



HOW DO JUDGES DECIDE THE DATE OF SEPARATION?

The exact day that you and your spouse separate is called the 'date of separation'.

This date is important because it affects your legal rights such as:

- When you can get a divorce
- The values of your assets and debts for division and sharing
- The start date for child support and spousal support
- Insurance benefits and designations

Canada's *Divorce Act* and Ontario's *Family Law Act* do not specify HOW to determine your date of separation.

Canada's *Divorce Act* refers to the date of separation as the date when the spouses *"lived apart and either of them had the intention to live separate and apart from the other."*

Ontario's *Family Law Act* refers to the date of separation as the *"date on which they separate and there is no reasonable prospect that they will resume cohabitation."*

But the case-law (judge-made law) has provided a more detailed method to determine a date of separation. You can find this at www.canlii.org by reading the case-law listed at the end of this guide*.

Therefore, based on the case-law, you can understand what judges look for to determine a date of separation**.

In this guide Benmor Family Law Group provides you with an easy-to-read summary of the factors that determine your date of separation.

This guide breaks it down to 6 categories including:

- Spousal Relationship
- Family Life
- Family Finances
- Public Activities
- Residences
- Additional Factors

Category #1: Spousal Relationship

1. When did the spouses stop having sexual relations
2. When did the spouses stop sharing a bedroom together
3. When did the spouses stop socializing with each other
4. When did the spouses stop celebrating birthdays and anniversaries
5. When did the spouses stop exchanging gifts
6. When did the spouses stop celebrating holidays together
7. When did the spouses stop marriage counselling
8. When did the spouses start using dating Apps and dating other people

Category #2: Family Life

1. When did the spouses stop discussing family issues and problems
2. When did the spouses stop performing household chores for each other
3. When did the spouses stop relying on each other for daily activities
4. When did the spouses stop caring for each other's health
5. When did the spouses stop informing each other of their personal and health appointments
6. When did the spouses stop helping each other during difficult times
7. When did the spouses stop travelling together
8. When did the spouses stop attending family functions together
9. When did the spouses stop socializing with friends together
10. When did the spouses stop attending public events together

Category #3: Family Finances

1. When did the spouses stop combining their incomes in a joint bank account
2. When did the spouses stop sharing home, family and personal expenses
3. When did a spouse stop using the other spouse's credit cards
4. When did the spouses stop acquiring property together
5. When did each spouse stop participating in the other spouse's career and business
6. When did a spouse change the beneficiary designation on the other's healthcare plan, RRSP, life insurance and will
7. When did the spouses begin checking off the box for ☐ 'Separated' under 'Marital Status' on their Income Tax Returns
8. When did the spouses change the designation of their marital status on other official documents

Category #4: Public Activities

1. When did the spouses stop presenting themselves publicly as a couple in their community, neighbourhood, at work or at functions
2. When did the spouses stop attending joint social or religious activities together
3. When did the spouses stop attending special events together such as weddings, funerals and graduations
4. When did the spouses stop sharing emails, social media accounts, passwords
5. When did the spouses change their marital status on social media

Category #5: Residences

1. When did the spouses begin living in separate bedrooms or homes
2. When did the spouses change the locks to their bedroom or home
3. When did the spouses change their home alarm codes
4. When did the spouses stop leaving personal items in the other's home
5. When did the spouses stop returning to the other spouse's home
6. When did the spouses stop sharing home keys

Category #6: Additional Factors

1. When did a spouse consult a family law lawyer
2. When did a spouse tell/text/email/DM the other spouse that the "relationship was over"
3. When did a spouse notify the children of their parents' separation
4. When did a spouse inform family and friends that they separated

**Mayberry v. Mayberry, [1971] 2 O.R. 378; Cooper v. Cooper (1972), 10 R.F.L. 184; Dupere v. Dupere (1974), 19 R.F.L. 270; McKenna v. McKenna (1974), N.S.J. No. 58; Oswell v. Oswell (1990), 74 O.R. (2d) 15; F. v. V., [2002] O.J. No. 3900; Sturgess v. Shaw, [2002] O.J. No. 2250*

***For a more fulsome recitation of the case-law on how do judges decide the date of separation, please scroll down to the end of this guide.*

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****What exact law do the judges rely on to decide the date of separation where the spouses do not agree?**

The date of separation is an objective determination of the date the spouses separated with no reasonable prospect or expectation of resuming cohabitation: see Warren v. Warren, 2019 ONSC 1751; Zahelova v. Wiley, 2020 ONSC 6990; Mohamoud v. Farah, 2023 ONCJ 103.

In Al-Sajee v. Tawfic, 2019 ONSC 3857, this judge comprehensively summarized the law to determine the date the spouses separated as follows:

“Ascertaining when spouses begin to live separate and apart requires a careful analysis of the unique realities of their relationship, routines, social and other habits, and practices and living arrangements over time. In deciding how much weight, if any, to give to any particular factor, the court must carefully assess whether there have been any real changes in regard to that factor since the parties were clearly together in a conjugal relationship. In addition, because of the particular dynamics of each relationship, no one factor will be determinative of whether spouses are living separate and apart; a global analysis and weighing of all factors is required. Subject to these caveats, the relevant principles and considerations that emerge from the case-law can be summarized as follows:

- 1. There are two aspects to spouses living separate and apart. First, they must live apart from each other, and second, there must be an intention on the part of one or both of them to live separate and apart from the other.*
- 2. To live “apart” requires a physical separation between the spouses. This means that the spouses cannot be cohabiting in a conjugal relationship. However, the fact that they continue to reside in the same home together does not necessarily mean that they are not living apart. Spouses can be living separate and apart under the same roof. The determination of whether the spouses who reside in the same home are living separate and apart involves a consideration of all relevant factors, including whether they are occupying separate bedrooms and/or areas of the home and any stated reasons for remaining in the same residence.*
- 3. The fact that the spouses have two residences and spend significant periods apart in the two homes is not determinative of whether they are living separate and apart. Spouses in these circumstances will only be considered to be living separate and apart if at least one of them intends to end the marital relationship. Where the spouses live primarily in separate residences, the court must examine all of the other circumstances surrounding their relationship to determine whether they were, in fact, living separate and apart. The reasons for maintaining separate residences will be one important consideration. Another circumstance which may be relevant in this situation is whether the spouses have kept personal items at each other’s residences.*
- 4. In order to establish the requisite intent to live separate and apart, there must be a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium or of repudiating the matrimonial*

relationship. The term “consortium” does not have a precise or complete definition, but refers broadly to the companionship, love, affection, comfort, mutual services and support, and sexual relations typically involved in the marital relationship.

5. *The law does not require a meeting of the minds regarding the intention to separate; a physical separation, coupled with the intention of one spouse to live separate and apart, is sufficient.*
6. *Unlike the decision to marry, the decision to separate is not a mutual one. It is a decision which is often made by one spouse over the objections of the other spouse. Those protestations matter not; once one spouse has decided to permanently separate and has acted on it, the other spouse has no ability to stop the process or object to it.*
7. *A clear statement or unequivocal act by one of the spouses of their desire to terminate the relationship will be very relevant to the determination of whether the spouses are living separate and apart. However, the intention to separate need not be unambiguously relayed to the other spouse by way of a verbal expression of settled intention. In the context of both common-law relationships and married couples, the courts have held that a relationship has come to an end when either spouse regards it as being at an end, and that spouse by their conduct has demonstrated in a convincing manner that their state of mind on this issue is a settled one.*
8. *In assessing whether there is an intention on the part of one or both spouses to live separate and apart from the other spouse, the judge must strive to determine their true intent and not simply their stated intent at the time of hearing.*
9. *A spouse’s intention to live separate and apart will not necessarily be broken by brief references by that spouse to the possibility of reconciliation where no serious steps were taken to move towards such a goal.*
10. *The degree to which the spouses were intimate with each other is a relevant consideration. However, the absence of sexual relations is not a conclusive indicator that the spouses are living separate and apart. Similarly, the fact that the spouses have engaged in sexual relations is not determinative of whether they remain separate and apart or have reconciled. Spouses who are generally living separate lives in separate homes may be found to be living separate and apart despite occasional incidents of sexual intimacy and discussions of reconciliation. However, the presence of sexual relations while the spouses are still physically living with each other will be a strong indicator that they continue to cohabit in a conjugal relationship.*

11. *One factor will be whether the spouses have been involved romantically with other people. However, the fact that a spouse has had relationships with other people is not determinative either, particularly if the other spouse was unaware of the other relations.*
12. *One factor will be whether the spouses have continued to discuss family issues and problems and communicate about daily issues.*
13. *One factor will be whether there have been any changes in expectations regarding the spouses' accountability to each other for daily activities.*
14. *One factor will be the extent and nature of the spouses' contact with each other, including whether they have continued to participate in joint social activities. In assessing any contacts, the judge will consider whether the events were evidence of an ongoing relationship or reconciliation or simply rare moments of friendliness or civility.*
15. *One factor will be whether the spouses spent vacations together.*
16. *Whether there were attendances by both spouses with their children for family events, activities and even family vacations is relevant, but not determinative, as these may simply reflect the spouses' efforts to co-parent in the best interests of the children post-separation.*
17. *One factor will be whether the spouses continued to share and participate in each other's daily routines as in the past, such as eating meals together and sharing household chores.*
18. *One factor will be whether the spouses celebrated special occasions together.*
19. *One factor will be whether the spouses purchased gifts or exchanged other tokens of affection with each other.*
20. *One factor will be whether the spouses supported each other with respect to extended family obligations, through difficult times and with each other's personal issues.*
21. *One factor will be how the spouses referred to each other and held out their relationship to third parties.*
22. *Documentary evidence respecting the spouses' relationship status is also relevant. For example, the manner in which the spouses described their status in important documents, including Income Tax Returns, and whether they have claimed any benefits that are conditional on their relationship status are important considerations. The judge will consider any explanations which either spouse may give before determining the weight, if any, to accord to them.*

23. *If the spouses have retained a counsellor or mediator, the purpose for which the mediator was consulted may also be of assistance in determining whether the spouses have separated.*
24. *Whether there have been any changes in the way the spouses manage their financial affairs, including whether they have taken steps to separate their financial dealings is another factor.*
25. *One factor will be whether the spouses continued to share the use of assets.*
26. *One factor will be the spouses' behavior towards each other in the presence of third parties.*
27. *Whether the spouses have taken legal steps to legally terminate their relationship and resolve issues relating to their separation is a factor, but not determinative if no further steps were taken to end the relationship.*

Recently, in the case of *Kassabian v. Marcarian*, 2024 ONSC 2719, the husband appealed to the Ontario Court of Appeal on the narrow issue of the parties' date of separation. The husband argued the parties had separated on December 10, 2014, the consequence of which would be that the wife's equalization claim would be outside the limitation period. The trial judge accepted the wife's date of separation, entitling her to an equalization payment. The Court of Appeal reviewed the aforesaid legal test and factors for determining the date of separation under Ontario law. The Court of Appeal cited *Al-Sajee v. Tawfic*, 2019 ONSC 3857 regarding the generally accepted characteristics of a spousal relationship (eg. shared shelter, sexual and personal behaviour, services, social activities, economic support and children, societal perception of the couple, etc.). In doing so, the Court of Appeal noted that a change in characteristics for a spousal relationship should be emphasized and summarized 5 non-exhaustive factors such as:

1. Nature of the Relationship: this factor includes whether the parties reside together, the reasons for living separately if applicable, whether they have personal items at each other's residence, whether there is sexual intimacy, arrangements for household tasks, meal sharing, future planning, whether they attend social events together, whether they vacation together, and whether they exchange gifts, among other examples
2. Financial Arrangements: the court should consider how the parties arrange their financial affairs, including payments toward necessities of life, asset-sharing, whether steps have been taken to separate assets, acquisition of joint property, renewal of joint mortgage obligations or a joint lease, use of shared financial professionals, and changes to designations in a Will.
3. Interaction with third parties: this factor requires the court to consider how the parties have held themselves out to family members, friends, professionals, and other members of the community.

4. Formal steps taken to end the marriage/relationship: this factor includes whether a party has taken legal steps such as consulting a legal professional about separating.
5. Any steps taken to resume cohabitation: this factor includes considering whether the parties have engaged in any form of couples/marriage counselling, or other steps to repair the relationship.

Then the Court of Appeal set out 7 principles which should guide a court's approach to the factors listed above:

1. True intent: the court should consider a party's true intent over whether they wish to separate, including their conduct;
2. Unilateral decision: a single party can decide to separate, and such a decision does not require agreement of the parties;
3. Clear and unequivocal communication: a party cannot separate in secret, and a clear statement or unequivocal act to terminate the relationship will be very relevant;
4. Uniqueness: separation should be assessed on what are significant features to the relationship before the court. In some relationships, the absence of physical intimacy may not be as significant a feature as in other relationships, for example.
5. Separation is often a process: a separation may involve multiple smaller steps and decisions rather than one major event;

The factors are not a checklist: no one factor is determinative, and each factor may have different weight depending on the relationship. The court must consider all relevant factors, however.

Objective assessment: the court must objectively look at the circumstances to determine whether the relationship has irretrievably broken down.

In *Kassabian v. Marcarian*, both the trial judge and the Court of Appeal decided that given that the parties continued to travel together, continued to eat together, continued to identify themselves as "married" on their taxes and neither attempted to divide assets or seek legal advice, that the wife's later date of separation was correct.

<https://www.canlii.org/en/on/onsc/doc/2024/2024onsc2719/2024onsc2719.html>