**Helping Clients Through Divorce**

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***Please note:*** *The following content is based on Canadian laws.*

I am a Certified Divorce Financial Analyst. The CDFA designation allows me to analyze the financial effects of divorce and settlement agreements to illustrate the short- and long-term effects of a proposed division of assets. Finding yourself advising in this situation is not for the faint of heart. The key is to help the clients move past the emotional turmoil and deal with the assets as if they were negotiating a business deal. The challenges and pitfalls are many, but the benefits are rewarding and worthwhile.

A CDFA can be of help to couples going through divorce in the following ways:

* Understanding the divorce process
* Preserving the family estate
* Dealing with the emotional aspects of certain assets
* Helping to set expectations
* Learning how not to cross the line—“The Unauthorized Practice of Law”
* Moving your clients to the next phase of their life

Money makes people angry, and it makes them anxious! This is why the understanding of money is very important. In some relationships, the reason for the breakdown is simply the fact that one spouse can no longer handle the controlling nature of the other. You may have clients who have never had to deal with issues surrounding the financial well-being of themselves or their family. You may find yourself in the role of supporter and educator.

## Understanding the Process

Unfortunately, not all lawyers are the same or prefer to work in all methods of settlement. People would not go to an eye surgeon to have their gallbladder out, nor should they engage a lawyer who likes to litigate if they can settle their differences by alternative dispute resolution.

Being able to outline the various methods of settlement and helping clients realize that by directing the process they will save on legal fees is a huge step in preserving the family estate. If clients can determine which process best suits their situation and then find a practitioner who prefers to work with that method, and all parties agree, this can be a huge cost saving, both emotionally and financially.

### Mediation

This, by far, is the fairest and least expensive way to settle a dispute. A trained third party helps the two sides come to an agreement. It is then put into a legal document to protect both parties. By using this method, the majority of the family assets are retained for the family. If a single issue cannot be settled in this manner, other options can be engaged.

When suggesting this method to a client, you must first understand whether both parties are willing and capable of settling their affairs in this matter.

If you are aware of a huge power imbalance in the relationship, then a trained mediator will not take the case on. If you have any indication of domestic violence, this is not an option.

However, if your parties are reasonable and willing to settle in a fair manner, then statistically it has been proven that these types of agreements are more satisfying to the people involved and therefore are usually adhered to.

### Collaborative Law

The jury is still out on this type of settlement. Some lawyers have built practices around this method. If a client’s desire is to negotiate using collaborative family law, he or she should seek a professional that *only* settles disputes this way.

Collaborative family law is best suited if you have two parties who consider themselves equal and need a team of advisors to help them come to a resolution based on sound principles.

Here is the drawback. If the negotiations break down on any one issue, the entire team of advisors must be let go, and the process started all over again with new lawyers and advisors. This can prove to be costly. Since your client may not even be aware of what the issues are, or what issues may arise, I personally find it difficult to promote this type of negotiation. This is the major difference between collaborative and mediation where all or one issue can be brought forth to a court if settlement on their own is not possible.

### Arbitration

Due to the long, drawn-out process of litigation, this method can actually save high-net-worth clients money. In places like Toronto where the court system is so backed up, I have heard where both parties have hired expensive lawyers and have sat an entire day waiting to have a judge hear their arguments only to find out that the court has run out of time and they have to come back another day. That can be $10,000 per day, with no results, or they hire a judge directly and pay the $7,000 for the day and walk away with a settlement.

### Litigation

The majority of cases settle on the courtroom steps; however, many dollars and emotional assets have been spent by this time. This process is very long and arduous and can take years, which means it is impossible for anyone to move on until the settlement is complete.

### Organizing and Understanding

#### What You Can Do to Help:

* Help clients get their personal financial paperwork in order.
* Instruct them to keep copies of all financial documentation that comes into the household.
* Have clients freeze liability on all joint accounts and credit cards.
* Direct them to interview lawyers.
* Help them understand their new financial reality.
* Develop a budget.

#### What You Can’t Do to Help:

* You cannot determine what assets belong to each party. This is property law!
* You cannot determine the amount of support that might be required. This is family law!
* You cannot determine valuation of assets. This is property law!

Although we are increasingly becoming a valued part of the team, lawyers protect their territory when it comes to family law. There are several acts that come into play when settling a domestic dispute: Some are provincial, and some are federal. Although this is not the scope of this presentation, I will outline the basics. As financial planners, we must realize that our clients rely on what we tell them, and due to our trust relationship, we must never say anything that might cross the line of giving legal advice. It is imperative that we learn to work with the legal profession to serve the best interests of our clients.

### Networking Contacts

We need to work with other professionals in order to help people through this process. It is important to have a referral network, including the following:

* Pension actuaries
* Mediators
* Parenting co-coordinators
* Lawyers
* Social workers
* Accountants
* Business valuators
* Arbitrators

### Be Part of the Team

By understanding the processes and the needs of your clients, you can become an invaluable part of the team. By helping clients to set expectations based on good financial advice, you can help preserve the estate for the family. If you can help drive the bus, the clients will realize you understand their entire situation and will not leave you when all is said and done. You will be responsible in helping them retain their assets.

### Three Sources of Money

1. Family property
2. Spousal support
3. Child support

Although the laws are clear, the waters become muddied when emotions become involved.

The best thing we can do is to help our clients understand that when the love is gone and it’s time to split up the assets, it is a business decision and must be treated in that manner. Where the fight usually erupts is when one party feels it has a claim that is not founded in law, or where ownership is not clear. Although it is ultimately up to the lawyer to advise on property rights, as a financial advisor, you need to be aware of a few things.

### Family Property

* Each party is entitled to 50 percent of the value of property gained or grown during the time of the marriage.
* This is different than 50 percent of each asset.
* There are legal formulas for figuring out the net family property—as there are exemptions, deletions, and exclusions.

### Family Property—Two Things to Consider

1. Ownership
2. Division

Again this is not something for a financial advisor to determine, but it does, once again, go to emotion and financial reality. Such things as time-shares, cottages, and the like become very territorial, whether realistic to retain or not.

### Inheritances

Inheritances are not divided upon marriage breakdown

* if received before marriage
* if received during marriage and is intact or is traceable
* except if stipulated in a prenuptial agreement or marriage contract

If the inheritance was received before the marriage, it will not be included in the net family property. Therefore, you won’t be entitled to it, plain and simple, under divorce laws. The value of property owned on the date of separation, other than the matrimonial home, that was acquired by gift or inheritance from a third person after the date of marriage is excluded from a division of matrimonial property. If you received an inheritance during your marriage, and that inheritance is still intact or is traceable, you do not have to divide that inheritance upon marriage breakdown. So, too, is income from that property, but only if the donor or testator (the person who died and made the will) expressly stated that the income was to be excluded from the spouse’s net family property, unless there was a private domestic agreement (prenuptial agreement or marriage contract), which is enforceable, and it reinforces the idea that your spouse’s inheritance (property, income from that property, etc.) is to be included in the net family property in case of a divorce.

### Child Support

* Neither taxable nor tax deductible
* Based on which parent has custody for 60 percent or more of the time
* Offset against each spouse’s income
* There are strict tables that outline the amounts payable.
* Covers food, clothing, and shelter

### What Isn’t Covered

* Section 7 expenses
* Although it will never be up to you to determine what falls into this category, it will be important to discuss as part of family lifestyle.
* From the emotional side, it will be the desire of the leaving party to want to keep the status quo for the children.

Section 7 covers everything from Johnny’s rep hockey to Melissa’s competition ballet, but it also covers education and everything else for the children that is not covered by the support. It is here where you will see people trying to maintain support on a single income what was previously supported by two incomes. It is important to note that Section 7 expenses will never be allowed to eat up a disproportionate amount of income so that there is nothing left for spousal income, if the need be (e.g., a mediation case: a husband wants to see his ex-wife suffer, but he wants the kids to have it all in the form of extracurricular activities in place of support for the ex-wife).

### Spousal Support

* This is taxable to the receiving spouse.
* This is tax deductible to the paying spouse.
* It is always calculated on the difference between the two spouses’ income.
* There are no specific rules; however, there are spousal support guidelines that the lawyers and the judges use.

Although we can help clients understand the reality of their new lifestyle based on the proposals for support, we can in no way indicate what is required, needed, or use the word *should* when discussing support (e.g., client who goes to lawyer and says, “My advisor says. . .”).

### Spousal Support Continued

#### Lump Sum vs. Periodic

Up until recently, if you would have suggested a client look at a lump-sum settlement, the lawyers would wonder what was in it for you. But with issues like alcoholism and gambling, sometimes this is the best or only option.

I find that sometimes this is the single issue that helps a client understand the value you can bring to the table. Although during the negotiation is no time to explain product or return on investment, it may be time to help them understand guaranteed cash flow.

### Emotional Assets

* Matrimonial home
* Pets
* A business
* Cottage

#### Matrimonial Home

This by far (next to the pension) is the most emotional asset of all. It is here where you will be able to make the most impact in terms of a reality check. In nine cases out of ten you will hear, “I just want to stay in the house until the kids finish school.” Who better than a financial advisor to help the clients understand the impact of this decision both short and long term?

What can you do? First and foremost, prepare a budget; help the clients establish whether or not it is realistic to even consider living in the house. Secondly, look at the other assets in the estate. If there is a pension they are giving up for the matrimonial home, does this make sense long term? Determine if there is cash for maintenance and repairs. Talk about market risk of value.

### Pensions

“They weren’t working by my side while I earned my pension by the sweat of my brow. It is mine and I am not sharing it.” This is just one of the comments I have heard repeatedly.

It depends on the case, but in nine out of ten cases, this is the most controversial asset.

When I started working with separating clients, the lawyers would run the other way when I wanted to split the pension. Our pension laws in Canada vary from province to province, and in Ontario, it was next to impossible to get proper information to split the pension. Over the last few years, this has changed. The most important advice you can give a client is to get a proper pension evaluation from a certified pension valuator. This includes government pensions. Unless it comes from a valuator, the information is incomplete, and clients may be giving up value on negotiation. Make sure your clients understand the full impact of this asset!

### Retirement Accounts

Although this might seem like a topic all advisors would know about, I can assure you I have seen many mistakes. The biggest mistake is not asking the right questions.

Retirement accounts, Canadian Pension Plan, and IPPs:

* One-time rollover, based on the wording of the separation agreement
* Canadian Pension Plan—making sure clients apply for the credit splitting (sometimes missed by lawyers and clients)

### Retirement Account Transfers

These are rolled over if:

* funds transferred remain in a Registered Retirement Savings Plan or a Registered Retirement Income Fund (similar to 401(k)) of the recipient
* done pursuant to a court order or written separation agreement

If some or all of the amounts in a Registered Retirement Savings Plan or Registered Retirement Income Fund are being transferred between spouses or common-law partners as a result of separation or divorce, the transfer can take place on a tax-deferred basis on two conditions:

1. The money being transferred remains in a Registered Retirement Savings Plan or Registered Retirement Income Fund of the recipient spouse or partner.
2. The transfer is done pursuant to a court order or written separation agreement using a specific government form.

When the recipient spouse or common-law partner later withdraws money from his or her Registered Retirement Savings Plan or Registered Retirement Income Fund, the full amount is taxable in that person’s hands at the marginal tax rate in the year of withdrawal.

So, in some cases, it makes sense to transfer some or all of a Registered Retirement Savings Plan or Registered Retirement Income Fund as part of equalization between spouses upon relationship breakdown.

Specifically, Registered Retirement Savings Plan transfers are a preferable way of satisfying equalizing obligations when there is a dramatic difference between the marginal tax rates of the spouses, particularly where the recipient spouse intends to draw income from the Registered Retirement Savings Plan or Registered Retirement Income Fund at a future time when his or her taxable income is lower.

### Insurance and Investments

Some things to take into consideration include:

* Transfer of ownership
* Beneficiary designations
* Rollovers of investments
* Disability protection for the receiving spouse
* Shortfalls of group insurance
* Annuities for income protection

If you do not have your insurance license, this may be a time where you could refer a client to someone who does. If you do have your license, it may be where you can be of the most value.

Try to work with the lawyers to get them to understand the logistics needed for protection of income in case of disability or death. This might be my single, biggest nemesis in helping clients through the maze of separation and divorce. To this day, it seems impossible to get the legal profession to understand that, unless the client who is to be protected (the receiving spouse) is the owner and beneficiary of the policy; giving him or her permission to call the insurance company (in the separation agreement) is not adequate. How many single moms have the time or energy to call the insurance provider to make sure the premiums are paid up to date and the policy has not lapsed? Another way to protect the client is to have the premium amount included in support payments and have the protected party pay the premium, but have the client named as irrevocable beneficiary.

Lawyers for the receiving spouse should insist on income protection on payer to guarantee the support payments in case of death, but even more so, in case of disability. In addition, the advisors should be cautioned on relying on group benefits for the protection of the receiving spouse as these can easily be lost or changed.

### Other Things to Consider

Tax issues are another huge area of concern. Although lawyers have a basic knowledge of taxes, they may not understand or take into consideration the implications on certain investment products.

You may ask your clients to let you review the separation agreement prior to their signing. This will allow you to point out anything that may impact them financially that has not come to light. It is important to make sure that whatever other advisor you may suggest they work with understands that they are reviewing things from the perspective of family law.

### The Law

In Canada, there are three governing bodies when dealing with the financial assets of people who are separating:

1. Federal: The Divorce Act—This act deals with the issues of custody, access, and support. It also defines *spouse*.
2. Provincial: The Family Law Act—This act deals with property.
3. Income Tax Act—This act deals with everything.

### Definition of *Spouse*

It is important to make the following note: “Clients living common law, according to the courts, have made a decision to opt out of matrimonial law.” (the Divorce Act)

Same sex couples follow the same rules when married or common law.

What does it mean to “opt out”? I can assure you this will come as a major surprise to most common law couples. The value of matrimonial law is to protect both parties for both property and support right. By opting out of marriage, a couple is no longer protected by the Divorce Act. So if there is a question about property, they must rely on civil law.

### Helping Clients to Understand the Financial Reality for Now and the Future

Making an informed financial settlement helps to move to the next phase of life.It also helps to illustrate the financial effects from the division of assets and support payments on both short- and long-term futures.

Here’s scenario one for Kate and Kenneth. Kate is 46 years old and Kenneth is 52 years old. They’ve been married for 18 years. They have two sons, ages 11 and 7. Kate’s take-home pay is $21,600. Kenneth’s take-home pay is $132,000.

Their joint assets include:

* Home equity: $180,000
* Mutual funds: $92,000
* RRSPs: $212,000
* Business: $180,000

Kate’s assets:

* Home equity: $180,000
* Half of the mutual funds: $46,000
* Half of the RRSPs: $106,000
* Total: $332,000

Kenneth’s assets:

* Half of the mutual funds: $46,000
* Half of the RRSPs: $106,000
* Business: $180,000
* Total: $332,000

Kenneth offers Kate 50 percent of the assets, $1,000/month child support, and $1,500/month spousal support for five years.

 In the second scenario, spousal support is increased to $2,500 per month for 10 years.

 What would it take to equalize net cash flow the first year?

* $5,000/month spousal support for five years
* Then $4,000/month for five years
* Then $3,000/month for five years

