Wealth & Family Law: Marriage and Common-law Relationships in Canada

Announcer: Welcome to the Empowered Investor Podcast. Have you ever felt overwhelmed by the sheer volume of choices and voices telling you how to plan or invest for your future? With a straightforward approach, host Keith Matthews of Tulett, Matthews & Associates cuts through the noise to help you create a winning action plan for you and your family. The decision-making framework discussed in this show can transform you and your investment experiences and will increase your odds of becoming financially secure. Learn more and subscribe today at TMA-invest.com.

Keith: Welcome to the Empowered Investor. My name is Keith Matthews and I'm joined by my co-host Ruben Antoine. Ruben, how are you today?

Ruben: I'm very good, Keith. What about you?

Keith: I'm great, thank you. And excited about today's show. In today's show, we continue our conversation on family law and the division of assets. So Ruben, why is this such an important topic for our listeners?

Ruben: It's a very important topic because, Keith, as wealth managers, we often get questions from our clients about what happens with their investment accounts if there is a divorce or a separation, and what happens with their other assets as well. So we know these questions are key for Canadians, for families, especially for people who are about to enter into a common-law relationship or getting married, but also for people whose things are not working well and they're about to go through a divorce or separation process. So those topics are really key for these people and with this show, we'll try to provide some clarity around them.

Keith: Yeah, so well said. It's all about planning. And I got to tell you, many times individuals would have told me, "I wish I would have known more before. I wish I would have understood things." So I'm looking forward to your interview today, Ruben. We have done a few in the past where we focused on civil law. Today's show is entirely on common law. So we're dealing with individuals that live in Ontario and the rest of Canada, primarily focused today on Ontario, but we are definitely going to nuance for the rest of the provinces.

Ruben: Exactly, exactly.

Keith: So tell us, who's our guest today, Ruben?

Ruben: We have an incredible guest by the name of Caroline Kim. She's a lawyer and a partner at Miller Thompson. So Miller Thompson is one of the largest Canadian law firms in the country. Caroline specializes in providing legal advice, mainly helping people before and after marriage or common-law relationships. So she works with all kinds of clients and she also works with high net worth individuals, especially in things like negotiation, working in court. And those people sometimes have complex property, corporate assets, family-owned businesses, and trusts. So she has expertise around helping them and guiding them in the matters of family law. So she came to me highly recommended and she covers many, like you said before, Keith, Ontario laws. So she's going to provide her knowledge on that. And I'm very excited to have her on the podcast.

Keith: Likewise, Ruben. So have a wonderful show. Have a wonderful interview with Caroline Kim.

Ruben: Thank you, Keith. Caroline, welcome to the Empowered Investor Podcast.

Caroline: Thank you. I'm glad to be here.

Ruben: I'm really happy to have you as a guest. In the introduction, we already introduced you, but if I can ask you as a first question, how would you describe what you do to someone who has no knowledge of what a family lawyer is?

Caroline: That's a really good question. So I would say that I help people to know what their rights and responsibilities are in a marriage or in a common-law relationship, both before the relationship starts or at the beginning stages of the relationship, and also at the end of a relationship. If it's breaking up and if there is a disagreement that can't be resolved, then I can be an advocate for my client either in negotiations, in mediation, or worst-case scenario, in arbitration or at court.

Ruben: Okay, very interesting. So family law is a very important topic because a lot of people are concerned. In Canada, I know that there are different legal systems, right? So our framework is based in Quebec, and Quebec is under the civil code, whereas the rest of Canada, it's on the common law. So it's two different legal systems. And we already did a couple of podcast episodes about family law in Quebec. So now that's why we are so excited to have you on the podcast, to discuss some nuances for what's happening outside of Quebec. So I know you are based in Ontario. So can you tell us a bit more about, is Ontario and the rest of Canada all treated the same and it's only Quebec that is on a different base, or are there some differences between the other provinces?

Caroline: So there are definitely differences between the other provinces. Family law has its own legislation in every single province.

Ruben: Oh, okay.

Caroline: Yeah, so everybody does it a little bit differently. But I would say on the whole, there is going to be some kind of legislation for married couples in every province, and whether or not that exists for common-law really depends on the province. And so I think that when people are looking at a separation or at going into a relationship together and they want to get some advice, they should really talk to the people from their own province to make sure that they have the right information.

Ruben: Okay, that makes sense. So today we're going to cover a couple of aspects that are mostly, if we can say, Ontario-focused, right?

Caroline: That's correct. Yep.

Ruben: Perfect, perfect. So let's start from the basics. So we're going to discuss in this show two main areas, if I can say. So we're going to cover different matters around married couples, and then later on, we're going to cover any other legal aspects regarding common-law couples. So couples that are not married but living together in a relationship. So if we start with the basics, when a married couple gets divorced or separated, they build some assets, they have some property. What happens generally speaking? Like how are those assets divided?

Caroline: That is a really interesting question and obviously it's the one that I'm asked the most.

Ruben: Same for us. We get asked that question a lot by our clients.

Caroline: Yeah, so people come in and they want to know, like, how are they going to divide their assets? And I have to explain to them that the Ontario

Division of Property is not a division of property per se. What we do in Ontario is we look to see what the net worth of each person is when they're leaving the relationship. So let's suppose that you and I are married and I have everything in my legal name and you have nothing in your legal name. Then my net worth is going to be high and your net worth is going to be low, right? Probably zero. And the principle behind it is that when we leave the relationship, we both have to leave with an equal net worth. So then actually what I do is I look at my client's net worth, so assets minus debts, and I look at the other person's net worth. I get that information from them or their lawyer and we try to make them equal. And that can involve a cash payment. And that's usually the fastest and easiest way to do it. But for many people, most of their net worth is either the family home or maybe a pension or RRSPs. It's not always possible to make a cash payment. And so in that case, people may say, "Okay, you keep the pension, I'll keep the house. You keep the investments, I'll keep the cottage," right? That's how they would divide it. So people do divide property because it's practical. Okay. And many people don't want to let go of what they own, but in principle, we would look at actually the numbers and see what the net worth is.

Ruben: So it's like an equalization. What you're saying is you give an example of someone with zero net assets and someone with assets. But let's say Mr. has $200,000 of assets and the other person has $100,000. Mr. will need to pay $50K to the other person so that they are left with $150K each. So it's really taking everything and selling everything and dividing it in two. It's more about making it equal or by making some kind of payment.

Caroline: Yeah, that's exactly. And it's great that you use the word equalization because that's the technical term that we use.

Ruben: Oh, wow. Yeah, I'm using the right terms.

Caroline: You're right on it. Yeah. We say, so people come, they say, "Oh, we want to divide property." And then the lawyers sit around and go, "We're going to talk about equalization of your net worth." So that's exactly the term. And there are of course deductions from that net worth because the idea is that you should only share the things that were built up during the marriage.

Ruben: Oh, I see. So when we're talking about assets, we'll be looking at everything. That would mean cars, pensions, money in the bank, investment accounts, but only if they were acquired or built after the date of marriage.

Anything before is not included in that calculation of net assets for the purpose of being shared or equalized.

Caroline: Exactly. Exactly. And when you think about it philosophically, it makes sense because why should you share something that you brought with you into the marriage? And so when we calculate your net worth, we also take away some deductions and we say, what was your net worth at the day of the marriage? We're going to deduct that. And if you came into the marriage with a lot of debts, then we're adding that back. So you take what you came in with. If you came in with debt, then you have to take that with you. And if you came in with assets, then you get to take that with you. But again, it's a mathematical calculation. And so at the end of the day, the number is in cash. And then we decide what we're going to trade off to make that number happen.

Ruben: Okay. So it goes both ways. You keep the asset you had before marriage, but also the debt. You cannot share the debt, but you keep your assets, right?

Caroline: Exactly.

Ruben: Okay. What about, let's say I got married today. I had some investment accounts, which we are investment managers, so I have a focus on that, but investment accounts or any other assets before the marriage. But then after the marriage, yes, I understand, I keep that. But there was growth. My investment account was $200,000. Now the value is $300,000 because the growth happened after the marriage. Will the growth be shared as well if we get divorced? Because it was from an asset that I had before the marriage, do I keep the growth as well?

Caroline: That's a really good question and it's a really good distinction. And the growth has to be shared.

Ruben: Oh, yes.

Caroline: Yeah. So what we do is we actually just ask for the bank and the investment statements for all of the assets on the date of separation. And then we ask for the same statements for the date of marriage and we just do the math.

Ruben: Okay, interesting. Oh, wow. That's quite interesting.

Caroline: You seem shocked.

Ruben: I'm learning, I'm learning. That's the idea, right? To have experts like you on the podcast. So it's really important. I'm assuming for people to, they can always find it, but it makes your job easier in this situation when people keep records. They have their statements and they save it, for example, they save a statement that they did of marriage so they don't need to dig too far to find the information. I guess when you're advising people as they are getting married, most people don't go and hire a lawyer to get advice on that because they are, it's not romantic, they will say, but if you have that situation, is that what you advise people to do, to keep the records so that it's easy to track if something happens?

Caroline: Yes, I think that's a really good idea. And the reason I think that is because I'm often helping people at the end of a relationship and they come to me and they say, I had $180,000 in assets. And I say, if you don't have a piece of paper that proves that, then the other side is allowed to reject that number. And then we're going to be negotiating about a number that really we shouldn't have to negotiate about. So that's lawyers' dollars and time spent going, was it really $180,000 or was it closer to $100,000? Who knows? Better to have the statements in hand and the banks don't keep the statements beyond seven to 10 years, depending on the bank.

Ruben: Yeah. And sometimes it's after 25 years or more that you get divorced.

Caroline: Yeah.

Ruben: Out of curiosity, I'm just curious, like in your experience, do you see many people getting legal advice as they are getting married? While we are in this subject, I'm just curious because we don't often hear that, right? "Hey, I want to see my lawyer to set things correctly." Unless it's the second marriage sometimes, but as a first marriage, do you see that often?

Caroline: The time that I see people come for a consultation before a marriage is usually if it's a young person who comes from a family that has wealth.

Ruben: Oh yes, that makes sense.

Caroline: So maybe they don't have personal wealth, but maybe in their future they could receive gifts, they could receive shares in a family company, they could receive a share in a family cottage. Like all these things that could happen in the future, or maybe they're a beneficiary of a trust. They haven't received money from the trust yet, but they potentially will be doing that. Those are the young people who come and often they come because their parents make them come.

Ruben: You want the inheritance, you need to accept. Yeah.

Caroline: Yeah. I think the parents will usually look and see and say, I've got a plan. Am I going to have to adjust that plan in order to account for the fact there is or is not a marriage contract and what does that contract look like?

Ruben: Yeah, that makes sense. That makes sense. So on that, we are talking about wealthy families that might receive a substantive gift or inheritance. How are gifts and inheritance treated? I inherited maybe a house or a large amount of money from my parents. So I'm doing the marriage and then I get divorced. So what happens to that? Share that. And I would even go further, if I didn't leave that inheritance, if it's money as cash in a bank, I bought something with it. So what are the rules around that?

Caroline: So the rules are simple, but then carrying out the rules complex.

Ruben: So let me start with the rule, because that's the easy part.

Caroline: It's complicated.

Ruben: Yeah.

Caroline: So in Ontario, the legislation says that once we do the calculation for your net worth during the marriage, we can pull out certain exclusions. And those exclusions include gifts and inheritances that were obtained after the marriage, income from gifts and inheritances as long as the original deed of gift or will says that the income should be excluded. You can also exclude damages for personal injuries, which kind of makes sense. If I break my arm and I get money, then I get to take that money out of the marriage with me because I'm also taking my broken arm with me. And proceeds of life insurance, like those are the things that the law says you can exclude from sharing.

Ruben: Meaning they will not be divided.

Caroline: They will not be divided. They won't form part of your net worth. And then what the law says is anything that can be traced to those assets can also be excluded from your net worth.

Ruben: So if I receive $500,000 from my parents as inheritance and I buy an investment property with that investment property and it's clear, you can follow the cash, that investment property will not be part of the net assets net worth that can be divided in case of divorce.

Caroline: Exactly. And the increase in value of that property won't be shareable either.

Ruben: Because it came from an inheritance.

Caroline: Exactly.

Ruben: I see.

Caroline: So the difficult part, just as you've identified, is making sure that trace is clean.

Ruben: Okay. Yes.

Caroline: So if I get $50,000 and if I put it into the joint account and it sits there for a year, and then a year later I say, oh, we always planned all along to use that $50,000 to buy myself a fancy car or whatever. Is the car from the $50,000 that was mine or is the car from the $50,000 that was joint? There's no way to know.

Ruben: Yeah.

Caroline: You have to be very careful about where you park your funds from gifts and inheritances because otherwise you can't trace it.

Ruben: Is that why you said that although the law it's clear in reality, it's often complex. Is that why? Is that it's what they do with the money? They don't usually follow the best practice if we can say, is that the reason or are there?

Caroline: Oh, absolutely. Absolutely. Because most people, you get some money from a gift or inheritance. And the first thing that you do is pay down your mortgage.

Ruben: Yes.

Caroline: Or put it into your RRSP. The RRSP has a mix of funds and it has funds from the inheritance, but it also has funds from other places unless you're buying a single RRSP product with that inheritance that is not mixed with anything else.

Ruben: Oh, so what you mean with the RRSP is that the RRSP will also include contribution that you made year by year from your earnings, your salary, which is part of what you accumulated after the marriage and your inheritance. So the inheritance got tainted.

Caroline: Exactly, it got tainted. And I think to be fair, if you have one RRSP investment vehicle and you put a $10,000 inheritance in it, it's not difficult to calculate what the notional return should be. And so most lawyers who are reasonable would agree, let's just do a notional deduction and the rest of the RRSP can be shared. But wherever you have the potential for argument, you're opening a door to create an opportunity for someone else to say, no, I don't want to give you that. That's where it becomes difficult.

Ruben: Yeah.

Caroline: And then of course there's the difficulty I should probably mention of putting the money into the house. Because I said that a lot of people, their instinct is to put the money onto the mortgage. But in Ontario, if you put money into the home that you're living in, the matrimonial home, then that trace is lost.

Ruben: Okay. So let's discuss this because earlier I asked you, I gave an example. If you take the inheritance and you buy an investment property, like with the whole money and you can easily track it, you said yes, this will be outside of the net assets that are subject to be divided in case of divorce. This will not be, we're talking about real estate. If we do the same thing with another type of real estate, which is a family home with the whole inheritance and it's clean, you can see it, there's a special status for that home.

Caroline: Yes. And that special status does not exist in all provinces. I don't recall which provinces might or might not give special status, but in Ontario, the matrimonial home has a special status. And the matrimonial home is defined as the place where the family resides and uses as their home. So for most people, that's their primary residence. And the legal assumption is that the matrimonial home always belongs in the family property, in the net family property. And so the value of the matrimonial home is always shared. And that creates a lot of situations that people would rather avoid. So the first obvious one is if I own a home already and then I get married to somebody and we live in that home for the next, say, five or six years and then we separate, my net family property, my net worth is going to include the entire value of that home. There's no deduction for the premarital value of that home.

Ruben: So even if that home was only under your name, so you are the legal owner of that home. And there were some increase in value between when you bought that home to when you get married. So if you bought the home 10 years ago and you got married today, there have been a good, we know Canadian real estate has been on fire the last decade. So you have a lot of increase in value in your home, but you got married today. Even the value before the marriage, if you get divorced one week after, you have to share the whole value of the home?

Caroline: Yeah, that's what the law says. There is a window of escape. There is a part of the law that says in special circumstances, you can have an unequal division of the property value. So an unequal division of the net family property is what we call it. But that window is very narrow. And so when people go into a marriage and they already own a home, I always tell them, you need to have some kind of agreement to make sure that at a minimum, the present-day pre-marriage value of the home is preserved in your favor.

Ruben: Okay. Okay. This one is very interesting because before we were saying that for the other assets, everything you own before the marriage is excluded from the possibility of being divided. But the home has a special status, it's not excluded. But now you're saying that you can have some kind of agreement in place to exclude it. So people can actually have a marriage contract to opt out of these rules. It's permitted.

Caroline: Yes, it's absolutely permitted to have a marriage contract to opt out of that rule. And it's actually a very common reason to have a marriage contract is to protect the home.

Ruben: I see. I see. Okay. Okay. So we are talking about home. There's a lot of Canadian families. They have their residential home in the city, but they have a cottage where they want to go and spend time with the family, but they go maybe a couple of weekends or a couple of weeks during the summer. So would that fall under the same rule or because it's like a second residence, we don't need to worry about that.

Caroline: Oh no, you definitely need to worry about it. So it can be a gray area, but it's well-settled law that the family cottage or the condo in Florida or the place that you have in the country, whatever it is, if you treat it like a home, then it can be a matrimonial home. Also, people can have more than one matrimonial home.

Ruben: I see. So it's not only the principal residence.

Caroline: No, absolutely not. And it really depends on use. If you mostly rent out the cottage for the summer, but there's one week in the summer when you go, then you have a pretty good argument to say that it's not actually a matrimonial home.

Ruben: More an investment property.

Caroline: Exactly. But if you go every weekend or even if you go for a whole month or if you're semi-retired and you're going there quite often, then you're falling more into the possibility of a finding that the home is a home.

Ruben: Oh, I see. I see. This is very interesting because for many Canadian families, their house, their home, especially nowadays when the real estate market is crazy like that, for most of them is their biggest asset. It's important for them to know that if you get married, if you are married and you divorce a couple of months after, that wealth gets divided. Yeah. If you own a home and you got divorced and you still own that home, I have a good understanding of the rule. But what happens if you sold that home before the marriage ended?

Caroline: If you sold the home before the marriage ended, then normally the value of that home would show up somewhere else in your assets. Maybe it went into a different home. Maybe it went into an investment. Maybe you spent it and it doesn't show up, but that would be a joint decision of the couple. So we don't worry about it. Once the home has been sold, it's no longer the matrimonial home. And it happens sometimes that people have no matrimonial home in terms of the value when they separate. So maybe you're retired, you don't want to own anything. So you're maybe renting a really nice condo instead. So you have a matrimonial home. It's the rented condo, but it doesn't have any value because you don't own it.

Ruben: Yeah. Okay. So if you sell your home, there is no matrimonial home, but maybe you put the money in a bank account, which is part of your net assets. So you're not really getting out of it unless you spend it all.

Caroline: Except that once you sell the home, let's say I sell a home, it's worth $500,000. Now I have $500,000 in my bank account. I also have a date of marriage deduction for the value of the home that I owned on the day of marriage. And you don't get that deduction if you separate when you're living at the home. You only get that deduction if you separate and you've sold the home before separation.

Ruben: Okay. Okay. Okay.

Caroline: Yeah. So if you're thinking about separating from someone and you're living in a home that you owned beforehand, you should probably move out.

Ruben: I live in Quebec and in Quebec, the home is part of family patrimony and there's no getting out of it. It has to be divided. You can't even get out of it with a marriage contract. That's why I was asking because it's interesting to see the differences between different provinces.

Caroline: Yeah, everyone's got a different way of trying to protect things, right?

Ruben: Yeah. So people can protect things with marriage contracts. So would you say that when you meet with your clients that are getting into a relationship, do you often suggest them to get a marriage contract because of those different rules, or is it a case by case? What are the best practices around marriage contracts?

Caroline: The best practice is probably to find out how much you need one. There are going to be some people that might not need one. So a young couple with no assets, their family doesn't have money that they're interested in giving them, they have very modest means, putting money into a contract just to say, we're going to divide everything that we accumulate together, would only be useful if that couple doesn't want to share their assets with each other. But otherwise, their net family property value at marriage is going to be zero.

They're not anticipating getting any gifts or inheritance or anything like that. Otherwise, they would just normally share what they accumulate. But for everybody else, I think it's a good idea to think about it and to talk to somebody about it. So for example, there could be a case where parents might want to give their children $10,000 for a down payment, maybe $20,000. And maybe not everybody has the same amount of money to give to a down payment for the new couple. Do you want to protect that down payment, or do you think it's going to be a gift to both of them? Because if you don't protect that down payment, then you're essentially giving both people an equal amount of that down payment, and there's no guarantee you'll get it back. Or what about a case where the family says, we're going to help you with the renovation. Maybe I've got a cousin in construction. We're going to spend the summer renovating your basement. We're going to add value to your house. We're not going to charge you for that. We're your family. We would never charge you. And then three years later, the couple separates and the house has a very high value. You're not getting that back. That work that you put in, the sweat equity, the materials that you helped with, that's all a gift to the couple. And they're both going to share in that increase in value unless you've put something in place to say we don't intend for you to share it if you separate. There are situations like that where it's not obvious that there should be a marriage contract, but at a minimum, there should be some kind of understanding that a gift is a gift and you can't get it back afterwards. Whereas a contract gives you an avenue to get something back if your intention was only to help your family member, your child.

Ruben: Okay. When we are listening to TVs, tabloids, we often hear about prenuptial agreements for Hollywood stars and for singers and wealthy people, what we call prenup. Is that what we are talking about? Is a marriage contract what we always see being referred to as prenup?

Caroline: Yes, a marriage contract is what people call a prenup. And a marriage contract can be done at any time, right? For lawyers, we say it's preferable to do it before the marriage because after the marriage, you've lost your bargaining power.

Ruben: It's too late.

Caroline: Yeah, but there are people who will enter a postnup or who will do a marriage contract after the marriage.

Ruben: Oh, you don't have to do it before, you can do it during.

Caroline: Yeah, you can do a marriage contract during a marriage. There are people who come to us and they say, we intended to do it, but we just got too busy. We'd like to do it now. And we're in agreement about what should go in and maybe there's a little bit of negotiation, but really it's about setting out everybody's expectations of what's going to happen to the family assets.

Ruben: Okay. I really thought it was an obligation to do it as you're entering because after it's too late, but you can do it during. This is interesting.

Caroline: Yeah, you can do it during.

Ruben: It's only when you hate each other and then you want to get divorced that it's a bit too late because you cannot even talk to each other anymore. You don't agree on anything. So you will not be agreeing on a marriage contract.

Caroline: Yeah, it's much more difficult, we find, to negotiate separation agreements than marriage contracts. Because if you do the marriage contract, you're at a point of trust and everybody is willing to listen to each other. And maybe there's a very small handful of people whose marriages fall apart because the marriage contract could not be properly negotiated, but it's very rare. Most people have some kind of understanding and agreement. And it can be very useful. There are lots of situations that you don't foresee can happen that might cause problems for you. So I have a client who inherited some shares of a family company. And some of those shares were inherited just before the marriage. And some of those shares were inherited after. So the ones that were inherited after are not going to be shared as part of the marriage because they were inherited after the marriage. But the ones that were inherited before, the increase in value of those shares is going to be shared.

Ruben: Why is that? Because I thought it was part of the asset that are before the marriage are not or the increasing value, you said.

Caroline: Exactly. The actual shares that you inherited before, the value of those shares will not be shared. But the increase in value of those were.

Ruben: Exactly. I see.

Caroline: Exactly. But it's a privately held family company and it's very expensive to make a valuation of shares.

Ruben: Yes. Private shares. Yeah.

Caroline: Exactly. Especially historical value and then a present-day value because you have to get both.

Ruben: Yes.

Caroline: Because it's a privately held family company, it's not like there's a ton of money to spend getting a valuation. And so we're stuck negotiating and negotiating. And I think to myself, oh, if only there had been some kind of agreement to say that inheritances, even before the marriage, would be excluded because at the end of the day, the person who passed away, their intention was not to spread these shares around or the value of these shares around. They wanted them to stay in the family.

Ruben: Exactly. So that's a really good example where a marriage contract would be very useful.

Caroline: Yeah. Yeah. And I think would be actually reflective of what the parties would have said when they were getting married.

Ruben: Yeah. Yeah. That's very interesting. And thanks a lot, Caroline, for all this information about different rules around married couples. But let's switch gears now to speak about unmarried couples because I was looking at the stats and back in the eighties, there were approximately 6% of couples in Canada that were living in a common relationship. And as we all know, this percentage has increased and now it's more around 20 to 25% in Canada of people living in a common relationship. So it's a large number of people and it's important that we want to share a couple of areas and law matters that they need to know about. If I start from the beginning, what is a common-law relationship in Ontario? Is it based on the number of years of cohabitation that people are living together or is it because they have kids together? So what constitutes a common-law relationship?

Caroline: That is a really good question and it has a little bit of a complicated answer.

Ruben: Let's try to make it simple.

Caroline: I'll try. In Ontario, you can have common-law rights for two different things. One of those things is the division of property or assets. And the other is spousal support, which is called alimony in the United States.

Ruben: Yes.

Caroline: The criteria for those two things are slightly different. So for a person who wants spousal support, we look to see if they have three years of cohabitation or three years of being in a conjugal relationship or if they have a child together or any other reason that indicates that they have a long-term intention to have a relationship of support with each other.

Ruben: Okay. So generally speaking, I know it's more complex than that. You've been living together in a relationship for one year. There's no kids. You may not qualify if you get separated for spousal support.

Caroline: That's exactly it. And that's fairly simple. Now in terms of division of property.

Ruben: Sorry, by property, you mean assets in general, right?

Caroline: Yes.

Ruben: Not necessarily real estate.

Caroline: Yes. Yes.

Ruben: So all assets, as we discussed before, the long list of assets.

Caroline: Yeah.

Ruben: That would be open.

Caroline: In terms of the division of property, it's a bit more complicated because first the court has to look and see whether or not the couple was in what we call a joint family venture. And it sounds very technical, but it basically means...

Ruben: How did you say that?

Caroline: Joint family venture. So this was a concept that was created by the Supreme Court. And so it does apply in all the provinces. And that concept is that a couple who is not married may be acting like they're running a family together. It might look like a marriage. It might smell like a marriage. And if it does, then you might have to divide your assets.

Ruben: The same way we describe, not the same way because it depends on the province, but very similar to what we described earlier for married couples.

Caroline: I'm so glad you asked that because when this decision was first made, we were all wondering what the actual division of assets would look like. So I went and I looked at a lot of case law in all the provinces where the courts had decided that there was a joint family venture and that there should be a division. And the division can go up to 50% of the assets of the relationship. So that would be very close to or equal to the equalization that you see in married couples. But it can also be very low. And it really depends on the court and the facts and the judge because the judge has to look and say, does this look mostly like a marriage where there was an intention to share in the financial gain of the couple? Or does it look more like a situation where everybody had intended to keep their finances separate? And so when you ask those kinds of very general questions, you end up looking at all the little facts that make the big picture. Are there kids? Did somebody give up their career? Were things owned jointly? Were there joint bank accounts or was everything separate? Did everyone pay for their bills in one pot or did everyone pay as if it didn't matter who was paying? Was there a long-term plan to retire together? All of these things become indicia of whether or not there was an intention to act like a married couple. And that includes, what do they call themselves in public? Do they celebrate anniversaries? Do their extended families treat each of them like they're part of the family? That can get very personal very fast, but if enough of those indicia are there, then you're much, much more likely to get a division of assets. And if none of the indicia are there, then the court's just going to say, I don't understand why you're even here. It doesn't look like you intended to share.

Ruben: I see. So if all those boxes are checked, the relationship can be seen as if they were married for the purpose of having assets being divided 50-50 or with some equalization, even if they are not married. And that doesn't depend on the number of years they've lived together. Is there more weight if someone has been living together for 50 years compared to 10 years, or is this part of the evaluation?

Caroline: I think that's part of the evaluation. And you know what, when I looked at the cases and I saw the cases that were 50-50, most of those ones were long-term relationships. Most of those ones had kids and most of those ones had people who were clearly sharing their financial abilities. So one person would have gone and worked very hard on their career for maybe 10 or 15 years and the other person stayed home. So when the court sees that, they go, that really does look like a relationship of financial dependence and that everybody was building the wealth together.

Ruben: Okay. But what I'm understanding, it's not law. It's really for a court to decide depending on the facts and the situation.

Caroline: Yeah, I guess I keep referring to the court because it is common law and it's the courts who create the common law.

Ruben: Oh, I see.

Caroline: Yeah. When you're in a negotiation situation with this kind of thing, then of course there's a lot more room for maneuver. And it really depends on the ability of the parties to come to an agreement. I don't think that their outcome in a joint family venture situation is always clear. And because there's so much left to chance, the negotiation skills of your lawyer and the stubbornness of the other side and of yourself really make a difference to the outcome.

Ruben: So people should get a good lawyer.

Caroline: Yeah, people should get a good lawyer and people should also get a lawyer that is able to tell them what's reasonable.

Ruben: Yes.

Caroline: Because you have to do a cost-benefit analysis in the end and you don't want to give all of your money to your lawyer just to avoid giving it to your ex. It's not worth it.

Ruben: You say 50-60 grand. Yeah, it's not worth it.

Caroline: And I think most lawyers will be honest with you and tell you, we have enough work. There's lots of unhappy people out there who need a lawyer.

Ruben: That makes sense. We spoke a lot for married couples about the home, the special rules of the matrimonial home. What would be the situation if there is a home but in a common-law relationship, especially if a lot of those boxes are checked where the relationship looks like a marriage relationship, but it's for unmarried couples living in a home?

Caroline: That's a really good question. And the answer is there is no protection for unmarried couples when it comes to their home. I'll give an example. Let's say, for example, you and I are married and we live in a home together, but you are the sole legal owner. And you say to me, I'm the owner of the house. So you have to get out. Maybe I have to share the value with you, but you can't stay here. Actually, the law says that I, as a married person, have a right to possess the home. So you can't actually kick me out.

Ruben: Okay.

Caroline: I can stay there until we're both miserable, but usually I would just stay there until we negotiate a way for me to get out.

Ruben: That's why we see people just sleeping on the couch for many weeks.

Caroline: Exactly. Or sleeping in the basement or whatever, because they have a right to stay until the separation is settled. They have a right to stay. But in a common-law relationship, that right doesn't exist. So if you're together in a common-law relationship, even if it's 10, 15 years and you're the sole owner and you tell me to get out, if I want to stay, I would have to come up with an argument that I somehow beneficially own the home. I would have to go to the court and ask them for relief. But if you said to the police, and I don't suggest anyone involve the police in the separation, but if you did ask them to come over and say, please remove them, they would tell you, you have to leave because you're in a common-law relationship. So you don't have a right to stay and you're not an owner of the home.

Ruben: So what happened if, okay, one member of the couple doesn't own the home legally, but I've contributed to the home either by using their own funds for renovation. And we are still talking about unmarried couples. It would be the same situation even if I have added my own money to that home for improvement and updates, I can get kicked out?

Caroline: So now it becomes a little bit more complicated and I think that every situation is different and so it's important to get legal advice that applies to that particular situation. And it's very hard to know or to assess what might be the outcome of those kinds of arguments and I think those would normally go to a court. That's quite a high conflict situation where one person is trying to kick another person out of the house. That's not usually something that is easily compromised on.

Ruben: Yeah. Wow. All the situations relating to the house, the home, it's very key for both married couples and unmarried couples.

Caroline: Yeah, because nobody wants to end up on the street.

Ruben: Exactly. It's a roof over your head. And when we talk about value, there's a lot of value embedded in the home as well. So very important to know your rights around that. So are there some differences? Is it all the same for all the provinces outside of Quebec in Canada, or are there a few differences or nuances between Ontario and some other provinces?

Caroline: Yeah, there are nuances when it comes, in particular, to common-law couples. So British Columbia and Saskatchewan actually have made legislation that says that common-law couples have a right to division of property. You don't have to argue about that if they've been living together, I believe it's for two years, then they are treated like they're married for the purposes of property.

Ruben: Oh, wow.

Caroline: Yeah. So if people are living there and they say, I'm in a common-law relationship, everything's fine, I don't have to share anything, you gotta think again and you gotta ask yourself if that's really the case. It would be important to talk to a lawyer before you hit that two-year mark to make sure you know what your rights are and what the implications might be if there was a separation after three years.

Ruben: Yes. What about Ontario?

Caroline: In Ontario, we don't have legislation for automatic division and that's why it's such a highly debated, discussed, and litigated thing here.

Ruben: I see. I see. So it's not law yet. Okay. Very interesting. Given all those different scenarios and the impact of the scenario, how can common-law spouses protect themselves?

Caroline: It's more difficult than a marriage because there's no obvious start point for the common-law relationship. But I do think that common-law couples, at the beginning of their relationship, when they start realizing that it's going to be permanent or long-term, they should talk to a lawyer and see what they want to sort out here. For many reasons, some of which I already talked about when we talked about married couples, you want to know what the expectations are. Maybe I expect that you're going to take care of me for the rest of my life and I'm just going to sit on a couch at home and eat bonbons. And maybe you expect that I'm going to be working really hard and making a lot of money and bringing it into the relationship. If our expectations are so drastically different, then they can create problems right down the line. Now, if we never separate, then maybe those problems never become real. But if we do separate, then all of a sudden you go, I was nagging you every day to go get a job, so why should I now have to support you? And I said, you nagged me, but you still stayed with me, so you should have to support me.

Ruben: Oh my gosh. I can already imagine this.

Caroline: And it happens. People fall into habits and then they don't discuss the things that are important. And yeah, I think it's important to know what that landscape looks like. A lot of people that I meet haven't actually put their minds to these things. They come and they say, I'm getting into a relationship, I want to know what to talk about. And I say, you should talk about these things. Here's the list. Go and talk about it and come back to me when you guys have decided what you want to do. Or if you can't agree with each other, then come and let me know.

Ruben: We spoke about marriage contracts for married couples, but can they put some kind of cohabitation agreement or common-law...

Caroline: Yeah, we can make a cohabitation agreement. Both marriage contracts and cohabitation agreements are valid domestic contracts in Ontario. They have to be signed, witnessed, and dated, but they're both valid forms of contracts. So yeah, there can be an agreement and people will come. People come and they say, you know what, I just want something in place, something very simple because we're going to be living in my house or I want something very simple in place because I'm going to be getting some money and I want to make sure I protect that. Or maybe they just want something very simple because they have a wealthy family and they want to make sure they don't have to pay all sorts of money out to their new partner. A marriage contract or a cohabitation agreement can be as complicated or as simple as you like. It can protect you from everything or it can say, you know what, I'm willing to give you quite a lot, but this 5% over here, I'm not willing to give you, so I just want something to protect that. So it's really tailor-made to the family and tailor-made to the couple too, because at the end of the day, if both people in the couple don't agree, then that contract's not getting signed.

Ruben: Yeah, exactly. Both people need to be willing to put their name on that piece of paper. And when people get separated, Caroline, sometimes there's a spouse or a member of a couple that stays home and that didn't progress in her or his career as much. One can argue that spousal support should be put in place. And sometimes when people get separated, the most impacted people are the children. So what are the rules for unmarried couples, common-law couples, around spousal support and child support?

Caroline: The rules for unmarried couples around child and spousal support are the same as the ones for married couples.

Ruben: Oh, okay.

Caroline: Yeah.

Ruben: In Ontario only or?

Caroline: You know what? I don't know the answer to that. You'd have to find someone who's a lawyer in the other provinces to ask about that. But for child support, across the board in Ontario, all the provinces, we just have what we call the table amount. And that's calculated and updated maybe every three or four years by, I'm assuming, a bunch of actuaries who work in a building somewhere for the government.

Ruben: Finance people.

Caroline: Exactly. They just calculate it based on what you would pay if the kids were living with you for their food, clothing, and their shelter. That is the monthly amount that you have to pay to the person that the kids primarily live with. And it's only based on the income of the person who has to pay. It doesn't matter if you're married to the person. It doesn't matter if you're a common-law. It doesn't even matter if you had a one-night stand and then you had a kid.

Ruben: Oh boy.

Caroline: If that's your kid, then you will be paying the table amount for support.

Ruben: Yeah. I guess it's to support and protect the kids as well. If you have a kid, you need to be accountable and responsible.

Caroline: Yeah.

Ruben: That's for the child support, but for the spousal support?

Caroline: So for spousal support, you have to show that you're entitled. So once you can show you're entitled, then the calculation is done based on what we call the spousal support advisory guidelines. And again, that gives you a range of outcomes that are calculated through some fancy financial way that we press a button, we put the numbers in, and then the numbers pop out.

Ruben: Yeah.

Caroline: They're advisory, so the court is not required to use them. But as general practice, we do use them and they do have to be considered. And spousal support is payable after child support. And the ranges are based on the net disposable incomes of the households because child support is not tax deductible. It's an after-tax payment. And so if I have five kids and you're making $200,000, then you're paying me quite a lot of money for child support. My spousal support will be less because I will need less money in order to reach the same net disposable income as you.

Ruben: Oh, that makes sense.

Caroline: But then if all five of those kids go to university, they're not living with me anymore and your child support to me decreases, then my spousal support may increase in order to bring me to a net disposable income that's a little bit higher.

Ruben: Oh, that makes sense. Yeah. But I didn't know that. Okay.

Caroline: It's really sensible, but you have to think about it in order to understand how it works. And then because spousal support is tax deductible to the person who pays it and tax includable to the person who receives it, there are another series of calculations that are done in order to figure out what the net disposable income could be. And spousal support is not very easy to figure out. It's highly litigated and it's something people really do negotiate and talk about quite a bit because there's a range of values, because we don't know what's going to happen when the kids move in or move out, because the kids might be living equally with both parents and that changes everything. It's not always a straightforward calculation to do. And quite often, you may be back at the table to negotiate every three or five years just to review, see where everybody is at, see where that number is at. And the person who receives spousal support has an obligation to try to support themselves. So maybe right after a separation, if I haven't worked for 10 or 15 years, my prospects are not very good. And so maybe I get paid quite a lot of spousal support, but if I go for retraining, if I reenter the job market five or 10 years later, my income might be equal to yours. So then why should you pay me support? That's why people come back to the table for spousal support.

Ruben: I see. Caroline, this has been amazing. A lot of interesting detail and information. I've learned so much. It's good to get out of how things work in Quebec and to know a bit more about the rest of Canada. And thanks for sharing your expertise and knowledge. Before we wrap up, what would be your takeaways or your key takeaway for our listeners around all those family law matters?

Caroline: We've mostly been talking about financial matters, so I think I'll keep to those ones. But I think that my key takeaway is to have honest conversations about what you expect to do with assets and with income. Because if you can have those honest conversations at the front end of the relationship, then I think overall your expectations, if there is a breakup of the relationship, will be similar. And if your expectations are similar, those negotiations are easier, they're faster, and they're less expensive because the lawyers come to the table and say, our clients mostly agree. Instead of arguing about 100% of the things, we can argue about 5% or 10% of the things. And when we can narrow what we're negotiating about, it always makes it less expensive for the client.

Ruben: That's a very good key takeaway. Definitely. It's always better to have those discussions when things are going well than having them when things are not going well.

Caroline: Absolutely. And it's always better for the couple to come up with a solution themselves. So do it at the front end.

Ruben: Yeah. That's when the conversation is easier. But like you said, it's always good as well to be guided by an expert, a lawyer that knows the law and that can provide guidance, which is key. Thanks a lot, Caroline. This has been great. I'm sure that our listeners really enjoy knowing a bit more about family law in Ontario. So thanks for being on the podcast.

Caroline: Thanks for having me.

Ruben: You're welcome. This is it for today's episode and we'll see you in two weeks from now for the next show. Bye.

Announcer: You've been listening to the Empowered Investor Podcast hosted by Keith Matthews. Please visit TMA-invest.com to subscribe to this podcast, learn more about how his firm helps Canadian investors, or to request a complimentary copy of *The Empowered Investor*. Investments and investing strategies should be evaluated based on your own objectives. Listeners of this podcast should use their best judgment and consult a financial expert prior to making any investment decisions based on the information found in this podcast.