

THIRTEENTH ANNUAL BREAD AND BUTTER ISSUES IN FAMILY LAW

FAMILY LAW

Separation Date Assessment Guide

David Frenkel, **Frenkel Tobin LLP (Toronto)**

Yunjae Kim, **Birenbaum Steinberg Landau Savin & Colraine LLP
(Toronto)**

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David Frenkel
Yunjae Kim

The following Separation Date Assessment Guide (the “*Guide*”) is a combination of the legal principles applied by courts in Ontario jurisprudence when determining a date of separation. The *Guide* was originally published in the *Canadian Family Law Quarterly* (40 CFLQ 335, 2022), “Separation Date Principles and Assessment Guide” (which includes all the citations that have been omitted here). The CLFQ paper also includes a deeper dive into the legal principles, evidentiary issues with examples, a comparison of interjurisdictional applications and case law citations to the *Guide*.

The legal principles in this *Guide* have been organized into six sections that represent a collection of foundational elements of a couple’s relationship pertaining to a separation date.

Some of the more cited cases addressing separation date issues that have influenced the *Guide*’s creation include *Oswell v. Oswell*, 1992 CarswellOnt 306, [1992] 43 R.F.L. (3d) 180 (Ont. C.A.), *Newton v. Newton*, 1995 CarswellOnt 84, [1995] W.D.F.L. 707 (Ont. U.F.C.), *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.), *Greaves v. Greaves*, 2004 CarswellOnt 2408, [2004] O.J. No. 2522 (Ont. S.C.J.), *Strobele v. Strobele* (2005), *Klimm v. Klimm*, 2010 CarswellOnt 1419, 2010 ONSC 1479 (Ont. S.C.J.) *Rosset v. Rosseter*, 2013 CarswellOnt 17606 (Ont. S.C.J.), *Tokaji v. Tokaji*, 2016 CarswellOnt 20010, 2016 ONSC 7993 (Ont. S.C.J.), *Ramoutar v. Ramoutar*, 2019 CarswellOnt 6677, 2019 ONSC 2448 (Ont. S.C.J.), *Warren v. Warren*, 2019 CarswellOnt 4106, 2019 ONSC 1751 (Ont. S.C.J.) and *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.).

Separation Date Assessment Guide

The sections of the *Guide* are as follows:

- A. “Relationship, Communication and Intimacy”,**
- B. “Household and Family”,**
- C. “Financial Affairs”,**
- D. “Activities with the Public”,**
- E. “Separate Residences”, and**
- F. “Additional Factors”.**

One purpose of the *Separation Date Assessment Guide* is to be used as a tool to obtain a preliminary assessment of the separation date issue. Another purpose is to have a starting point when digging a little deeper into the separation date issue.

A point of caution. The *Guide* is best used when counsel interviews the client rather than providing the *Guide* to the client and asking them to complete it on their own. Otherwise, clients may answer with bias, with ulterior motives or simply not understanding the questions themselves without further advice.

When going through the *Guide*, keep in mind that the goal is to decide an accurate separation date that can be ultimately supported by the evidence.

A. *Relationship, Communication, and Intimacy*

When did the spouses stop:

- 1) having sexual relations
- 2) sharing a bedroom together
- 3) going on dates with each other
- 4) celebrating anniversaries (e.g. wedding)
- 5) exchanging tokens of affection
- 6) exchanging gifts with each other
- 7) celebrating holidays together (e.g. Christmas, Thanksgiving, Easter)

Separation Date Assessment Guide

- 8) being faithful to each other (i.e. fidelity)
- 9) making attempts to reconcile with one another
- 10) attending couples and/or marriage counselling

B. Household and Family

When did the spouses stop:

- 1) discussing family issues and problems
- 2) performing household chores (e.g.: grocery shopping, laundry, preparing and eating meals, washing/mending clothes, cleaning)
- 3) having expectations regarding accountability to each other for daily activities
- 4) caring for each other for health reasons (e.g.: during an illness, after an injury, after surgery, during hospitalizations)
- 5) informing each other of their illness and/or health procedures
- 6) helping each other during difficult times (e.g.: personal issues, problems, grieving during the death of a spouse's loved one)
- 7) having joint family vacations, outings or gatherings with the children
- 8) having the existence of a relationship between the spouses and members of their respective families (e.g.: socializing with the other spouse's family, spending holidays with extended family, arriving separately when socializing with friends)

C. Financial Affairs

When did the spouses stop:

- 1) combining their finances (e.g. having joint bank accounts, having access to family funds, contributing towards RRSPs of each other, having a joint safety deposit box)
- 2) contributing towards the expenses of the home
- 3) acquiring and owning property together

Separation Date Assessment Guide

- 4) participating in the operations of the other spouse's business
- 5) being beneficiaries of the other's life insurance policy or a will
- 6) showing marital status on income tax returns filings
- 7) showing marital status information on other official documents (examples: loan applications, citizenship applications, property registrations)

D. Activities with the Public

When did the spouses stop:

- 1) presenting themselves as a couple at neighbourhood, work or family social functions
- 2) attending joint social activities together (e.g. theatre, church)
- 3) attending special events together (weddings, funerals, graduations)
- 4) vacationing together

E. Separate Residences

If the spouses began living in separate residences:

- 1) when did they stop:
 - a. making efforts to resume cohabitation
 - b. having personal items of one spouse at the other's residence
 - c. returning to the home at the other spouse's request
- 2) When did any of the following occur?
 - a. a spouse purchasing furniture for the new residence
 - b. the spouse still living at the primary residence changing the locks
 - c. the public being aware that the spouses are living separately

Separation Date Assessment Guide

F. Additional Factors

When did either of the spouses do any of the following?

- 1) consult a family law lawyer
- 2) tell the other spouse that the “relationship was over”
- 3) tell the children of couple’s decision to separate
- 4) inform third parties that the couple is no longer in a relationship
- 5) take significant legal steps (examples: purchasing a separation agreement template, exchanging draft separation agreements, having a lawyer send a letter indicating separation, issuing a Divorce Application)

* David Frenkel is a partner at [Frenkel Tobin LLP](#). Yunjae Kim is a partner at [Birenbaum Steinberg Landau Savin & Colraine LLP](#).