

Please note: Legal information
may not be up to date

SEPARATION AGREEMENTS

Your Rights and Options

March 2019



Legal
Services
Society

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www.legalaid.bc.ca



Acknowledgements

Published on the traditional unceded territory of the Coast Salish peoples, including the territories of the xʷməθkʷəy̓əm (Musqueam), Skwxwú7mesh (Squamish), and səliłwətaʔ/Selilwitulh (Tsleil-Waututh) Nations.

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West Coast LEAF envisions an equal and just society for all women and people who experience gender-based discrimination.

The Legal Services Society is a non-profit organization that provides legal aid to British Columbians. LSS is separate from the BC government, its primary funder. It also receives grants from the Law Foundation and the Notary Foundation (of BC).

West Coast LEAF and LSS thank the lawyers, advocates, and community members who provided their feedback on the first edition of this booklet.

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This publication explains the law in general. It isn't intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. The information in this publication is up to date as of March 2019.



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West Coast Legal Education and Action Fund's (West Coast LEAF) mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in BC. In collaboration with community, we use litigation, law reform, and public legal education to make change. In particular, we aim to transform society by achieving: access to healthcare; access to justice; economic security; freedom from gender-based violence; justice for those who are criminalized; and the right to parent.

Gender inequality impacts family law. Women and transgender people are more likely to face violence in relationships. After the breakdown of a relationship, women and transgender people often don't have access to income to support themselves.

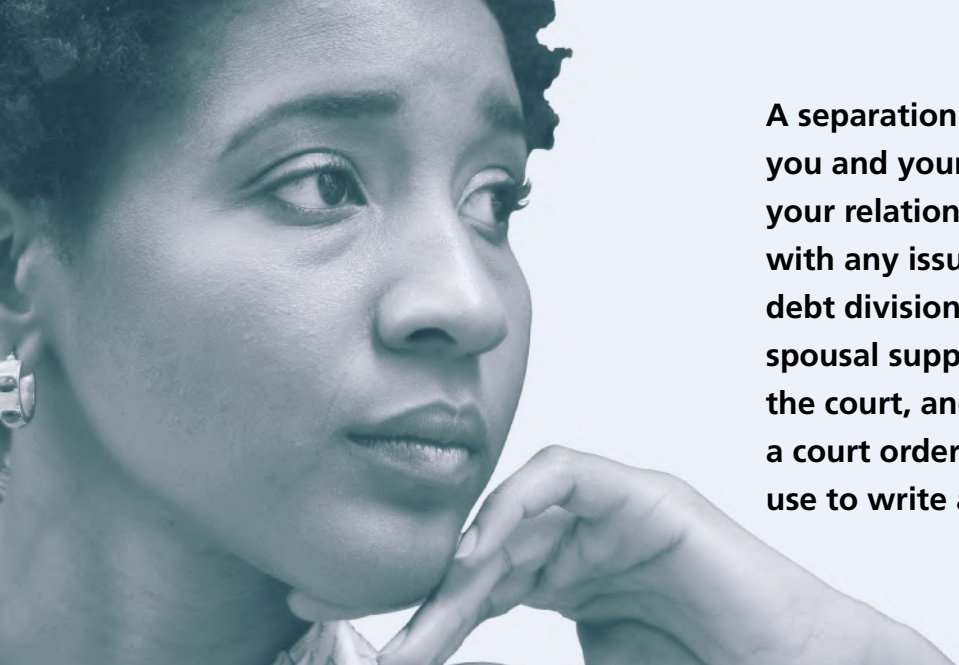
The Legal Services Society (LSS) Family Law in BC website provides comprehensive family law help in various formats. You'll find step-by-step guides, booklets and brochures, definitions, general information, online help from law students, referrals on where to find in-person help, and more. See familylaw.lss.bc.ca.

The website also has links to family law court forms. You can fill them out online, in Word or PDF. The Word forms have easy-to-follow instructions. See familylaw.lss.bc.ca/resources/court_forms.php.

West Coast LEAF acts as an intervener, or interested third party, in cases that will affect gender equality under the law. In 2009, we intervened in a case called *Rick v. Brandsema*, which was important for women's right to fairness in separation agreements. The findings in this case have since been codified in s. 93 of the BC Family Law Act. The purpose of this booklet is to share important legal principles from that case and legal developments that followed. We hope to help readers understand their legal rights and options regarding separation agreements, and improve their access to justice.

The purpose of this booklet is to share important legal principles from that case and legal developments that followed. Our goal is to improve women's access to justice in family law cases by helping women understand their legal rights and options.

The MyLawBC website uses guided pathways to help you find solutions to your family law problems. The pathways ask you questions about your situation. Then MyLawBC gives you a plan based on your answers. MyLawBC can help you with separation, divorce, family orders, and more. If you're going through a separation or divorce, you can use the negotiation tools with your spouse to make an agreement. See mylawbc.com.



A separation agreement is a written contract that you and your spouse negotiate (work out) after your relationship ends. The agreement can deal with any issue you want, including property and debt division, care of children, child support, and spousal support. You can file the agreement with the court, and the court can enforce it as if it were a court order. There's no official form you have to use to write a separation agreement.

Who this booklet is for

For the purposes of property division, a **spouse** is someone who is married to another person, or who has lived with another person in a marriage-like relationship for at least two years (often called a "common-law relationship," though you won't find that term in the Divorce Act or the Family Law Act).

A spouse also includes a former spouse (married spouse who has divorced and unmarried spouse who has separated).

This booklet might be for you if you're separated from your spouse, you and your spouse signed an agreement to divide your assets and/or debts, and you want the court to **set aside** (cancel) or replace your agreement because:

- you believe that your spouse didn't **disclose** (share) information about all **assets** (any items worth money that a person owns) when you negotiated the agreement, or your spouse set too low a value on the disclosed assets; and
- there was a significant **power imbalance** (when one person has more influence or control than the other person) between you and your spouse when you negotiated the agreement, and your spouse unfairly took advantage of that. This could happen even if you had a lawyer to represent you during the negotiations.
 - Examples of a power imbalance could be if your spouse knew much more about or controlled your family's finances, took advantage of your vulnerabilities (for example, a mental health issue or language barrier), or if there was abuse in your relationship.

This booklet will also be useful if you want to know:

- The law about dividing family property or debt
- How to prepare a financial statement for court
- Who can help you and where to get more legal information

Under the BC Family Law Act, unmarried spouses have the same property rights as married couples.

This booklet won't help you:

- Write a separation agreement.
- Set aside or replace your separation agreement simply because you no longer agree with how your assets or debts were divided.
- Deal with agreements between you and someone who isn't your spouse.
- Get access to income that your spouse got through crime.
- Get access to assets that your spouse shares with their parent, especially if the assets are in the parent's name or outside Canada.
- Apply to increase or decrease child support payments, or change a parenting arrangement.
- Deal with property issues on reserve.

Asking the court to set aside a separation agreement can be legally and emotionally difficult. You may have to face stressful questions and statements from your spouse or their lawyer. For example, they might tell the court about abuse you experienced in the relationship, or question your parenting skills. An advocate (someone who can provide you with legal assistance and support but isn't a lawyer and can't represent you in court) or other community support workers can help you before and during the legal process. See page 15 for information about where to find an advocate.

Setting aside a separation agreement

It may be difficult to prove that your spouse hid or lied about the value of assets, especially if assets are located outside BC, or were the result of crime. You'll need financial statements, witnesses, and other information to use as evidence in court. See page 15 for information about where you can get legal help.

In 2009, the Supreme Court of Canada decided a case called *Rick v. Brandsema*, 2009 SCC 10. Ms. Rick and Mr. Brandsema negotiated a separation agreement after a 29-year marriage. Ms. Rick had mental health issues at the time. She also identified herself as a survivor of family violence.

A few years later, Ms. Rick found out that Mr. Brandsema didn't disclose important financial information during the negotiations. She asked the court to set aside the separation agreement she had signed because she thought it was unfair.

At the Supreme Court of Canada (SCC), the judges agreed the agreement should be set aside. The court said that while judges won't interfere with agreements that **parties** (participants in a court case, contract, or other legal matter) freely **enter into** (make), in some circumstances the judges will **intervene** (step in) to preserve fairness.

The SCC set out three important points that may guide judges when they're asked to set aside a separation agreement:

1. Was there a failure to disclose? Did your spouse hide, lie about, undervalue, or transfer assets during your negotiations?
2. Did your spouse take advantage of your mental health or other vulnerable condition, or did your spouse have access to all the family's financial information, while you had little or none?
3. Did the agreement meet the goals of BC family law? Is the agreement fair and equal to both you and your spouse and does it make sure that both of you can financially support yourselves?

A judge might also set aside your separation agreement if you can show that you didn't understand how the agreement would affect you, or if the agreement is "significantly unfair" (see ss. 93(3) and 93(5) of the BC Family Law Act).





You and your spouse must provide each other with “full and true” information to solve your legal problems. Fair and lasting agreements are based on full and honest disclosure (sharing of information). The process of sharing information in a court case is called **discovery**. For more information, see familylaw.lss.bc.ca/resources/fact_sheets/discovery.

Dividing property and debt fairly

Spouses who separate can agree to divide family property and debt in all sorts of ways. Knowing a little about the law may help you decide if your separation agreement is fair or not, and whether you want to ask a judge to set it aside. These rules apply to married couples and common-law couples who’ve lived together for at least two years.

- Under BC’s Family Law Act, spouses who separate are entitled to 50 percent of **family property** that either or both spouses acquired during the relationship. Family property includes things like homes, bank accounts, RRSPs, pensions, and business interests. It doesn’t matter who paid for the property or whose name the property is in.
- Property a spouse owned before the relationship doesn’t have to be shared when spouses separate. Neither do gifts, inheritances, and certain insurance or damages payments obtained during the course of the relationship. This type of property is called **excluded property** under the BC Family Law Act s. 85(1).
- Spouses are also responsible to equally share debts taken on during the relationship. It doesn’t matter who took on the debt or whose name is on it. However, creditors can demand payment only from the spouse named on the debt.

These legal rules are just a starting point. A judge won’t set aside your separation agreement just because it doesn’t follow these rules. A judge may decide that it would be “significantly unfair” to follow these rules and may order another way to divide family property or debt. For example, it might be significantly unfair to equally share a debt that your spouse took on to pay for things for themselves. See familylaw.lss.bc.ca/resources/fact_sheets/dividePropertyAndDebts.php.

Making a fair agreement

The best way to avoid the time, expense, and stress of going to court to ask to have your separation agreement set aside is to make a fair agreement when you first negotiate it. This may be difficult if you don't have access to the family financial information, or if there's been abuse or a power imbalance in your relationship. A lawyer or advocate may be able to help you get the information you need. See page 15 for a list of free legal resources that can help.

Both you and your spouse need to know about all of the family finances. The law says that both spouses have to give each other "full and true" information to make a fair agreement.

Don't feel pressured to sign a separation agreement. It's a good idea to have a lawyer review your draft agreement before you sign it, especially if you're worried that it might be unfair.

If you go to court to settle your family law issues, you and your spouse will have to disclose relevant documents and financial information. Court proceedings may also involve **examinations for discovery**, when you and your spouse have to answer questions under oath. You can ask about your spouse's financial statements and find out if there are any undisclosed assets or sources of income.

Financial documents

These are some documents that will help you get an accurate picture of your family's finances. *Never put yourself in danger to get these documents.* A women's centre or transition house may be able to suggest safe ways to find and store these documents.

- Copies of recent bank statements.
- Copies of recent credit card statements.
- Copies of any statements for RRSPs, RESPs, or investments you or your spouse may have.





- Copies of tax returns for the last three years. Request copies of your tax returns by calling the Canada Revenue Agency: 1-800-959-8281.
- Assessments of the value of your home or any other assets you and your spouse own.
- Statements of earnings if you and/or your spouse are employed: if your spouse's wage changes from season to season, it's a good idea to have a copy of statements from both high and low pay periods to get an accurate picture of annual income.

If your spouse controlled your family's finances, you may not have access to all of these documents. This isn't your fault. Do the following even if you can't get the financial documents:

- Make a list of any assets you or your spouse owned during your relationship. The more information you can include, the better. For example, get the serial numbers of vehicles you own, if possible.
- Write down the names of any banks, investment companies, or other institutions you think your spouse may do business with. If you don't know the names, describe any logos shown on business letters that come in the mail.
- Make a list of your spouse's employers and sources of income.
- Make a list of assets or sources of income that you believe your spouse may have but which you can't prove. For example, you may believe your spouse is receiving cash payments they're not reporting, or you may believe they own property in another province or country. Share this list with your lawyer, if you have one. It may be possible to hire an investigator to find out more.



The BC Family Law Act says that unreasonably restricting a spouse's financial or personal autonomy (independence or freedom) is **family violence**. All **family dispute resolution professionals**, including lawyers, mediators, and family justice counsellors, have to assess whether their client has experienced family violence to see how it affects the safety and fairness of negotiations. You should never feel forced to negotiate with an abusive spouse.

Preparing your financial statement

In a financial statement, each spouse lists their income, assets, expenses, and debts. This helps them understand each other's financial situation before negotiations begin.

If you're planning to ask the court to set aside your separation agreement, you'll have to fill out a financial statement in a specific form called Form F8, which is in Appendix A of the Supreme Court Family Rules. The form has six parts, but you only have to fill out the parts that apply to your situation. You can get the form online at www2.gov.bc.ca. In the search bar, type Form F8. Then click the link Supreme Court Family Rules Forms. On the next page, scroll down and click the link Financial statement.

Preparing a financial statement can seem overwhelming. The form asks for a lot of information. Take your time filling it out. Be honest about your household expenses and don't underestimate what you need to spend for groceries, children's school supplies, childcare, and other expenses. If you have a low income or rely on social assistance (welfare), you may not be able to afford the food, clothing, childcare, and other things your children need right now. In your financial statement, you can list the amounts you would spend on these things if you had enough money.

Make a note of any questions you have or things you don't understand. See pages 15 – 16 for information about where to find legal professionals who can answer your questions.

You must attach copies of the following documents to your financial statement:

- Tax returns for each of the last three years, including any Notices of Assessment or Reassessment
- If you're employed, your most recent statement of earnings, showing your total earnings paid so far this year
- If you're not employed and receive government benefits, your three most recent Employment Insurance (EI) benefit statements, workers' compensation benefits statements, or a statement showing the amount of social assistance you receive
- If you own a home or other real estate, the most recent assessment notice from the assessment authority for the property
- If you're self-employed or control a corporation, the business financial statements for the last three years and a statement showing the breakdown of all salaries, wages, management fees, or other payments you've paid to anyone you're close to (that is, who's not "at arm's length"), such as a family member or someone you're dating
- If you're in a business partnership, a statement showing any income drawn from and capital in the partnership for the last three years
- If you're a beneficiary under a trust (when someone else holds property for your benefit), a copy of the trust settlement agreement and the trust's three most recent annual financial statements

After you prepare your financial statement, you must take it to a Commissioner for Taking Affidavits (a lawyer, notary public, government agent, or clerk at the court registry) and **swear** (take an oath) or **affirm** (formally declare) that it's complete and accurate. You can be challenged in court if your financial statement doesn't make sense, contains untrue or exaggerated information, or leaves out important information.

If your spouse's financial statement doesn't include all the necessary information, you may **demand particulars**, which means you may ask for more details. If your spouse doesn't provide the information, the court may order your spouse to produce it or prepare a new financial statement.



Managing your case and working with a lawyer

Asking the court to set aside a separation agreement can be a challenge, but you may be able to get help. See pages 15 – 16 for information about free legal help.

If your only issue is fair division of property, legal aid in the form of **representation services** (a lawyer or referral to a lawyer to represent you in court) isn't available to help with your application to set aside your separation agreement. Usually, you'll have to pay a lawyer to represent you, or you'll have to represent yourself.

You have to apply in BC Supreme Court and pay fees to file your documents to set aside a separation agreement. If you have a low income or receive income assistance, you can apply for an order to **waive** (not pay) these fees. This is called an application for indigent status. The LSS Family Law in BC website has a step-by-step self-help guide on how to make an application to waive court fees. See familylaw.lss.bc.ca/guides/waiveFees.

Here are some tips on how you can manage your case and work with a lawyer.

- Remember that lawyers think like lawyers. They're trained to find and solve legal problems, but they aren't social workers or counsellors. Trained counsellors and family support workers can give you emotional support and help you identify your legal issues.
- Make a timeline of important events. This will help your lawyer understand your situation. Write down dates for things like when your children were born, when you and your spouse bought your home, when you stopped living together, etc. Lawyers' time is expensive, so focus on important details during your meetings.
- Make a list of questions for your lawyer. This will help you get all the information you need from your lawyer and understand your rights and responsibilities. If your lawyer tells you something you don't understand, ask them to explain. It's important that you don't feel confused after a meeting with your lawyer.
- Take a friend or other support person with you, if you can. It may be difficult to remember everything your lawyer says, especially if you're feeling strong emotions or dealing with a complicated situation. A friend or advocate can support you by taking notes and reminding you of important questions to ask. Check with your lawyer before taking someone with you to an appointment.
- Know that fees, disbursements, and costs are different things. Lawyers often charge hourly rates (**fees**). There may be additional expenses (called **disbursements**) for things like photocopying and postage. Ask your lawyer about how to keep these expenses as low as possible. If you lose your case, you may have to pay for the other party's **costs**.
- Tell your lawyer if you were abused. If your spouse abused you or your children physically, sexually, emotionally, or financially, threatened you, stalked you, or made you feel unsafe in any way, tell your lawyer. Your lawyer has to protect **lawyer-client confidentiality**, which means that your lawyer can't tell anyone about your conversations without your permission. If you don't want your lawyer to talk in court about your abuse, you can say so, but it's still a good idea to tell your lawyer about the abuse anyway.



- Keep copies of all of your information. Make copies for your records of all your financial documents before you give them to your lawyer. If you don't have a copy of your separation agreement, ask your lawyer to send it to you. If you didn't have a lawyer when you made the agreement, you can get a copy from the court registry if it was filed there.
- Read about the law on your own. You can get some excellent free self-help guides online and in print. Many are available in languages other than English. See pages 15 – 16 for information about these resources.

The LSS Family Law in BC website has a checklist to help you prepare and work well with your lawyer. See familylaw.lss.bc.ca/resources/fact_sheets/how_to_work_with_lawyer.php.



Resources: Where to get free legal help

Rise Women's Legal Centre

201 – 456 West Broadway
Vancouver, BC V5Y 1R3
604-451-7447
womenslegalcentre.ca

Free and low-cost legal services and advice to self-identified women in BC.

LSS Family Law in BC website

familylaw.lss.bc.ca

LSS Legal Aid BC website

legalaid.bc.ca

Free legal information, legal advice services, and legal aid if you qualify.

MyLawBC website

mylawbc.com

LSS Family LawLINE

604-408-2172 (Greater Vancouver)
1-866-577-2525 (elsewhere in BC)

Brief, next-step advice from a lawyer on family law issues for people with low incomes.

PovNet

Find an Advocate
povnet.org/find-an-advocate

A directory of community-based advocates across Canada.

Access Pro Bono

accessprobono.ca

604-878-7400 (Greater Vancouver)

1-877-762-6664 (elsewhere in BC)

Legal advice clinics for people with low to modest incomes.

Clicklaw

clicklaw.bc.ca

Legal information and resources from community and government organizations.

Mothers Leaving Abusive Partners: Family Law Information

legalaids.bc.ca/read

A guide for women with children leaving abuse, produced by LSS and the YWCA Metro Vancouver.

Toolkit for Immigrant Women Working with a Lawyer

bwss.org/wp-content/uploads/2014/10/Toolkit-for-Women-FINAL.pdf

A guide about the legal system and a workbook of forms and worksheets, produced by Battered Women's Support Services.

Also available in:

- Punjabi: bwss.org/wp-content/uploads/Punjabi_Toolkit-for-Women-Working-with-lawyers.pdf
- Farsi: bwss.org/wp-content/uploads/Farsi_Toolkit-for-Women-Working-with-lawyers.pdf

The BC Family Law Act: A plain language guide for women who have experienced abuse

blogs.ubc.ca/cfls/files/2013/07/fla_guide1.pdf

A guide produced by UBC's Centre for Feminist Legal Studies.

The New Family Law Act and its Implications for Battered Women

bwss.org/wp-content/uploads/2010/07/Family-Law-Act-GUIDE_2.pdf

A guide produced by Battered Women's Support Services.

Justice Education Society

justiceeducation.ca/content/legal-help?topic=Family

A legal help directory on family law in BC.

How to get free copies of this booklet

Order

crownpub.bc.ca

(under Quick Links, click BC Public Legal Education & Information)

Read

westcoastleaf.org

(under Publications, click Educational Resources)

legalaid.bc.ca/read

Questions about ordering?

Contact Legal Services Society

604-601-6000

distribution@lss.bc.ca

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