

Family

Common pitfalls for family law clients

By **Laurence Klass**



Laurence Klass

(February 4, 2020, 11:12 AM EST) -- "If I knew then what I know now ..." is a common refrain among family law clients, heard again and again by counsel. While hindsight is 20/20, we can all strive to learn from the mistakes of others in order to avoid making them ourselves. This article summarizes many common pitfalls for existing (or prospective) clients, which they come to regret later in life.

Parties separate for a multitude of reasons. Regardless of the reasons, the parties are likely not in a position to rationally evaluate their circumstances. Neither are they likely to carve a path forward that is practical and sound from a legal perspective. The parties will be embroiled in the raw emotions of a breakup and everything that entails, which limits their ability to be objective and reasonable.

As lawyers, our job is to steer our clients towards a sensible resolution and to be the objective voice of reason that our clients frequently need to hear. However, without consulting with a lawyer, and perhaps daunted by the expense of retaining such services, parties may be tempted to deal with the fallout from their relationship breakdown themselves, without legal assistance, which can lead to undesirable consequences.

Below are some common mistakes people make when separating or divorcing, which could be avoided by obtaining the proper legal advice.

Selling home and equally splitting proceeds

This strategy may make sense if the mutual intention is reflected in a written agreement, to ensure certainty. However, often such an agreement does not exist in writing, so this important intention is not accompanied by any documentation. The parties go their separate ways and move on from the relationship.

Years later, one of the spouses is served with a Notice of Family Claim. What happened? The other party now alleges that there was no final agreement, they had just dealt with part of the family property or it was merely an advance. It may be that one party had used their 50 per cent share to invest in another property, while the other had spent theirs and now wants a share of the increase in value of the other's asset. The legal cost of dealing with this claim will often far exceed the cost it would have taken to retain a lawyer and document the intention at the outset in a proper agreement.

The 'DIY' separation agreement

Perhaps the parties have read the first part of this article and know the importance of agreements. At the same time, they are in a rush to divest themselves from each other and may attempt the "do-it-yourself" agreement using whatever precedent can be found online. This DIY agreement often features the following hallmarks:

- The precedent is old and refers to out of date or repealed legislation.
- The precedent is from a different jurisdiction.
- The agreement includes unnecessary clauses.
- The agreement does not include necessary clauses.

- One or both of the parties did not make proper disclosure.
- One or both of the parties did not obtain independent legal advice.

As a result, this DIY approach has now set up the parties for an agreement that is set aside, and they go back to the beginning, with the threat of costly litigation down the line.

Choosing inaction

In a marriage-like (non-marital) relationship, we often see one party controlling most of the family assets. With that power imbalance, the controlling party is happy to sit out the two-year limitation period, perhaps assuring his or her spouse: "Don't worry, we will work it out in due course." The other spouse is then left in a vulnerable position. If such vulnerable parties do not obtain legal advice, they may become statute-barred from being able to apply for spousal support and property claims.

The 'divorce only' approach

There are occasions where the parties rush to obtain a divorce only, ignoring other financial, support and parenting issues that may be present. In the process, one of the parties is left at a disadvantage. The divorce should be part of the claims sought and obtained. Once the divorce (only) is granted, the parties only have two years to deal with property and support issues, which puts them on the same footing as if they were in a marriage-like relationship and at risk of losing leverage due to inaction.

The 'joint claim for divorce' approach

A joint claim for divorce may be a great idea depending on the situation. However, much depends on the execution, which may fall short if legal help is not available. If a party realizes that a joint divorce means they are reliant on the other party, they should remember that they have separated and are getting divorced for a reason. Sometimes claims are filed, then one of the parties disappears without a trace. The divorce may then not be obtained until years later (if at all), with significant efforts and sizable legal costs to boot.

Conclusion

In general, the earlier legal advice is sought, the less overall cost is accrued to the client. As the saying goes, "An ounce of prevention is worth a pound of cure." We see this axiom play out repeatedly in the family law arena when parties embark on various paths that they think will be timely and cost effective without first consulting with a legal professional, where often the opposite is true.

Laurence Klass is the practice group leader of the family law group at Watson Goepel LLP. With a passion for helping families navigate difficult transitions, Klass is an experienced litigator, regularly appearing in B.C. courts.

Photo credit / AndreyPopov ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Yvette Trancoso-Barrett at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.