Canada:
Common Law Marriages

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CANADA

COMMON LAW MARRIAGES

In Canada, the final authority for determining the state of the common law rests with the Supreme Court of Canada. That court has never ruled on the question of whether common law marriages legally exist in those provinces that might allow for them under their provincial marriage laws. Provincial courts, however, have considered the issue. Generally, these courts have expressed doubts as to whether common law marriages are possible. Two notable cases in this regard are Louis v. Esslinger, 121 D.L.R. (3d) (B.C.C.A) from British Columbia and Dutch v. Dutch, R.F.L. from Ontario. In Saskatchewan, a court recognized a common law marriage in the case of Cote (Re) 1971 S.J. No. 71. That case was unusual in that the court did not find that the parties had gone through some form of marriage ceremony. In almost all other Canadian cases, the courts have indicated that even if common law marriages are possible in a particular province, the common law derived from England requires some form of a ceremony to solemnize the marriage. Extended cohabitation is not, under this line of authority, sufficient to establish a common law marriage.

In light of the above, no complete list of the provinces in which common law marriages are definitely possible or impossible can be given. However, two recent Supreme Court of Canada decisions in this area are instructive. In Nova Scotia (Attorney Genera) v. Walsh, 2002 S.C.C. 83, the Supreme Court held that the desire of parties to live together without getting married should be respected and that provincial matrimonial laws do not have to extend to them. This case stands for the proposition that Canadian law does recognize a distinction between cohabitation and marriage. However, in Miron v. Trudel, 1995 S.C.R. 418, the same court held that the denial of accident benefits from certain cohabitants that were available to married persons infringed the Equality Rights section of the Canadian Charter of Rights and Freedoms. These two cases suggest that Canadian law recognizes a distinction between marriage and cohabitation, but that denying persons living arrangements on the basis of their matrimonial status is unconstitutional in Canada if the cohabitation has been extended. What constitutes extended cohabitation has not been clearly defined, but in Miron v. Trudel, the Supreme Court approved a definition that interpreted extended cohabitation to mean living together for at least 3 years or, if there is a child from the relationship, living together in a relationship of some permanence.

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