

## DETERMINING THE DATE OF SEPARATION

The date of separation is usually the date we lawyers call the “Valuation Date” or “V-Day”. Except in rare cases, such as where a party proves that they have an equitable or trust ownership interest in a particular piece of property, there is no sharing in the value of assets or in the debts or liabilities incurred by a party *after* V-Day. The value of the property, liabilities and debts that exist on V-Day will be shared if the parties are married.

Sometimes the result can be bad for you, such as when your spouse has incurred significant debt prior to the V-Day and sometimes the result is good, such as when an asset has significantly risen in value. By way of example, imagine you owned a million dollars in Nortel stock. If you separated on the day the market crashed then you would have to share ½ the value of those stocks with your spouse, even though the market crashes the very next day and the stocks are then worth nothing. If, on the other hand, the market crashes on the day before separation and are worth nothing on the day of separation, then the loss would be shared equally.

You can’t pick the date based on what is most advantageous to you and you should not just pick the date that one of you moved out of the home as the date of separation. Below are some of the criteria a court will look at when determining the correct date of separation or V-Day. Give some thought to these criteria before selecting the date and pick the date that best reflects the criteria for establishing the date of separation.

### **Statutes**

1. Under the *Family Law Act*, the valuation date, or “date of separation” is defined as the date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. Under the *Divorce Act*, parties were separated if the parties lived apart and either of them had the intention to live separate and apart from the other.

### **Case Law**

*Oswell v. Oswell* 1990<sup>[1]</sup> was decided under the *Family Law Act*. The parties disagreed on the date of separation and the difference between their respective dates was

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<sup>[1]</sup> CarswellOnt 278 (Ontario Supreme Court, High Court of Justice)

approximately four years. The court noted the various indicia (below) set out in several cases under the *Divorce Act*, which contains similar phraseology, to assist a court in determining when spouses who occupy the same premises are living separate and apart:

- There must be a physical separation. Often this is indicated by the spouses occupying separate bedrooms;
- There must also be a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium or of repudiating the marital relationship;
- The absence of sexual relations is not conclusive but is a factor to be considered;
- What discussion has there been of family problems and what has been the nature of the communication between the spouses;
- Presence or absence of joint social activities;
- What was the meal pattern;
- Although the performance of household tasks is also a factor, help may be hired for these tasks and greater weight should be given to those matters which are peculiar to the Husband and Wife relationship outlined above;
- The court must have regard to the true intent of a spouse as opposed to a spouse's stated intent. An additional consideration to which this court may have regard in determining the true intent of a spouse as opposed to that spouse's stated intentions, is the method in which the spouse has filed income tax returns.

Although the issue in the case was whether the parties were spouses, the case of *Molodowich v. Penttinen* is also helpful as it sets out the generally accepted characteristics of a conjugal relationship. In that case courts are directed to consider the following and to ask the following questions:

1. Shelter:

- Did the parties live under the same roof?
- What were the sleeping arrangements?

2. Sexual and Personal Behaviour:

- Did the parties have sexual relations?
- Did they maintain an attitude of fidelity to each other?

## Determining the Date of Separation

- What were their feelings toward each other?
- Did they communicate on a personal or intimate level?
- Did they eat their meals together?
- What, if anything, did they do to assist each other with problems or during illness?
- Did they buy gifts for each other on special occasions?

## 3. Services:

What was the conduct and habit of the parties in relation to:

- preparation of meals;
- washing and mending clothes;
- shopping;
- household maintenance; and
- Any other domestic services?

## 4. Social:

- Did they participate together or separately in neighbourhood and community activities?
- What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

## 5. Societal:

- What was the attitude and conduct of the community toward each of them and as a couple?

## 6. Economic Support:

- What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?
- What were the arrangements concerning the acquisition and ownership of property?
- Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

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