



Novel Coronavirus (COVID-19)

Family Law

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The coming family law tsunami

By Lorne H. Wolfson

Those of us who were practising family law in 1982 will recognize this moment – the moment of quiet before the tsunami hits. The phones have stopped ringing, the mail has dried up and suddenly our calendars are empty. But do not misinterpret the signs; in a few short weeks the tsunami will arrive. What can we expect?

Do I stay or do I go?

It is commonly believed that recessions result in more separations. Certainly the added stress caused by financial meltdowns can be the tipping point in already fragile relationships. However, the decision to separate is usually more complicated than that.

For every person who decides to leave because “things can’t get any worse,” there are others who prefer the devil they know over the devil they don’t. For many, separation is not a realistic option because they lack the financial, emotional or social resources to walk away from an unhappy situation. Throw in the prospect of conflict over the usual family law issues (custody of and access to children, division of property, support, etc.) and many will remain paralyzed with indecision.

Parenting issues

More important than money to many is what is will happen to the kids. Although the labels have changed (custody is now primary residence and access is now parenting time), the issues remain the same. The current situation of quarantines and social distancing creates additional opportunities for conflict.

Parties with whom the children have primary residence will argue that the other spouse’s access to the children should be suspended to comply with government advisories and to avoid unnecessary risks to the children’s health. Parties who already have parenting agreements or orders will no doubt argue that the current situation constitutes a material change in circumstances justifying a variation.

Property problems

The stock market meltdown and the closing of businesses will pose particular problems for those looking to divide property as a result of marriage breakdown. Equalization under the *Family Law Act* is determined based on the value of each party's assets and debts on the date of separation (the valuation date). When an asset (shares in the company, a business, a home) declines in value as of the valuation date, the titled spouse is still required to equalize its value as of the date notwithstanding its subsequent decline in value.

While the court does have the power to make an unequal division of net family property, that power is limited to circumstances in which an equal division would be "unconscionable" (a standard that courts are very reluctant to find). On the other hand, property owners may find the current economic environment is a good time to initiate a separation (on the theory that he or she will be able to get the benefit of a low equalization payment even after the value of his or her asset has recovered).

Variation of support

This tsunami will hit with the greatest force in the area of support. Most separation agreements and court orders provide that child and spousal support provisions can be varied by either party in the event of a material change in circumstances (which can include a significant change in a party's income, loss of employment, business insolvency, etc.). It is foreseeable that virtually every support payor will seek a reduction in the support that he or she is paying and that every support recipient will seek to minimize that reduction.

In those cases where the agreement or order provides for non-variable support except where there has been a "catastrophic change in circumstances," the parties will predictably disagree as to whether or not the change has been "catastrophic." The wave of variation cases will likely take years to resolve.

How do we resolve disputes when there are no courts?

The Ontario courts that typically resolve family law disputes are closed for the foreseeable future. So how are these issues to be resolved? Luckily, family law professionals have, over the past 20 years, developed a wide range of dispute resolution alternatives including mediation, arbitration, parenting co-ordination and collaborative practice. Each model has its own advantages and disadvantages and not every model is suitable for every case. However, at least one of these models will provide a practical alternative for dispute resolution in a world without courts.

Information about these alternatives can be found through the following websites: Family Dispute Resolution Institute of Ontario (FDRIO.ca); Family Mediation Canada (FMC.ca); Ontario Association for Family Mediation (OAFM.ON.ca); and Ontario Association of Collaborative Professionals (OACP.CO).

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Author

Lorne H. Wolfson
Specialist in Family Law

Tel: 416 777 5414
lwolfson@torkinmanes.com

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