for any length of time, it may be difficult to know who owns what, especially if you both contributed. To protect your property rights, it is wise to have a cohabitation agreement with your partner that clearly sets out the ownership and division of property.



BREAKING UP

How do we end a common-law relationship?

To end a relationship, a common-law couple stops living together. However, legal obligations may have arisen during the relationship, particularly where the couple has children, or one partner has been dependent on the other. If the couple



has a cohabitation agreement, they may already have decided what will happen upon separation. Since the *Marital Property Act* does not apply to the property of common-law couples, they may want to enter into a

Separation Agreement to set out their rights and obligations to each other. The separation agreement can include the same things as a cohabitation agreement (ownership and division of property, and support arrangements), but it can also include provisions for the custody and access of the children. It is important that each person talks to a different lawyer to make sure the document reflects what they have agreed to.

Can the court change our cohabitation agreement?

Generally, the court will respect the agreement reached by the couple. However, the court can change any provisions dealing with the support, custody, or access to the children where it believes it is in the best interest of the children to do so. The court can also disregard any provision where it thinks that one spouse did not consult with his or her own lawyer first or where it would be inequitable in the circumstances.



What if my partner and I cannot reach an agreement?

If you and your partner can agree on all these issues, you may not have to go to court. If you need help reaching an agreement, you should consider using a family mediator to help you reach an agreement. If you file the agreement with the court, it will have the same force as a court order made by a judge for enforcing child or spousal support.

If you still cannot agree, you can apply to the court to have a judge make the decision. You should consider getting help from a lawyer. If you cannot afford a lawyer, you may be eligible to receive free legal advice and representation from the New Brunswick Legal Aid Services Commission for certain family law matters.

Can I get financial support from my ex-partner?

In New Brunswick, a legal obligation to support a common-law partner arises when they have lived with each other for three years and one person is substantially dependent on the other. This obligation arises after one year of living together where you have a child together.

How much will I receive?

The amount of spousal support you receive will depend on your needs and how much your partner is able to pay. The court will look at

- how long you lived together
- your age and health
- your ability to support yourself
- if you are at home caring for a child
- any contribution you made to the ability of the other to pursue their career (for example, housekeeping and child care)

Except in rare cases, the court sees support as a temporary measure. Generally, the court expects a dependent former partner to become self-sufficient after a reasonable period of time.



Who will have custody of the children?

Parents both have custody of their children unless they have a separation agreement or court order giving custody to one parent. When you separate, both parents have the right to ask the court for custody of the children. The court will make a decision based on the best interests of the child. The non-custodial parent will almost always get access, or rights to visit with the child. A custody and access order is never final, and can be changed if the circumstances are different.

Can I get child support from my partner?



All parents, whether married or not, have the same obligations to their children. Both parents are required to financially support their children, but it is generally the parent who does not have custody that pays the child support. Again, if the parents cannot reach an agreement, or mediation is not successful,

you can apply to the court to get support payments as the entitled parent. To do so, you should get legal advice. You may be able to get help making your application from the New Brunswick Legal Aid Services Commission. To determine the amount of support, the judge will look at the child support guidelines.

How will our property be divided if we separate?

Generally, any property that you bring into or buy during the relationship is your own. If a common-law couple breaks up, the person who has paid for the item or whose name is on the deed may be the only one entitled to it. The rights to an equal division of marital property given to married couples under the *Marital Property Act* are not given to common-law couples.



What about things we bought together?

If you and your partner bought something together, such as furniture or a car, you both own it. If you separate, you must decide how to divide it. For example, you can sell it and split the proceeds. If you cannot agree, you may have to go to court and have a judge decide for you. A mediator may be able to help you reach an agreement.



The house is in my partner's name. Am I entitled to any of it?

The person whose name is on the deed owns the property. However, if it was purchased, developed, or maintained with your contribution of labour, time, or money, you may be entitled to some of it. The courts are using a legal doctrine called 'constructive trust' to help people in common-law relationships who are not eligible to apply under marital property laws. The amount that you can receive will depend on the extent of your contribution. The court considers home-making and child care to be important contributions. You will need to talk to a lawyer.

DEATH

If my partner dies, what rights do I have to his or her property?

Your partner may leave you something in his or her will. As long as the will is valid and your partner had the capacity to make a will, you will receive any property that has been left to you. If you want your common-law partner to inherit your property, you should specifically name him or her in your will.

What if my partner dies without a will?

If your partner dies without a will (called intestate), the *Devolution of Estates Act* determines who will get the property. Although the children born of your relationship will receive a share of the property, common-law partners are not recognized as having any property rights.



However, the *Provision for Dependants Act* offers some help if your partner dies without a will. You can ask the court to order your partner's estate to provide support for his or her "dependants". Even if your partner dies with a valid will, a dependant can apply under this Act if the will does not provide adequate support. You must make an application within four months after the death of your partner.



PENSIONS

Contact the specific pension provider for more information on the benefits to which common-law couples are entitled. It is important to know whether you or your partner will be entitled to credit-splitting, survivor benefits or both.

My partner has been contributing to a pension plan. Am I entitled to any of it if we separate?

If you separate from your partner, you may be able to negotiate a share of his or her pension credits. The federal Canada Pension Plan recognizes the entitlement of common-law spouses to pension credits. The court can divide the pension credits if you have lived together for 12 consecutive months, and have been living apart for the same amount of time. You must make an application to Human Resource Development Canada within 4 years after you separate. You can find more information about credit splitting and the forms you will need at:

<http://www.hrsdc.gc.ca/eng/isp/pub/factsheets/credit.shtml>

In New Brunswick, the *Pension Benefits Act* sets out the rules for credit-splitting for common-law partners. Under provincial pension plans, if you separate from your partner, you may be entitled to a share of his or her pension credits if you have lived together continuously for two years.



Am I entitled to survivor benefits under my partner's pension plan?

Again, many pension plans recognize a common-law couple's entitlement to survivor benefits when one partner dies. Under the Canada Pension Plan (CPP), your partner must make contributions to the plan for enough years and have been living



with you for at least a year before his or her death. Same-sex partners may be eligible if their partner died on or after January 1, 1998. (A separated legal spouse will be eligible except where an eligible common-law spouse applies for the benefit.) You must apply within a year after your partner's death. For

more information about CPP Benefits go online to <http://www.servicecanada.gc.ca/eng/isp/cpp/survivor.shtml>.

Under the *Pension Benefits Act* in New Brunswick, common-law couples who have lived together continuously for two years are entitled to survivor 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*. If a legally married spouse and a common-law partner both apply for the same benefits, the spouse has priority unless stated otherwise in a domestic contract.

