

# Living separate and apart in the same house

by Janice Mucalov, LL.B.

To get a divorce in Canada, you must show that there has been a "breakdown of the marriage." The federal *Divorce Act* says that such a breakdown occurs in three cases: separation, adultery, and physical or mental cruelty. Most divorces are based on separation – to get a divorce on this ground, you simply need to establish that you and your spouse have been living "separate and apart for at least one year."

Often when a couple separates, one spouse physically moves out and lives elsewhere. But not always. Sometimes financial circumstances may prevent the two of you from living in separate homes until you sort things out. Or maybe neither one of you wants to leave the children right away.

The question is – can you be separated, but still live under the same roof? To decide this, the courts will look at the particular circumstances. Generally speaking, living separate lives – even while sharing the same house – combined with an intention to end the marriage is sufficient to establish that the two of you have been living "separate and apart."

But the evidence must be convincing. There must be an intention to end the sharing of married life together and the normal intimacies that go along with that. For example, things like sleeping in separate rooms; not going out together; opening separate bank accounts and closing your joint account; buying separate groceries, preparing separate meals and eating separately; and performing separate household chores like the laundry are all indications that the relationship has broken down.

That doesn't mean you need to show all of these things. In the case of Mr. and Mrs. M., the court said: "In determining whether a marriage exists the court must give greater weight to those matters that should be peculiar to a husband and

wife relationship, i.e., sexual relations, joint social ventures, communication and discussion of family problems, etc., than to the performance or non-performance by the wife, for example, of meal preparation and laundering, tasks that can be done by any maid or housekeeper."

What happens if you have sex again, or you try to work things out but are unsuccessful? Does this interrupt the separation period of one year and force you to start the clock running again?

The *Divorce Act* actually contains clauses designed to encourage couples to stay together. So if you attempt to reconcile during your separation, this won't stop the clock running. You're allowed to resume living together – or sharing your lives together if you're still in the same house – with reconciliation as the prime purpose for up to 90 days.

The 90 days don't have to run together in one block. It's a total of 90 days within the one-year period of separation that's allowed. But you can't reconcile for more than 90 days if you don't want to start the one-year clock again. In one case, where the husband frequently returned home after "separating," the periods of living together totalled more than 90 days, so even though they didn't get along, they weren't considered to have been "separate and apart."

And, if you simply have sex occasionally with your spouse while living separate and apart (whether under the same roof or in separate homes), that alone won't stop the one-year separation period and delay your divorce.

***This column has been written with the assistance of NAPORA, UNDERWOOD & CO. The column provides information only and must not be relied on for legal advice. Please contact Tyleen Underwood of NAPORA, UNDERWOOD & CO. for legal advice concerning your particular case.***



**Tyleen Underwood**

Lawyer Janice Mucalov has authored several popular law books and writes about legal affairs for a variety of publications. "You and the Law" is a registered trade-mark. Copyright by Janice Mucalov.

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