



Community Legal Information Association of Prince Edward Island, Inc.

Legal Information for Same Sex Couples

People in same sex relationships often have questions about their rights and the rights of their spouse. This pamphlet will give you information about:

- Marriage
- Living together
- Issues around children: adoption, assisted conception, child support, child custody
- Divorce and separation
- End of life issues: wills, power of attorney, health care decisions

Introduction

The legal rights of people who are lesbian, gay, bisexual, and transgendered (LGBT) have changed dramatically in Canada. Since 1969, homosexuality has not been a crime in Canada. In 1996, sexual orientation was added as a prohibited grounds of discrimination in the Canadian *Human Rights Act*. The same was done in PEI's *Human Rights Act* in 1998. In 2005, Canada legalized same sex marriage.

In 2009, the *Domestic Relations Act* became law in PEI. This *Act* amended the *Family Law Act* to redefine “spouse” in all existing legislation in PEI to include same sex spouses.

In the *Family Law Act*, the word “spouse” is defined as:

- two people who are legally married or
- two people who have lived in a conjugal (sexual) relationship for at least 3 years or
- two people who are living in a conjugal (sexual) relationship and are the natural or adoptive parents of a child or children

Most Islanders recognize the phrase “common law spouse” to mean a couple who live together, but are not legally married. Although this is not a legal term, we will use the term in this brochure. We will also refer to spouses who are legally married as “married spouses”.

Marriage

Same sex partners can legally marry in Canada. In PEI, a same sex marriage has the same benefits and obligations as a heterosexual marriage.

Same sex couples can legally marry if both partners are 18 or older, mentally capable, not legally married to another person and not closely related to each other.

Special circumstances can sometimes allow for marriage of a person under 18.

The civil marriage process for same sex couples is the same as for heterosexual couples. A couple may have a religious ceremony, but no religious body is required to marry any couple, heterosexual or same sex.

What steps do we take before we can get married?

You must make an application for a marriage license to Vital Statistics (1-877-320-1253) or an Access PEI site. This service is available at most Access PEI sites. The license must be issued before a marriage can be performed.

You must show identification when getting the marriage license. If you are a resident of PEI, you must show a provincial birth certificate and your provincial health card. If you are from out-of-province, you will need to show a Photo ID. If you are a resident of another country, a valid passport may be acceptable.

If you or your partner is divorced, you must bring the original copy of the Certificate of Divorce to Vital Statistics or Access PEI. If either of you is widowed, you must bring your deceased spouse's Certificate of Death that was issued by Vital Statistics from the Province or Country where the death took place.

There is a fee for the marriage license.

Who can perform marriages in Prince Edward Island?

A civil ceremony is a marriage that can be performed by a judge, a justice of the peace, a prothonotary or a marriage commissioner.

A marriage commissioner is a Canadian citizen or a landed immigrant who is licensed by the province to perform civil marriages.

A religious ceremony can be performed by any registered clergy in the province.

A person licensed to perform marriages in PEI can refuse to perform a marriage if it is not in accordance with his or her religious beliefs.

To get a list of people who can marry you, contact your local Access PEI location or Vital Statistics. Their web site is www.gov.pe.ca/vitalstatistics .

What are our rights once we are married?

All laws on PEI that deal with marriage recognize same sex marriages to be the same as heterosexual marriages. The legal rights and obligations are the same for all legally married couples, whether heterosexual or same sex.

Where can we find more information?

All information about marriage licenses and processes on PEI is available through Vital Statistics. You can contact Vital Statistics at (902) 838-0880 or toll-free at 1-877-320-1253. The Vital Statistics office is located at 126 Douses Road in Montague, PEI C0A 1R0.

Living Together

In the past, couples who lived together in a conjugal (sexual) relationship were called common law partners. The *Domestic Relations Act* amended the *Family Law Act* to include such couples in the legal definition of “spouse”. We will use the term “common law spouses” to refer to partners who live together.

It is important to know that no amount of time together will change a common law relationship into a legal marriage.

Common law spouses have similar rights and obligations as married spouses for child support, child custody and access. In all spousal relationships, there may be an obligation to pay spousal support.

The rights of common law spouses differ from married spouses in division of property. Since common law spouses are not protected by all of the same laws, you and your spouse may wish to create a cohabitation agreement.

What is a cohabitation agreement?

A cohabitation agreement is a legal document in which you express rights and obligations towards each other if you separate. You cannot include child support, custody, access or visiting rights in the cohabitation agreement.

To be legally binding, your agreement must be in writing and be signed by you, your spouse and a witness. It is best to have a lawyer write it for you. If you marry your partner after signing a cohabitation agreement, the agreement becomes a marriage contract.

More information can be found in the CLIA pamphlet entitled “Living Together”.

Important!

In provincial legislation concerning the division of property, a spouse is defined as a person who is legally married. Common law spouses do **not** have the same rights as married couples in division of property.

Children

What are the guidelines for same sex couple adoption?

The guidelines for same sex couple adoption are the same as those for a heterosexual couple. Married or common law spouses can make a joint application for adoption.

If you have a child, your spouse may be eligible to adopt as a step-parent. You may need permission from the other biological parent of the child. For more information and a complete list of adoption guidelines, contact Adoption Services 902-368-6511.

The conception of my child was “assisted”. What are the rights of my spouse? Assisted conception means conception took place by means other than sexual intercourse.

The spouse of a mother who has conceived through assisted conception is presumed to be the lawful parent of the child, even if the spouse has no biological connection to the child.

For male spouses, the spouse who is not the biological father of the child must adopt the child to become a lawful parent. This is because the law gives rights to the biological mother of the child.

Donating sperm or eggs does not make you the parent of a child.

The law does not acknowledge surrogacy. If a woman gives birth to a child, the law recognizes her as the mother of the child, even if she is not biologically related to the child.

Who is responsible for child support if my spouse and I separate?

The law says that both parents must contribute to the cost of raising their children. This is true if you were married, lived together or have never lived together.

A person who “stood in place of” or acted as a parent (for example, a step-parent), might be required to pay child support. For more information on child support, contact CLIA or the Child Support Guidelines offices (Charlottetown 902-368-6220; Summerside 902-888-8188).

Divorce and Separation

The *Divorce Act* is a federal act. In 2005, the term “spouse” was redefined in the *Divorce Act* to include any two people who are legally married. On PEI, a same sex divorce is handled in the same way as a heterosexual divorce.

The only ground for divorce is marriage breakdown. There are three ways to prove marriage breakdown and qualify for divorce:

- a one year separation;
- adultery by the other spouse (and you can prove it);
- physical or mental cruelty (and you can prove it).

You divorce in your current province of residence, no matter where you were married. If you are a non-resident who came to Canada for a same sex marriage, see below for information on the *Civil Marriage of Non-Residents Act*.

If you and your spouse can agree on support, custody, and division of marital property, you may be able to use an Uncontested Divorce Kit to get a divorce. To get a copy of the Uncontested Divorce Kit, contact CLIA. There is a small fee for the kit. The kit can only be used for divorces based on one year separation.

If you cannot agree on these matters, you can try mediation, a collaborative law process, or speak with a lawyer to try to reach an agreement. For more information on divorce, mediation, collaborative law or to get a lawyer referral, contact CLIA (902-892-0853; 1-800-240-9798).

In 2013, the *Civil Marriage of Non-Residents Act* became law in Canada. This *Act* gives same sex couples who came to Canada to get married the right to divorce in the province where they were married if same sex marriage is still not legal where they live. Same sex couples can divorce from the jurisdiction where they live. If you are in this situation, contact a lawyer in PEI or Community Legal Information Association for more information.

When we separate, what is the next step?

You and your spouse may decide to create a separation agreement. You can outline how you will handle division of property, child custody and access, child support, spousal support (if any), and any other issues that matter to you and your spouse. It is a good idea to get independent legal advice about the agreement. Once you are satisfied with the agreement, you can sign it with witnesses present. The terms of your separation agreement can be included in a divorce petition and can become part of your Divorce Order.

If we divorce or separate, will one of us be responsible for spousal support?

The law says that you must try to support yourself after a separation or divorce. But, if one of you is unable to support yourself or will suffer a big drop in income or standard of living as a result of the separation, a claim for spousal support may be made.

Spousal support will only be awarded after any child support is considered.

Spousal support is tax deductible for the payor and must be declared as income by the receiver.

More information can be found in the CLIA pamphlet entitled “Spousal Support: What You Need to Know”.

What are the laws around division of property?

The *Family Law Act* states that both spouses in a legal marriage have the right to an equal division (one-half-share) of any property of the marriage. Division of property does not apply to property either of you owned before being married. There are also exceptions, depending on the circumstances, for inheritances, gifts, personal injury settlements, and proceeds from some insurance settlements.

This equal division does not apply to common law spouses. When common law spouses separate, the person whose name is on the receipt or who has paid for an item may be the

only one entitled to it.

Recently, the courts have been looking at the property of common law spouses more closely than in the past. If you have contributed time or money towards an asset owned by your spouse and can prove it, or if you both intended the item to be jointly owned, the law may now help you to get a share of that asset after separation. If this is your situation, you should see a lawyer.

End of Life Issues

Many people in same sex relationships are concerned about end of life issues and their spouse's rights. With legislative amendments made under the *Domestic Relations Act*, spouses in a same sex relationship have the same rights as spouses in a heterosexual relationship.

Can I name my spouse as the person to look after my financial affairs when I cannot?

You can name your spouse in your Power of Attorney document as the person you want to handle your financial affairs. A Power of Attorney is a legal document usually written with the help of a lawyer. A Power of Attorney allows the person or persons named in the document to take care of your financial and legal business if you cannot do this yourself, or if you wish them to do it for you.

To take on this role, the person you name must be:

- willing to accept the responsibility associated with this position;
- be 18 years or older; and
- be mentally competent.

For more information on Powers of Attorney, contact CLIA at 902-892-0853 or 1-800-240-9798.

What happens if I become ill?

If you are capable, you have the right to agree to treatment or to refuse treatment on any grounds, even if this may result in your death. You can have an associate with you to help explain the medical information to you.

If the health practitioner determines that you are incapable, he or she will choose a substitute decision maker who may make decisions for you. The substitute decision maker can be, in the following order:

- the proxy named in your health care directive
- your guardian, if given this power as guardian
- your spouse
- your children or parents
- your siblings
- a trusted close friend
- any other relative
- the Public Guardian

Can I name my spouse as the person to make health care decisions for me if I cannot?

You can name your spouse as your proxy in a Health Care Directive. A proxy is someone you choose to make health care decisions for you if you cannot make them or communicate them yourself. A Health Care Directive is a document in which you explain your wishes about health care and/or treatment in case you are unable to make decisions or communicate them at a future time. You can also include your wishes about end-of-life medical treatment.

Currently, the law says that if you have not named a proxy, the health care practitioner chooses a substitute decision maker for you. If you haven't named a proxy, the first person the practitioner must choose is your guardian (if you have one that has been given this power as guardian), followed by your spouse, either married or common law.

It is very important that your family and physician know of your wishes about end-of-life treatment.

For more information about Health Care Directives and to get the blank Health Care Directive form provided by the province, call CLIA at 902-892-0853 or 1-800-240-9798.

Can I name my spouse as the executor of my estate?

You can name your spouse as your executor if you wish. The executor of your estate is a very important person. You should pick someone you trust, and possibly someone with some business knowledge. It is easier if your executor lives in the same province as you.

It is important to name at least one alternate executor in case your executor is unable or unwilling to act at the time of your death. You must talk to the person or people you wish to name as executor(s). They must agree to serve in this role.

Some responsibilities of an executor can be:

- gathering together all of your assets,
- applying for probate,
- paying all funeral expenses, debts and taxes owed by you,
- distributing the remaining estate,
- completing a final income tax return

For more information on wills or being an executor, call CLIA at 902-892-0853 or 1-800-240-9798.

Is my spouse entitled to my estate?

If you do not have a valid will when you die, there are provincial laws that say what must happen to the things you own at your death (your "estate").

If you have no will, your estate will pass to your spouse and children.

If you are dependent on your spouse and he or she dies without providing for you or the children, you can ask the court to order the estate to provide support for you. You must have been a dependant of the deceased for at least three years. This must be done quickly, so it is important to see a lawyer about this as soon as possible.

Is my spouse entitled to Canada Pension Plan survivor benefits?

Your spouse is entitled to Canada Pension Plan Survivor benefits. For the purpose of the Canada Pension Plan, a "spouse" is a person with whom you are in a legal marriage and a "common-law partnership" is defined as two people, regardless of gender, who have lived together in a conjugal (sexual) relationship for at least one year. All guidelines for application need to be followed to receive benefits.

Is my spouse eligible for other benefit programs?

You need to carefully check the requirements for assigning a beneficiary for private pension plans, investments, insurance policies, and RRSPs. Sometimes special forms need to be filled out or steps taken to prove the nature of the relationship while you are alive, especially in common law relationships. If a policy says that it is payable to the "wife" or "husband" you need to find out if this includes same sex couples.

Other Notes

Everyone has the right to live free of violence and free of the fear of violence. If you are in a violent or abusive relationship and need more information, please call PEI Family Violence Prevention Services at 902-892-0960 or 1-800-240-9894, Victim Services (Charlottetown—902-368-4582 or Summerside—902-888-8218) or PEI Rape & Sexual Assault Centre at 902-566-8999 or 1-800-289-5656.

The provincial *Human Rights Act* does not allow discrimination in:

- employment
- accommodations
- lease or sale of property
- membership in professional, business or trade associations and employee organizations
- publications, broadcasts, public displays, and advertisements
- services and facilities available to the public
- volunteer work

This includes discrimination based on:

- age
- association
- colour, race, ethnic or national origin
- creed or religion
- criminal conviction (in employment)
- family status
- marital status
- physical and intellectual disability
- political belief
- sex or gender
- sexual orientation
- source of income
- having filed a complaint or given evidence or assistance under the *PEI Human Rights Act*

Resources

Abegweit Rainbow Collective: provides support, education and advocacy to bisexual, gay, lesbian, transgendered, two-spirited and questioning individuals.
(902) 894-5776 or 1-877-380-5776

Community Legal Information Association: provides information, support, referrals and education on the law and the justice system. The inquiry line is confidential and you do not need to give your name. 1-800-240-9798 or (902) 892-0853

Lawyer Referral Service: Island lawyers volunteer to provide brief consultations with people who need legal advice. There is a modest fee for this service. 1-800-240-9798 or (902) 892-0853

Family Legal Aid: Services to low-income clients in family law matters concerning children. Victims of family violence are a priority. Charlottetown (902) 368-6540 and Summerside (902) 888-8066

PEI Human Rights Commission: (902) 368-4180 or 1-800-237-5031 (Toll Free PEI only)

Community Legal Information Association has free pamphlets on all of the topics covered in this booklet.

- Child Support: What You Need to Know
- Spousal Support: What You Need to Know
- Living Together
- Court Orders for your Protection
- Making a Safety Plan
- Islanders' Guide to the *Family Law Act*
- Custody and Access
- Family Court Procedures
- Collaborative Law in Separation and Divorce
- What Do I Include in a Separation Agreement?
- Mediation in PEI
- Making Your Will
- Powers of Attorney
- Health Care Directives
- Divorce Kit: Doing Your Own Uncontested Divorce

This pamphlet was published by Community Legal Information Association of Prince Edward Island Inc (CLIA) for information and education only. It contains general information about the law. It does not contain a complete statement of the law in this area and is not a substitute for legal advice.

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For more information, you can visit our website at www.cliapei.ca, telephone CLIA at 902-892-0853 or 1-800-240-9798, or email us at clia@cliapei.ca . You can also find us at: www.facebook.com/CLIAPEI, www.twitter.com/CLIAPEI and www.youtube.com/CLIAPEI.

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