Legal Ease

Chances are you've heard horror stories about the divorce process from well-meaning friends and relatives. But before you start to worry about being "taken to the cleaners" or "left without a dime," it's important that you understand a few basic principles of Canadian divorce law.

By Diana Shepherd

The first thing to realize is that every divorce is unique -- just as every marriage is unique. Your individual circumstances, personalities, emotional states, and where you live all play a part in determining what "kind" of divorce you'll have: straightforward or complex; fast or slow; civilized or bitter. This article is not intended to provide legal advice -- you'll need to consult with a lawyer for answers to your specific questions. But knowing some of the "lingo" and what some of your options might be should help you to become a more informed participant in your own divorce -- and that's the first step to taking charge of your post-divorce future.

The Divorce Procedure

The legal divorce process in Canada begins with an application to the court asking it to declare that there has been a "breakdown of the marriage." *The Divorce Act* is a federal law made by the Parliament of Canada, administered equally across all provinces and territories. The Act stipulates the sole grounds for divorce as marital breakdown, and provides for three basic ways for proving it:

1. **You and your spouse have lived "separate and apart" for one year.**
2. **Your spouse has committed adultery.**
3. **Your spouse has treated you with intolerable mental or physical cruelty.**

Of these, the first -- a "no-fault" -- ground is easier to prove than the "fault" grounds. More than 80% of divorcing couples file for divorce citing the one-year separation.

According to Julien Payne, one of the architects of no-fault and an Ottawa-based lawyer, no-fault divorce reduces hostility in the legal process. "Fault breeds anger, inflammation, and retaliation -- that's why we got rid of it," says Payne.

Although critics have suggested that no-fault has increased the divorce rate and even contributed to the feminization of poverty, Payne believes that a return to fault would not reduce the incidence of marriage breakdown in our contemporary society. "In our current day and age, we have a cultural ethos where people don't have any strong incentive to stay in a dead marriage," he points out. "The critics of no-fault divorce don't go to the root of the problem."

According to Payne, people need to differentiate between what the legal system does and how their emotional condition is affected by the conduct of their spouse. "If someone's wife is unfaithful, they may be very annoyed," he says. "But that doesn't mean that we should establish a legal system around fault any more than we should allow the criminal-law process to be reflective of only the victim's point of view."

No-fault divorce acknowledges that both husband and wife have contributed in some way to the breakdown of the marriage, so one party is no longer "punished" -- financially and otherwise -- for being solely to blame for the marriage's failure.

One advantage of no-fault is that parties don't have to waste time and money hiring detectives to prove grounds. It reduces the need to litigate for days or weeks about grounds and allows couples to move on to important issues such as custody, child or spousal support, and distribution of marital assets.

"It's possible there might be some tactical reason to use fault, but one would need to be really careful," says Joel Miller, a practicing Toronto lawyer and the founder of www.familylawcentre.com, a comprehensive source for Canadian family-law information. "You don't have to wait the year if using fault, if there's some degree of urgency, but doing so is very inflammatory unless there's some advantage in creating a lot of hostility. All other relief can be obtained in a year in any event."

When a judge makes decisions about property and support, he or she takes factors into consideration such as:

- how long the marriage lasted;
- what the couple's ages are;
- both parties' standard of living during the marriage;
- what marketable skills each one has or could acquire;
- the health of each party;
- any financial obligations to prior families;
- the necessity of the custodial parent to stay at home with the children;
- the contributions each one has made towards the marriage (through regular employment, homemaking, investments, etc.)

In certain situations, the judge may award permanent maintenance (ask your lawyer if you're eligible for this).

So rather than looking for which party has the biggest list of complaints against the other, the courts now try to create an equitable solution based on what each spouse requires to be financially independent and off public assistance.

Generally speaking, there's no advantage to filing for divorce using the fault (adultery or cruelty) rather than the no-fault (living separate and apart) grounds; in terms of property or support awards, which ground you cite is immaterial. The only time when fault might be relevant is during a custody dispute. For instance, if your spouse is abusive, a drug addict, or a criminal, filing for divorce on these grounds may help to ensure that you get custody of your children.

The Adversarial Divorce

The very word "adversarial" implies that each party considers the other to be an enemy; that there will be a "winner" and a "loser" at the end of the process. According to Margorie L. Engel and Diana D. Gould, co-authors of *The Divorce Decisions Workbook* (McGraw-Hill, 1992), the two most popular female threats in an adversarial divorce are: "I'll take you to the cleaners!" and "I'll get the children, and you'll never see them!" The two most popular male threats are: "You'll get no money!" and "I'll take the children!"

During a truly adversarial divorce, each spouse is looking out only for his or her own interests rather than trying to resolve their issues in a fair, balanced way. Everyone has heard of a "divorce from hell" in which the participants have spent years in litigation and ended up bankrupt rather than compromise on a single issue. Such divorces, however, really aren't the norm.

"To get out of the divorce process, get on with your life, and acknowledge the end of the marriage is a valuable step worth paying for," says Miller. "People who want these tend to be uninterested in litigating. Litigation is emotionally draining, psychologically harmful, and expensive; it's not a positive or productive experience. For people who are bitter, hostile, or worried about their resources or rights, litigating is a way of forcing the fight into some kind of arena where a judge can make a decision for them. Generally, both clients are hugely better off by not litigating and by making the decisions themselves -- but that requires two people."

Contested vs. Uncontested Divorce

If the divorce petition is unopposed (or uncontested) by the respondent, the case moves forward, and in due course, the petitioner simply moves for judgment. No personal court attendance is necessary for the judge to

grant the divorce. It's important to note, however, that petitioners of unopposed divorces must satisfy the court that reasonable arrangements have been made for the support of the children.

Even when the relationship between husband and wife is strained or adversarial, contested divorces are a rarity in today's legal system. Although some experts believe that there are some emotional and psychological benefits to going to trial (such as psychological vindication and economic rewards if you "win"), most recognize that couples who end up in court ultimately lose sight of the long-term interests of the family unit, inflict additional pain on themselves and their children, and greatly increase their legal costs.

It's estimated that fewer than 4% of all divorce cases actually go to trial before a judge. "Generally speaking, after a year of separation, it doesn't matter what the other side does. Someone's going to get a divorce," says Malcolm Kronby, a Toronto lawyer and the author of *Canadian Family Law* (Stoddart Publishing, 1997). In most cases, particularly in adversarial divorces, the outstanding issues are typically resolved through further negotiation.

A contested divorce must go to trial before a judge. Basically, this happens when spouses are unable to agree on one or more important issues -- often relating to property or custody -- and they are asking the judge to make a decision for them. This should be the last resort, because you're putting your fate in the hands of a busy judge, and you're stuck with whatever the judge decides. For instance, the judge may divide your property 50/50, but you may not get the 50% you want. And a judge may not look at the tax ramifications of his or her decision, so your settlement might end up costing you a lot of money.

"Once a case is contested there is no way of predicting how long it will take to resolve or what the ultimate cost will be," warns Michael Cochrane, a Toronto-based family lawyer with Ricketts, Harris and the author of *Surviving Your Divorce* (John Wiley & Sons Canada, 2002). "Many contested divorces go on for years -- particularly if the dispute concerns property."

"If you have two parties who are genuinely interested in reaching a fair resolution and keeping costs down, although there are a variety of issues, it's not unreasonable for the divorce to be dealt with in two to three months," says Miller. "If the issues can't be easily resolved, it takes much, much longer. When you're disputing amounts of support or income, it can take months to years."

Some common reasons why people want to contest a divorce include:

- **The hopes of reconciliation.** One spouse wants the marriage to continue for emotional, financial, social, or health reasons.
- **Revenge.** One spouse is using this as an opportunity to hurt or annoy the other by dragging the divorce process out as long as possible.
- **Religious beliefs.** One spouse's religion doesn't recognize or sanction divorce.

"Money and kids are the most common issues that need to be resolved," explains Miller, "but very often, people contest a divorce for psychological reasons; they're not yet ready to accept that their former life is over. A lot of people contest divorce to keep the other person from moving on."

Mediation

If a long, bitter court battle doesn't turn you on, you might want to consider trying mediation. Mediation is growing in popularity as an alternative to the adversarial approach to divorce. Basically, mediators provide couples with professional guidance while giving them an opportunity to maximize their personal input into the settlement.

Mediation can offer many advantages. Because the settlement is reached voluntarily, and with the involvement of both parties, it's more likely to be carried out without the need for further litigation or enforcement. The non-adversarial nature of the process and the emphasis on cooperation are also more likely to reduce tension between the parties and encourage future cooperative behavior -- an important objective when children are involved. "There's absolutely no question that mediation is faster and more economical," adds Nancy Macivor, a lawyer-mediator in Richmond Hill, ON.

The best candidates for divorce mediation are couples who are willing to work together, who want to attack the problems they're facing rather than each other. In general, you must be able to separate your feelings of anger or rejection from the actual problem-solving tasks that need to be addressed. "They have to be able to sit in a room and talk to each other," Macivor continues, "although there are times when both parties still become angry and emotional. In those instances, the mediator may caucus them."

"There really has to be an even power balance between the parties before mediation works well," says Macivor. "Where there's an imbalance, it becomes very difficult. You can see it happening when a party with less power accepts a deal not in his or her best interests. When I see an imbalance, I suggest collaborative law, which is still out of the court system but deals with the issue because each party has a separate lawyer."

If you want to try mediation, find a mediator and begin the process as soon as possible; if you're already knee-deep in litigation, any kindly feelings you may have had for your ex will be long-gone, and you'll be less willing to make the compromises that mediation will require for the good of the family.

Even if your mediator is also a lawyer, each of you should still retain your own lawyer to read and advise you of the implications of any proposed agreement before you sign it. In this case, the lawyers will be acting as consultants rather than active participants.

Mediation is growing in popularity as an alternative to the adversarial approach to divorce. Basically, mediators provide couples with professional guidance while giving them an opportunity to maximize their personal input into the divorce settlement. Mutual trust and respect are prerequisites for couples who use mediation. The process provides an opportunity for couples to work on communication skills. It also allows the parties to be very creative with their settlements -- tailoring them to suit their own situations.

Some Canadian courts will provide access to public mediation services free of charge; community organizations use a sliding fee schedule. It's important, however, to be sure that you're adequately served when using community or court-appointed services. Mediators are typically appointed -- and meetings can be limited in time, number, and hence, in scope.

"Some would argue that mediation is not an option when there's been abuse of any kind, physical or emotional," says Macivor. "Both parties would need legal counsel. When you work as a mediator, you're not a lawyer but a facilitator."

It may seem obvious, but for mediation to succeed, both parties must want closure to their marriage. Sometimes, the process can simply be delayed until this level of emotional readiness has been achieved. In situations in which there is ongoing domestic violence, mediation may not be an option.

Collaborative Law

A new alternative to dispute resolution, "Collaborative Law" is gaining popularity among divorcing couples. It's the third resource in a lineup consisting of litigation and mediation.

You and your spouse each hire your own collaborative lawyer, and you conduct settlement negotiations with your lawyers by your sides -- usually during four-way meetings in which the lawyers act as advisors to the clients instead of taking charge of the process. If you can't reach agreement, then your lawyers must both withdraw, and neither your lawyers nor any member of their firms may represent you in divorce litigation. This means all four participants are committed to reaching a reasonable settlement.

"It's a non-adversarial approach, which means that feelings aren't ruffled unnecessarily," explains James C. MacDonald, founder and president of the Toronto Collaborative Family Law Association. "It's less stressful because confrontation is not in the books. The whole idea is to use cooperative strategies rather than confrontation. People retain their dignity and self-respect." The collaborative method reaches for the basic goodness in you and your spouse and looks for win-win solutions. Instead of creating bitterness, it aims to create a renewed respect for -- or a better understanding of -- your ex-spouse.

"Another advantage is the lower cost -- although a negotiation can be prolonged depending on the complexity of the case," says MacDonald. "And you can manage your own timetable; you're not subject to the external timetable that litigation imposes. You don't have someone else tell you when to go or stop. Along with these things, you control your own outcome. The participants themselves make the decisions with the help of their lawyers. The whole process tends to expand the options beyond what's normally available in the court-oriented process."

Most negotiations end in agreement because of the determination of all participants -- including the lawyers -- to reach that goal. "All you need is the tiniest bit of willingness to settle on the part of both spouses," says MacDonald. "We work on that willingness, and it usually brings about a settlement."

If you *can't* reach agreement, you'll have a clear understanding of the issues involved, which should help you deal with your new lawyer more effectively -- saving time and money. "If the case can't be settled, the process is considered a failure on the part of the collaborative lawyers. No one likes failure, and the risk of failure is one of the goads that keeps the process moving. If a settlement is unattainable, the parties then retain other lawyers and the collaborative lawyers resign from the case. By virtue of the participating agreement they've signed, they're disqualified." This restriction actually promotes the success of the process, says MacDonald. "The collaborative lawyers can forget about keeping up with developments in litigation and concentrate on honing negotiating skills, including conflict management and effective communication."

Annulment

A divorce disolves a legal marriage; an annulment is a judgment declaring that the marriage was never a legal one. The circumstances under which you can file for an annulment are limited -- and "living separate and apart" is not one of them. The annulment procedure is usually complicated, often requires expert testimony, and should not be considered without consulting a lawyer first. Generally speaking, the most common grounds for an annulment are:

- **One party lacked the capacity** to consent to the marriage. For instance, one party lacked the mental capacity to consent, was so ill that he or she couldn't consent, had been plied with alcohol or drugs, or was forced or fraudulently induced to enter the marriage.
- **One party was a minor** (less than 18 years old in AB, ON, MB, QC, SK, and PEI; or 19 in the remaining provinces and territories) and the marriage occurred without parental consent and a court order granting permission to marry.
- **Bigamy.** One party was still legally married to someone else when the marriage took place.
- **Consanguinity.** Marriage is prohibited because of blood relationship (brother and sister, father and daughter, aunt and nephew, uncle and niece).
- **Sexual impotence.** At the time the marriage took place, one of the parties was and has since remained unable to have normal sexual intercourse with the other.

"Other reasons people want to annul are cultural reasons -- for example, if it's very important that you not be seen as a formerly married woman in your community," adds Miller. "Some people may think there's a social value to it. But an annulment is only available under a tiny set of circumstances."

As you take your first steps towards legal separation or divorce, it's important to remember that each divorce is unique and there are many approaches to divorce available in the judicial system. With careful consideration, you're certain to find the professionals and the approach that are right for you.

With files from Jeffrey Cottrill.