

Lawyered – Episode 74
Divorce Law ft. Steve Benmor
Episode Transcript

HUSEIN
00:03

This is episode 74 of Lawyered. I'm Husein Panju. And on this week's episode, we will be speaking with Steven Benmor about recent developments in the area of divorce law. First up, we'll chat about some of the new amendments to the Federal Divorce Act. The Trudeau government recently introduced the most major overhaul of this legislation in decades, and we'll learn about some language tweaks that may shift the thinking away from a winners and losers dynamic. Next, we'll discuss a new civil tort of family violence which may provide for financial compensation to victims of abusive relationships. And we'll also chat about some new case law that provides some clarity about the collection of retroactive child support payments. And finally, in our Ask-Me-Anything segment, we'll chat about a bunch of topics, including prenups, negotiation strategies, and other questions submitted by our listeners. All that and a lot more is coming up in just a bit. This is Lawyered. Hello, listeners, and welcome to another episode of the podcast. And thanks for tuning in. Hope you're having a good summer, and we appreciate you continuing to support the podcast. This is not intended to be a blatant call to action, but I wanted to say that I'm really pleased with how this season is going so far, and it's getting a lot of traction. I gather that it's kind of a bad forum to be focused on vanity metrics, like how many downloads or how many listeners do you get per episode, but I've heard that a more effective measure of success is how many people are actually getting value from it.

HUSEIN
01:51

And I think that based on the input that I've been receiving-- the transcripts are going a long way in making this show accessible and more digestible as well. I've heard from a number of regular listeners and even some new listeners that these transcripts have been able to get into their feed through whatever measure, and by exchange of doing that, we're getting a bit closer to our goal of decluttering the law and making this information more accessible. So I wanted to just ask for a general color that if it's something that you're interested in doing, we'd really appreciate spreading the word. I was looking through my podcast feed myself - I consume a lot of podcasts, as you can imagine - and I realized that the majority of the podcasts that I follow are actually things that I learned about through word of mouth. A friend of mine said, "Oh this is just a cool podcast, you may like it," or, "This reminded me of something we were speaking about." So if that's something you're interested in doing, if you have a friend or a colleague who you think would get value from some or all the episodes, please feel free to share the word. That's the whole point of the show, trying to make this information more accessible and spreading the information as best as we can. Our last episode was fantastic. It was an episode about social media law with one of-- or perhaps the leading expert in Canadian social media law named Maanit Zemel. Talked about a bunch of very topical issues in this area, including a new tort of online harassment. There's also some new case law about CASL, known as Canada's anti-spam legislation. And we spoke of this area called the right to be forgotten, which is something that got a lot of traction in the EU a couple of years ago and has now made its way to Canada as well. It's a great conversation.

HUSEIN
03:39

I'm assuming that if you're listening to this, you likely have some kind of social media presence of your own in whatever quantity applies. And there's a lot in

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there, especially in our Ask-Me-Anything segment in terms of practical things for you to be thinking about as you are publishing content and even consuming content as well. So if you want to check that out, that's episode 73, Social Media Law with Maanit Zemel. Today's episode is a really powerful one. It's about the area of divorce law, which in Canada, I knew very little about before we started the recording. And it reminded me of something that we heard from our guests many seasons ago about the area of family law. I think he mentioned this later on in the recording, but it's an interesting reflection that divorce, in and of itself, while it's upsetting, typically does not end the relationship, but more frequently it changes the relationship in terms of how these two individuals interact with each other. And by extension, it's more of an incentive for the parties to play nice and fair and in good faith during the divorce process. And that was something that really echoed with me, especially when we were talking about the amendments from a new case file that's developing. So it's a really interesting conversation. Whether you have a direct involvement in the topic or not, I think you're going to find a lot of value-add from it. So without further ado, here is our divorce law episode with our guest Steven Benmor.

HUSEIN
05:18

And on today's show we're very excited to have Steve Benmor. Steve is the founder of Benmor Family Law, and he's a recognized divorce lawyer, family mediator, arbitrator, speaker, writer, and educator. He's proficient in mediating high-net-worth divorces and complex financial cases with a sophisticated financial understanding and in-depth knowledge of divorce law, tax law, real estate law, corporate law, and trust law. And he's worked as lead counsel in many divorce trials, held many leadership positions in the legal community, and has been regularly interviewed on television, radio, and in newspapers as an expert in family law. Steve is also one of the only divorce professionals in Canada who is licensed and certified and accredited in all out-of-court divorce options. And in addition to his extraordinary commitment to children and families, the Family Dispute Resolution Institute of Ontario has awarded Steve his designation as a specialist in parenting coordination. And Steve is also one of Toronto's 34 certified specialists in family law, one of Canada's 51 fellows of the prestigious International Academy of Matrimonial Lawyers, and holds a master of law in family law. So Steve, thanks for joining us on the show today.

STEVE
06:33

Thank you, Husein.

HUSEIN
06:34

Great. So we have a lot of interesting topics to speak about today in this area of divorce law. And just from my perspective, I would say that divorce law is a pretty sensitive topic, and in some cultures and for some people, it might be even a taboo topic as well. But we're really looking forward to learning a bit more about the specific area of law and some of the media issues in which you practice. So the first topic we're going to speak about is some of the new amendments to the Divorce Act. Because in early 2021, the federal government brought into force the New Divorce Act, which represents the most significant legislative change to divorce legislation in over 20 years. And these amendments were introduced in order to modernize this legislation. And we're going to discuss a bit about what the changes are and their likely impacts as well. So Steve, I know that some of the

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amendments adjust the language of some otherwise common family law terms or divorce law terms like custody and access. I was hoping you tell us a bit more about what these changes entail.

STEVE
07:41

So in family matters, for over 20 years, people who split up would go to court and ask judges to make awards regarding custody and access of their children. So what is custody and access? Custody, by definition, meant where the children live and who makes the decisions regarding their lives. Access meant when the children are with the other parent, who the children do not live with. And the parent with access does not have the power or right to make decisions regarding the children, but gets notification of the decisions made by the parent with custody. So for decades, people who split up either privately settled their affairs or had judges make determinations with respect to custody and access. In 2015, a very smart judge by the name of Mary Lou Benotto, sitting in the Court of Appeal and hearing a case by the name of M versus F, wrote a very lengthy decision regarding the problem with the legislation. And she specifically wrote, "For over 20 years, multidisciplinary professionals have been urging the courts to move away from the highly charged terminology of custody and access. These words denote that there are winners and losers when it comes to children. They promote an adversarial approach to parenting and do little benefit to the child. The danger of the winner-loser syndrome in child custody battles has long been recognized."

STEVE
09:17

So that was a decision that was released in 2015. Only four years later, the Trudeau government had passed bill C-78 making sweeping changes to the Divorce Act. And then just last year, March 1, 2021, bill C-78 became law and what is now called the New Divorce Act. And the New Divorce Act made a whole series of changes. The principle one is the removal of the labels custody and access. The word custody is used in criminal law like it's also used in family law. But in criminal law, the word custody is when someone has been stripped of their legal rights to have the ability to be free. They are taken into the custody of the state. Well, if you think about it in those terms, would children be similarly held against their will by the parent with custody? Absolutely not. But you can see how those words were inflammatory in the family law sector.

HUSEIN
10:37

These words have been removed, but presumably, there's some new replacement language. Is that right?

STEVE
10:41

That's right. So now, rather than using the words custody to denote where the children live primarily and access to denote when the other parent has time with the children when not with the primary parent, now the words are parenting time, parental decision-making, and parenting orders or parenting plans. And so now when people are separating, we now use language like, okay, what should the parenting plan be and the parenting time for each parent? The language that is used to describe their time is parenting time. So rather than one person having the better language and the other person having the relegated diminished language of access, now they both have the same language. They both have parenting time. It may be that the children are with one parent more than the

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other, but now we have lost those very coercive, very determinative language that made one person feel like a winner and one person feel like a loser.

HUSEIN
11:59 Understood. Okay. So another aspect that I think about, because our listeners may find interesting, is this aspect of best interest of the child. And I know that this is kind of an overarching principle that is often used in a number of different areas of law, including family law and, I imagine, divorce law as well. And I was wondering if the New Divorce Act provides any new guidance on how this best interest test is or can be applied.

STEVE
12:23 So a lot of people ask what decides what the parenting schedule will be. And the short answer is it what is in the best interest of the child. The long answer is what are the components of a child's best interest. For many, many years, there have been various advocacy groups that have been pushing legislators to move the New Divorce Act into a presumption of shared parenting, whereby when the parents split up, there was an assumption or a presumption, a legal presumption that the children should be with each parent 50/50, equal time. So the New Divorce Act did not adopt that conclusion. There is no presumption of shared parenting. And it's found in section 16, sub 6 where it says in allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interest of the child.

HUSEIN
13:31 What do you think about this change in terms of shifting from maximum contact, principal parent, to what's in the best interest of the child in practical terms for practitioners?

STEVE
13:43 Well, the actual legislation, overall, is well received by the legal profession. It really was necessary. It was the right thing to do. So the legislation really was catching up with what we family law specialists have been doing for many, many years. We have been trying to teach parents that children should not be considered luggage that they fight over when they split up. And so the legislation overall is good. Now, to the point of the shared parenting issue, for one - and I'm only speaking on my own behalf - I'm torn on it because if the legislation's intent was to eliminate fighting, one way to have eliminated fighting would have been to create the presumption of shared parenting and to deviate from that when it was not in the best interest of the child. Well, what the legislation did was it said there's no presumption of shared parenting, people can argue it, and the judge will decide what is in the child's best interest. So if you think about it this way, the onus is on the parents to convince the judge that the children should be either more with one parent, less with the other parent, or equally with both parents. And so by doing that, by creating the onus on the parent, it sort of kept the conflict alive by making them fight over what the division of time should be.

STEVE
15:20 And since the legislation, some judges have said, well, since the legislation does not presume shared parenting, I don't have to order it. Or other judges have said, well, because there's no presumption, I can order it, and I will order it. So it hasn't exactly eliminated the conflict between separating parents, and it could have eliminated it by making it harder for people to argue and to make it harder for people to get a different arrangement than 50/50. And let's not forget, Husein, we're also living in a world right now that is very different than 30 or 40 years

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ago. 30 or 40 years ago, it was much more common for men to work and women to be at home with the kids. These days, it's far more common for both parents to be working, and it's far more common for fathers to be more involved in the raising of their children. So one can argue that those advocacy groups that were promoting shared parenting or the presumption of shared parenting had it right because it did indeed match some societal norms.

HUSEIN
16:34 Now, in early 2022, the Ontario Superior Court of Justice issued a landmark decision that will fundamentally reframe how family violence is treated in divorce proceedings. And while victims of family violence typically had limited options for redress, this decision creates a new tort of family violence by allowing damages to be recovered from abuse suffered during the course of a relationship. So Steve, in a moment, we're going to be speaking about this new tort of family violence. But before we get into this case, I was hoping you can tell us a bit more about the remedies that were previously available for victims of family violence.

STEVE
17:14 So really the remedy that was available for a spouse in a marriage or in a common law relationship or in any form of romantic relationship, if they suffered either physical harm or the threat of physical harm, they could have gone to the police. And in that situation, they might have been arrested, charged, removed from the home, and then under bail terms that would have prevented them from having any contact with the person until there was a trial. And if the person was able to convince the judge and/or jury that there was a reasonable doubt as to whether there was such an act, the person would have been found not guilty and there would have been no further protection to the victim. And so there was and still is a significant portion of those people that are accused of domestic violence who are found not guilty. And so in the criminal law sphere, victims had some protection, but not significant protection, and definitely did not have restitution. So the criminal courts never granted money to the victim in order to compensate them for their losses, for their damages, for what they suffered. Having said that, there have been cases, historically, in Canada where a wife or a husband or a spouse in a common law relationship sued in civil court or in family court for damages for domestic violence. But those cases were very rare, and oftentimes, the damages were very, very small until the *Ahluwalia* case was decided.

HUSEIN
19:12 Okay. So why don't we talk about this case? The case is called *Ahluwalia v. Ahluwalia*. And the citation is 2022 ONSC 1303. And for people listening, we'll have the CanLII link in our show notes and the website, as well, so you can find it easily. So you can start by walking us through the relevant facts of this case.

STEVE
19:33 No problem. So the facts are very simple actually. The parties, they were married for 17 years. They had two kids. By the time they split up, the kids were adults. And the kids actually didn't have a relationship with their father for many, many years after separation. And the judge found that during the course of the relationship, the father was domineering, aggressive, volatile, and that the wife had suffered various forms of distress and domestic violence. The judge used language like a 16-year pattern of coercion and control. It was not just unhappy or dysfunctional, it was violent. The mother went through this 11-day trial self-represented. And in the trial, she asked for what is normally asked for in every family law trial. She asked for equalization of property. She asked for child

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support. She asked for spousal support. All very standard claims. But in this case, she also asked for compensation for the abuse. And she was able to prove the abuse by taking the witness stand.

STEVE
21:04

So the judge ultimately granted her the equalization of property claims, child support, and spousal support. But the reason this case became so recognized and popular is because, in this case, the judge took the definition of family violence from the New Divorce Act and used it to determine whether family violence occurred in this relationship. And of course, she did. And then she used the finding of family violence to create a tort, which is a civil wrong. And the tort of family violence was established in this case. So this judge used a definition that was established by federal law to determine parenting schedules, and she ported it or transported it into the arena of determining whether this woman should be entitled to compensation by making it a tort.

HUSEIN
22:18

So like all torts, I understand that there's a specific legal test that a party must meet in order to make out or establish this tort. So can you explain, going forward, if a party wants to make the same allegation that there was this tort of family violence, what do they need to prove?

STEVE
22:35

The definition in the Divorce Act of family violence includes all forms of abuse, including nonphysical abuse, which has been defined in other cases to even include stalking, intercepting one's private communications and emails, using social media to disparage and embarrass a person, using text messages to threaten them, using emails to cause them fear. So all of these behaviors fall under the umbrella of family violence, which therefore, could entitle a person to compensation if the judge makes a finding, like the judge did in Ahluwalia, that the person is entitled to it because a tort was committed.

HUSEIN
23:28

Now, we're talking about people who have undergone potentially physical and/or mental harm. I was wondering if you had any thoughts about this approach of using financial compensation. Bluntly, do you think money is enough to compensate people who have gone through all this damage?

STEVE
23:48

Well, when we think about penal law or criminal law, we often think about behaviors that are not legal. And so although this is a tort, we do know that a tort that could result in compensation causes the person that might be thinking about doing something to be fearful that there could be a negative consequence to doing it. So perfect analogy is a retail store knows that if they leave a puddle of oil on the ground, somebody might fall, hurt themselves, and sue the store. So the retail store makes sure that there are steps in place, safeguards in place to prevent that from happening. So arguably, the Ahluwalia case created such a blizzard of news activity that reminded all Canadians, including lawyers and judges, that this sort of behavior is not acceptable. And so if there are men and women in relationships at home right now, where this is a behavior that has previously occurred, they've now heard that a woman who suffered as a result of domestic violence was awarded \$150,000 because of the husband's behavior.

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HUSEIN
25:12 What impact do you think this new tort will have on divorce lawyers and people, either if there's litigation that's already in practice or potential litigation down the road?

STEVE
25:23 Let's first remember that this case is going to be appealed to the Court of Appeal, and it may very well end up in the Supreme Court of Canada. And so we all have to be alert to the fact that the trial decision may very well be validated or overturned at various appeal levels. However, assuming this tort is upheld and the compensation is upheld by various levels of appeal court, when a client walks into a lawyer's office with a similar fact scenario, it is incumbent on the lawyer to ask the necessary questions and to know what the law is and to know that there is this tort of family violence. And in some cases, the victim might decide not to make the claim because the victim might decide that they do not want to go through a lengthy trial like Ms. Ahluwalia did and relive the violence that occurred. On the other hand, the person might decide to make the claim, and the perpetrator, the other side, might decide to settle the claim in order to not allow the trial judge to be influenced by the evidence of family violence that might cloud their rights regarding the children or other issues. So these are very live, factual, and legal concerns that practitioners, lawyers, mediators, and judges will have to grapple with in the years to come.

HUSEIN
26:59 The area of child support is an important element of divorce law, particularly as it relates to protecting the best interests of the child. There's been a recent line of supreme court cases that provides a new clarity in terms of how to retroactively adjust the amount of child support based on various facts. And a 2021 case from the supreme court provides an important clarity on how to balance the predictability and flexibility of child support payments. So Steve, just for context, I was hoping you can just start by giving us a very high-level overview of what child support is and how it's defined, and also how the calculation works as well.

STEVE
27:41 Well, child support is the amount of support that a parent pays the other parent for when the children are living with one parent and not with the other parent. And so child support is a sum of money payable by the nonresidential parent to the residential parent to support the children. So under Ontario and under Canadian law, first, we have to determine what the parenting schedule is. But assuming the children are primarily with one parent, which, as I say, is at least 9 out of every 14 days, then the amount of child support paid by the nonresidential parent to the residential parent is based on the nonresidential parent's income. And the income is determined by looking at the line 150 income in the income tax return and notice of assessment. Generally speaking, is determined by their tax returns, and then you cross reference that with the tables under the child support guidelines, and you look up the province, you look up the number of children. And assuming the children are living with one parent at least 60% of the time, that is the amount of child support that is generally payable each year. And each year, it is varied based on the change in income.

HUSEIN
29:06 So what do we mean then when we talk about retroactive child support?

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STEVE
29:12 So retroactive child support is defined to be an amount of child support that should have been paid but that was not paid for a preexisting period. So if you think about it in practical terms, people might split up today. The father might move out today. Between today and, say, the next six months, the father might pay the bills on the home, which some would consider to be in lieu of child support, but then the home is sold and then they live in different residences. And in that case, it may be another year or two before the couple resolves their divorce and all of the issues. And in that period, the father, in my example, may not have paid child support or he may have paid child support but a small amount.

HUSEIN
30:10 But in theory, it could refer to any gap, I imagine, in terms of when child support was owing but was not paid, right?

STEVE
30:19 Correct. In fact, there are many cases, sadly, where people split up and no child support is paid for many, many, many years. And that's precisely why we have these twin cases from the Supreme Court of Canada that dealt with that very issue. What do we do with those cases where it's not a matter of a couple of weeks or a couple of months of no child support. It's a matter of a retroactive child support claim that is in the tens or hundreds of thousands of dollars.

HUSEIN
30:48 So the case is called *Colucci v. Colucci*. The case is citation 2021 SCC 24. And can you start by telling us about the relevant facts that led to that getting all the way up to the court?

STEVE
31:00 Yeah. This is a situation where the Coluccis were married. They were married in '83. They divorced in '96. The children ended up living with the mother, and the father was under court order to pay child support of \$115 a week until the children were no longer dependents. And like I said, they divorced in 1996. And in 1998, the father, two years after the divorce, requested a reduction in his child support obligations, but he didn't provide any financial disclosure and no child support agreement was reached. And his child support obligations ended in 2012. In other words in 2012, the children were no longer dependent.

HUSEIN
31:45 So does that mean that they were no longer 18 years old?

STEVE
31:49 They were past 18. But beyond that, they were also not in school full-time. So there was no obligation to pay child support after 2012. Now, remember that the Colucci case was decided in 2021, so about nine years after the children were minors. And so what came to light was that from 1998 to 2016, the father made no voluntary child support payments, and only limited sums were collected through the provincial enforcement office. So for many years, the father was under obligation to pay child support. He didn't pay the child support. A little of it was garnished from his income. And in fact, he was absent from the children's lives and his whereabouts were unknown for many, many years. Eventually, the father realized that there was a judgment against him for arrears of child support, and the father asked for the arrears to be canceled.

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STEVE
32:58 The arrears at that point were about \$170,000. And so he comes to court and he asks for the arrears to be reduced. And the judge, at first instance, granted him relief by reducing 170,000 down to \$41,000. The Court of Appeal overturned the decision, and the Supreme Court of Canada agreed with the Court of Appeal that he owed the full \$170,000. The Supreme Court of Canada did not give the child support payer, which in this case is the father, a pass, and held him to the amount that he ought to have paid under the preexisting court order, even if the preexisting court order overcharged him for child support.

HUSEIN
33:53 So why is this case significant?

STEVE
33:55 The case is significant because, for many, many years, people thought that if the children were already adults, that the issue of child support was no longer alive. And that, for example, Mrs. Colucci, in a case like this, would not have been able to come to court and ask for the \$170,000. And it also stood for the proposition that someone like this man could come forward many, many years later and say, look, the \$170,000 was based on an income that I never earned. And if you actually apply the child support guidelines to my actual income in all of those years, I would not have owed \$170,000. I would have only owed \$41,000. And it's unfair for me to be required to now pay, many, many years later, \$170,000, which, by the way, I don't have. And the other argument that the man made was by giving her now \$170,000, it would be a windfall because the children are no longer children. So why would I pay her \$170,000 if the money isn't really going to the benefit of the children? He underpaid when they were young, and he now had a bill of \$170,000 that he simply couldn't afford. So the reason this case is significant is because it stands for the proposition that you cannot avoid your child support obligation if, during the time when the children were younger, you did not pay the proper amount of child support either because you were absent or because you didn't provide evidence of what your true income was or because maybe you did provide evidence of your income but you didn't pay the right amount.

HUSEIN
35:45 This case would have some impact on, in the future, parents who are waiting in the weeds with respect to their child support obligations. How does this case change your thinking as a divorce lawyer in terms of how you're advising your own clients?

STEVE
36:02 As a divorce lawyer, I tell my recipient clients, in other words, the ones that are to get support, to not wait in the weeds, to not delay, and to pursue financial disclosure each and every year to ensure that they collect the right amount. I tell my payer clients who are underpaying child support or not paying child support to not think that it's going to go away. It's going to creep up on them or it could creep up on them in the future, and it could be far more onerous later to have to pay a huge amount in child support arrears or retroactive child support if they don't pay it now.

HUSEIN
36:57 And as always, we're going to wrap up with our Ask-Me-Anything segment with our guest Steve Benmor. As our guests know, one of the bonus rewards for members of our Patreon crowdfunding community is the opportunity to submit

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questions that they want to hear our guest answer on the show. They submit questions about anything at all within our guest area of expertise as long as they're not asking for legal advice. And if you want to find out more about how you can become a patron and get awards like this and others, you can check out our crowdfunding website, which is lawyeredpodcast.com/patron. There's a lot more information there. Okay. So Steve, we got a bunch of great questions for this particular episode, and then what we're going to start with is, by virtuous nature, divorce law seems to evolve. It's just being a high stress to clients during some of the most emotionally fraught moments of their lives. And so the question is, as a lawyer, are there any strategies that you find helpful in advising clients in this regard?

STEVE
37:59 Whether you are a professional, a therapist, a police officer, a doctor, or somebody that's in the labor field, divorce and separation is devastating and agonizing, and it unearths every human being in a significant way. And so what I first do for clients is I remind them that if they feel that their lives are crumbling, are falling apart, that is common. And that they need to look in the mirror and recognize that this is a very, very difficult moment in their life, and that they need to encircle themselves with a group of people that they can rely upon to help them and support them through the process. And those people start with their family. Sometimes, sadly, the family has been estranged for many years as a result of the marriage. So now is the time to reach out and rebuild those bridges with the family by letting them know they need to help.

STEVE
39:19 Secondly, by establishing the right professional relationships, so for example, a therapist. A lot of people don't think, but they have through their employment healthcare plan, which includes employment assistance, which therefore includes therapy services. And so they should go and take advantage of that. And if they don't have insured therapy, they should still go and get therapy and counseling through this process to assist them. And in fact, these days, through social media, there are Facebook groups that help people deal with the stages, the early stages and the middle stages and the later stages of divorce.

HUSEIN
40:02 What about you as a divorce lawyer? Are there times when you feel like sometimes you're their lawyer and sometimes you're providing this emotional support?

STEVE
40:13 Yes. And indeed--

HUSEIN
40:15 And how do you reconcile that, or how do you deal with that? Yeah.

STEVE
40:18 I always preface it by saying I'm not licensed, trained, and insured in psychology. I share with them some general tidbits that I've picked up over 30 years as being a family law lawyer. But I remind them that the real help is going to be found in the support that they get from proper professionals and from their family and friends that love them and they love.

HUSEIN
40:48 The next question that we have is in light of real estate prices, have you noticed any trends in terms of clients who are seeking to enter into what are called

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cohabitation agreements? And if so, what are some legal considerations for lawyers to keep in mind in that respect?

STEVE
41:04 In most centers in Canada, certainly in Ontario and Toronto, Mississauga, and various cities outside of the GTA, the prices of real estate have skyrocketed. And with people getting married later in life after university, and with people getting money from their parents to buy their first condo or their first house, it has created a confluence of factors that have driven, spiked the demand for cohabitation agreements and marriage contracts.

HUSEIN
41:45 For people who maybe are not familiar, can you explain what is a cohabitation agreement?

STEVE
41:48 So a cohabitation agreement is a contract prepared by a lawyer, signed by the two spouses who are either living together or about to live together, that sets out what their legal rights are both while they're together and if they were to split up. And so I draft hundreds of cohabitation agreements and marriage contracts. The marriage contract is the equivalent of a cohabitation agreement for people that are about to get married. And in fact, some people have asked me to sign a marriage contract after they got married. So they, in effect, are the same kind of contract, but the cohabitation agreement is for people that are not married, and the marriage contract is for people that are married. But what they cover effectively is very similar ground. And what is that ground? How to deal with, generally, the real estate. In fact, that is the biggest driver of demand for cohabitation agreements and marriage contracts. Oftentimes, more money is put in by one person than the other, and in some cases, it's a property that was owned by one person before they started living together. So for all of those reasons, plus the fact that money is coming from the bank of mom and dad, those are all reasons why there's such a surge for cohabitation agreements. And quite frankly, it's just good financial planning because if they don't do it, then they will be involved in a big fight when they split up where one person will say, "I want half the condo," or, "I want half the house." And the other person will say, "But I paid for it all," or, "I paid for most of it." And it's just a big fight that will cost them multiples of the cost of a cohabitation agreement or a marriage contract.

HUSEIN
43:45 Absolutely. The next question is a bit related. And the question is, what are some considerations for new spouses who are contemplating whether to enter into a prenup or a prenuptial agreement, especially when they don't currently have many assets in their portfolio?

STEVE
44:01 That's an interesting one because I've had a number of those cases where initially I scratched my head and wondered, why are they even asking me for that because they earn low income and they have no assets.

HUSEIN
44:16 When I hear a prenup agreement, so there's often these celebrities or athletes who have a vested interest in a prenup agreement.

HUSEIN
44:25 Historically, we would think prenups and marriage contracts and cohabitation agreements are reserved for the very wealthy. It once was celebrities and corporate icons, then it's moved into wealthy people who nobody knows about but they want to protect their assets, but now we're seeing a rise in the number

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of people that are doing cohabitation agreements and marriage contracts who actually have very little income and very little assets. So why is that happening? And the answer is just people are being smart. People are being smart and they say, you know what, we are going to be together for a long time. And during the time that we're together, we're going to accumulate assets together, but we're also going to accumulate assets apart. And so if they decide to buy a house together and they decide to put the house in joint names, that's fine. But if one of them says I earn more money and I'm going to buy a condo as an investment or I'm going to build an RSP or I'm going to build a pension, I don't want to one day find half of that going to the other person, or the other person getting it really simply because we were together for 5, 10, or 25 years. And so what they're doing is they're acting very responsibly by predetermining what the breakdown of assets and income will be before they start living together. Prenups, cohabs, and marriage contracts can deal with both the outcome of a separation or death. And quite frankly, when it deals with death, it then serves as the springboard for them to go to a lawyer to have their wills and powers of attorney done to match what they put into the cohabitation agreement or marriage contract.

HUSEIN
46:21 Next question we have is – and I'll say for context that I've not practiced family law during my career, but whenever I hear "ADR" or alternative dispute resolution, this is a context in which ADR is used a lot. So the question that's been submitted is, what are some ways that family/divorce lawyers can optimize the use of alternative dispute resolutions during divorce proceedings?

STEVE
46:47 So ADR, as you've defined, is alternative dispute resolution. So the question is, what's the alternative to? So the alternative is to court. Now, the funny thing is, we all recognize that going to court is the place of last resort. So it's a little funny to use the A in ADR, because really it should be PDR, primary dispute resolution mechanisms, not alternative. Why do people go to court? People go to court because somebody is cheating the other person of money, lying about their income, lying about their assets, or there's domestic violence, and it's just not appropriate for them to resolve things privately. But really, we have now reached a point where mediation-- and mediation, arbitration in family matters is really the primary mechanism to resolve separation and divorce, not the alternative mechanism that it was once called. And so we lawyers, oftentimes, first try to resolve a divorce through negotiation.

STEVE
48:09 And if that is not feasible, then the next step is to look at mediation, or in some cases, mediation arbitration, which is a hybrid process where the mediator, if unable to resolve the matter, then invites everybody back for what would be called a quasi court hearing called arbitration. ADR also includes parenting coordination. Parenting coordination is after the parents have settled all of their affairs and they cannot agree on parenting issues, they hire a parenting coordinator to be able to help them resolve outstanding parenting issues that they themselves cannot agree upon.

HUSEIN
48:55 I appreciate, from a lawyer's standing point, it's much more advantageous to pursue ADR in whatever form you were describing, or PDR as it may be. But do clients always see it the same way? Because I can imagine when they're going through something so personal and so emotional and so sensitive to them,

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sometimes they can become a lot more adversarial and may want to take it all the way to a court proceeding. But does that track with the trends that you've noticed from your own practice?

STEVE
49:29

There has rarely been a case where the two spouses are at the same spot, same level, same status. Oftentimes, we see one spouse was the one that has been contemplating separation for weeks, months, and years, and the other spouse is dumbfounded when the first spouse says, "I want to separate." And so when the first spouse, who has been thinking and planning separation, comes to a lawyer, oftentimes, they just want to get it done right away. Whatever speedy avenue is available, that's the avenue they want. They want to move on. They want it over. And in that situation, the other spouse might not be ready. That other spouse might be thinking I want to reconcile or I want to go to marriage counseling or-- and they are just not ready. And so if you come at them too fast and say, here, sign this, they run for the hills. And so if you come at them and say let's negotiate, no; let's mediate, no. And in some situations, the person that really wants it over with is left with court. By taking them to court, they get to force a timeline on the other spouse.

HUSEIN
50:49

In those contexts, what do you do?

STEVE
50:51

I, as a specialist, recognize that sometimes we just need to lean back. Because if you go at the other spouse who is not ready to separate too fast, you're going to end up backfiring and costing a lot of money and really increasing the conflict and the stress. So in some cases, I counsel my client to be more patient and keep on chipping at it until we're able to get the other side to agree to negotiate, to meet, to mediate, to arbitrate. And in some cases, where the other side is just impossible and it's weeks and it's months and in some cases even years, we will then issue a court application because once the case is in court, it follows its own timetable. Oftentimes, it's a longer timetable than negotiation and mediation. But where the other person is not even willing to go to mediate, then we have to come up with a timetable because any client is entitled to divorce and move on with their life.

HUSEIN
51:56

From my limited knowledge of this area, there is some relationship management that's at play in terms of even after there is a divorce, oftentimes, these two individuals still have a role to play in the respective lives of the other party, right, especially if they have kids. So I imagine that there's also this incentive to play nice.

STEVE
52:19

Exactly. Definitely where there are children in common, divorce doesn't end the relationship, it just changes it. And even when there aren't children in common, people would think, well, then it's a no-brainer, they go their separate ways, they never have anything to do with one another. Not true because during the time they were together, they became part of one another's families and they formed relationships with those families, in some cases, friendships with those family members. And beyond that, they may have had mutual friends that they entertained with, traveled with, dined with. And so even in cases where there aren't children in common, in many cases, the relationship does continue because

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they have mutual interests. And so it's critical that when people go through separation and divorce, they don't employ a scorched earth campaign and try to burn the other one in order to get the very best outcome because they think they'll never have anything to do with them again, because they will. And so that's where family law is really a combination of law and diplomacy. And we lawyers, we family law specialists do a significant amount of education because, oftentimes, the clients aren't aware because they're in an emotional cloud for very valid reasons, because their marriage of many years or their relationship of many years is falling apart. And there's a lot of emotions, there's anger, there's resentment, there's revenge. There's all these feelings that cloud their ability to think clearly, and our role is to help them remove the clouds and to deal with this in a respectful, civil, and cost-effective manner.

HUSEIN
54:14 So Steve, I think your comments at the end, I think, very well summarized my understanding now of this area of divorce law. It very much is an art, it seems like, in terms of law and diplomacy put together. And the topics you walked us through, I think, reinforced that this is really much about relationships and there is a tactical way to go about it for both the practitioner and for the parties as well. So I want to thank you so much for taking the time to walk us through these important issues, and we look forward to staying in touch in the future as well.

STEVE
54:47 Thank you, Husein. It was a pleasure. And I hope the viewers and the people that listen to this podcast benefit from the ideas, the concepts, and the lessons that I shared.

HUSEIN
55:07 And that's our interview for today. Thanks for listening. Our guest for today's episode was Steven Benmor. And you can learn more about him and his law firm at his firm's website benmor.com. And he also posts a bunch of regular and high-quality content about his area of expertise on social media. You can find those on his handles and also under the hashtag [#BenmoreKnowsDivorceLaw](https://twitter.com/BenmoreKnowsDivorceLaw). And for more about today's show and for links to the cases that we spoke about today, you can find those on our website, which is lawyeredpodcast.com. Our next episode will be about the area of planning law, where our guest will be Isaac Tang, who is a prominent lawyer in this field. We were going to release this a bit earlier, but due to schedules, we're releasing it in two weeks from now. And on that episode, we're going to be chatting about housing affordability, heritage planning issues, and Minister's Zoning Orders, also known as MZOs. So it's going to be a fun episode, especially if you got interest in urban planning and the way that our communities are actually developed.

HUSEIN
56:12 And if you want to help to improve our show and get some neat and affordable legal rewards in exchange, including the ability to submit questions on our show, the best thing you could do would be to become a patron of our show. And you can find out more about how to do that on our crowdfunding website, which is lawyeredpodcast.com/patron. And to make sure that you never miss another episode of our show, you can subscribe to our podcast for free on iTunes or your favorite podcast platform. You can also follow us on Facebook, LinkedIn, or on Twitter. Our Twitter handle is [@lawyeredpodcast](https://twitter.com/lawyeredpodcast). As always, our sound editing work is managed by Solomon Krause-Imlach, theme music by Ben Swirsky, and website management by Steve DeMello. And finally, please be advised that while

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this show is aimed to be helpful and informative, that it is not intended to be legal advice. However, if you do want legal advice, please reach out to a lawyer directly to help you in your particular situation. And with that being said, we will see you in two weeks. Until then, keep it legal.