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A N D A S S O C I A T E S

YOUR FAMILY LAW SOLUTION

A SHORT GUIDE

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Family Law Section
Law Council of Australia
Member



**LAW
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SEPARATION

WHAT IS SEPARATION?

Separation is defined under section 49 of the *Family Law Act 1975*. It is described as the end of an intimate partner relationship. This is inclusive of a marriage or de facto relationship. You can still be deemed separated if you continue residing with your ex-partner under the one roof.

HOW DO I SEPARATE FROM MY PARTNER?

When you have made the decision to separate, it is recommended that it is made clear to your partner that the relationship has ended. It is also important to remember the date you separated. Some other things to consider are:

- Advising any relevant authorities that you are separated, such as Centrelink, Child Support and Medicare;
- Telling the important people in your life, such as family or friends;
- Making arrangements for your children, such as deciding where they will live;
- Protecting yourself online (e.g. changing any passwords that your ex-partner might know);
- Gathering as much financial information about the relationship, including documents relating to the assets and liabilities, such as bank statements and tax returns.



DOES ONE OF US HAVE TO LEAVE THE FAMILY HOME?

If there has been family violence, a court can say that one person must leave the family home. Otherwise, you decide if you want to leave or stay in your home. Your partner has the same choice. You can agree to both live in the same house after separation. If you do, you might need to prove that you are really separated. This might include telling the court about:

- where you both sleep;
- what cooking and cleaning you each do;
- whether your family and friends think you are separated;
- how you each manage your money;
- how you communicate with each other.


DO I LOSE MY RIGHTS IF I LEAVE?

No. If you leave the family home, you will not lose your rights to the house. However, once you leave it may be difficult to regain access.

WHAT SHOULD I TAKE IF I LEAVE?

It is best to take all your legal and financial papers with you, if it is safe. This includes:

- birth and other certificates;
- your Will;
- passports;

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- visas;
 - ATM cards, bank statements and cheque books;
 - superannuation, tax and other financial papers.

You can also take:

- personal belongings, such as photographs;
- practical items you need for yourself and your children, such as clothing, essentials, and toys.



DIVORCE

WHAT IS DIVORCE?

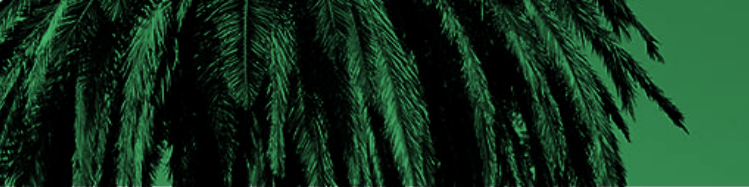
Divorce is an application under the *Family Law Act 1975* for a divorce order in relation to a marriage that has broken down irretrievably. It is the legal ending of a marriage.

WHEN CAN I GET A DIVORCE?

You can apply for a divorce if you have been separated for at least 12 months.

DO I HAVE TO GET A DIVORCE?

No. However, you must be divorced if you want to marry again. You can make decisions about your



children and property without being divorced. If possible, try to make these arrangements soon after separation. If you stay married, it may affect you financially and will also affect your Will if it is not updated.

WHAT IF WE HAVE CHILDREN?

The court will require that parties with children under 18 have proper arrangements regarding the child/ren care, welfare, and development. The court may require more information before a divorce is granted.

HOW DOES DIVORCE AFFECT MY PROPERTY AND ASSETS?

If you have already had a property settlement, getting divorced won't affect your assets. If you have not had a property settlement but wish to apply for a divorce, keep in mind that a property settlement must take place within 12 months of your divorce becoming final.

PROPERTY & ASSETS

WHAT IS A PROPERTY SETTLEMENT?

A property settlement is a decision about how your property and assets will be divided. There are many factors to be taken into consideration when reaching agreement about how the property and assets are divided. It is important to seek legal advice about understanding your rights and obligations before reaching a formal agreement.

DOES IT MATTER IF WE WERE NOT MARRIED?

If you were in a de facto relationship and there are joint assets of the relationship, you can both agree to a property settlement. From the date of separation, you will have 2 years to finalise your property settlement. If 2 years have passed and you have not had a property settlement you may apply for “leave” of the court (permission to have a property settlement out of time).

WHAT HAPPENS IF WE AGREE?

It is important to get legal advice and ensure you understand your rights and obligations before signing any agreement. There are only 2 ways in which you can finalise your property settlement and make it legally binding. That is through a Binding Financial Agreement or an Application for Consent Orders. Speak to our experienced family lawyers about what option may be best for you.



WHAT IF WE CANNOT AGREE?


If an agreement cannot be reached there are several steps that must be taken in accordance with the court's pre-action procedures, such as:

1. make inquiries about, invite the other parties to and where it is safe to do so, participate in dispute resolution services, such as family counselling, negotiation, conciliation or arbitration;
2. if dispute resolution is unsuccessful, write to the other parties, setting out their claim and exploring options for settlement;
3. comply, as far as practicable, with the duty of disclosure by exchanging relevant documents; and
4. initiating Proceedings within the Federal Circuit and Family Court as a last remaining option if an agreement is still not reached.

WHAT DOES A PROPERTY SETTLEMENT INCLUDE?

All your assets and liabilities should be included in the property settlement. This refers to assets owned by you or with another person, family trust or company. Some examples of property that are to be included in the asset pool as are follows:

- Properties and land;
- Motor vehicles;
- Money, including cash and in bank accounts;
- Investments, such as shares;
- Superannuation;

- 
- Other assets, such as inheritance monies and redundancy packages;
 - Liabilities, such as mortgages, loans and credit cards.

WHAT IS CONSIDERED WHEN ASSETS ARE DISTRIBUTED?

When you apply for a property settlement, the Court uses a '4-step' process to determine the application as follows:

1. Firstly, the Court determines the value of the asset pool which includes assets, liabilities and financial resources (such as superannuation) in your own name, joint names, or assets held in any other entity in which either party may have an interest. This involves undertaking full and frank disclosure to ascertain the pool, and this may require formal valuations to be conducted.
2. Thirdly, the Court will assess each party's contributions to the relationship. Contributions can be financial and non-financial, including contributions to the household and family in general, and consideration of assets brought into the relationship and contributions made during the relationship. Generally, a percentage weighting is given to contributions. However, there is no set formula as to how this is determined; it is discretionary and can vary.



3. Fourthly, the Court will assess each party's future needs. In assessing 'needs' the Court would look at things such as relative earning capacities, state of health of the parties, and the need for the primary carer of the children to provide a suitable home for the children.
4. The final step is one whereby the Court ensures that in light of the circumstances of the case as a whole, the orders which it makes are 'just and equitable', or fair and reasonable in all the circumstances.

HOW CAN I PROTECT MY PROPERTY?

Keep track of all assets and debts until financial arrangements are complete whether it be by way of a Binding Financial Agreement or an Application for Consent Orders.

Having final Orders financially severs the relationship between you and your former partner so that neither of you can re-enter into a further property settlement in the future. Especially in circumstances where one party increases their wealth, having final Orders in place prohibits the other party from re-negotiating a further agreement or varying the current one.

Whilst it is difficult to have final Orders set aside, it is not impossible. However, it is difficult to predict future circumstances.



SPOUSAL MAINTENANCE

Spousal maintenance is an obligation under the *Family Law Act 1975* when financial support is paid by a party to a marriage to their husband or wife (or former husband or wife) in circumstances where they are unable to adequately support themselves.

DE-FACTO MAINTENANCE

De facto maintenance is financial support paid by a party to a de facto relationship that has broken down to their former de facto partner in circumstances where they are unable to adequately support themselves.

The Court can only make a de facto maintenance order if your de facto relationship meets certain jurisdictional requirements.

WHEN SHOULD I APPLY FOR A PROPERTY SETTLEMENT OR SPOUSAL MAINTENANCE?

We can apply to the court any time after separation although we recommend having a property settlement as soon as possible.

You must finalise your property settlement within a 12-month period from the date of your divorce.

For de facto parties you must finalise your property settlement within a 2-year period from the date of separation.



CHILDREN

DOES IT MATTER IF WE WERE NOT MARRIED?

No. The same laws apply to all children whether the parents were married or in a de-facto relationship.

WHAT IS THE BEST WAY TO MAKE ARRANGEMENTS FOR THE CHILDREN?

The law encourages separated parents and other people interested in the welfare of children to try to agree on arrangements for children. It is best if you and the other parent decide together what to do about your children and consider the following:

- where the children will live, and who they will spend time with;
- how the children will be financially supported; and
- how the children will maintain a relationship with both parents and other important people, such as grandparents and extended family.

CAN GRANDPARENTS AND OTHER FAMILY BE INVOLVED?

Other family members, like grandparents, stepparents, aunts and uncles can play an important part in children's lives. They can be included in family dispute resolution, parenting plans or court orders.



WHAT IS A PARENTING PLAN?

A parenting plan is a written agreement, signed and dated by both parents or other carers involved. We will ensure your parenting plan includes:

- where the children live;
- who the children spend time and communicate with;
- school or childcare;
- medical issues;
- religious or cultural practices;
- financial support for the children;
- how parental responsibility is to be shared (i.e. who will make long-term decisions about the child/ren);
- how disagreements about parenting arrangements will be resolved;
- how the parents, or other carers, will communicate with each other; and
- any other significant matters about their care, welfare and development.

DO I NEED TO GO TO COURT?

If we can assist you in reaching an agreement, you do not need to go to court. We will prepare a parenting plan for you to enter into, or apply for consent Orders on your behalf. If we cannot reach an agreement, you may consider filing an application with the court. Before filing, there are pre-action procedures that must be followed, including:



1. complying with the requirements of Compulsory Family Dispute Resolution (also known as mediation), and if your matter still cannot be resolved, you will be issued with a Section 60i Certificate; and
2. giving written notice of issues and future intentions to the other party (or reply to this notice of intention, if you have received one).

If no resolution is reached during these pre-action procedures, you can then make an application to the court.

WHAT ARE CONSENT ORDERS?


Consent Orders include similar aspects to parenting plans, however, are legally binding orders made by the Federal Circuit and Family Court of Australia (Family Court) by the consent of you and the other parent.

DO CHILDREN HAVE TO SPEND EQUAL TIME WITH EACH PARENT?

No. The law says children should usually spend time with both of their parents, but it does not have to be equal time. Think about what arrangements are best for your children and what will work for your family.

That may be:

- equal time;
- specific times on weekdays, weekends, holidays and special events; or
- some other amount of time.



Try to create an arrangement where both parents believe the children's needs are being met. This includes thinking about the quality-of-care the children will have and arrangements that make them feel safe and settled. If you cannot agree on how much time children will spend with each parent, we can assist you in applying to the court for a parenting order.

WHO SUPPORTS THE CHILDREN FINANCIALLY?

Every parent should support their child/ren financially. 'Child Support' is the government-assessed financial support paid by one parent to another, to help with the costs of a child. The amount to be paid can depend on:

- the income of each parent;
- the amount of time each parent spends with the children;
- the number and ages of the children; and
- if either parent is supporting other people financially.

Parents can also agree to enter into private arrangements about their child/ren's expenses and financial support, that is not government-assessed, such as through Binding Child Support Agreements.

Determining an appropriate level of financial support is complex, so getting the right legal advice and guidance is essential.



WHAT IF MY CHILDREN DO NOT WANT TO VISIT THEIR OTHER PARENT?

This will depend on the children's ages and if there are court orders about spending time with that parent. If the children refuse to spend time with the other parent, you should encourage them to go if it is safe to do so. These issues can be quite complex, and should be discussed with one of our experienced family lawyers.

WHAT IF COURT ORDERS ARE NOT BEING FOLLOWED?

If the court orders state that the children are to spend time with you, and the other parent is refusing to abide by the orders, or not encouraging the children as best they can, you may be able to seek the court's intervention. Getting urgent and experienced legal advice is crucial.

WHAT IF THE ARRANGEMENTS ARE NOT WORKING?

Over time, things change and new arrangements may need to be made. It is best to discuss these matters with the other parent. We can assist you in negotiating and drafting a new agreement. If there are final court orders that have been made, there must be a significant change in circumstances to have the orders changed, unless it is mutually agreed between the parties.

CAN I TAKE MY CHILDREN INTERSTATE OR OUT OF THE COUNTRY?

There must be mutual agreement between the parents before this can take place. Different advice applies to parents intending to move permanently versus going on a holiday.

It is important to remember that it is usually beneficial for children to have a relationship with both parents, and other important people in their lives (provided it is safe). Moving away, interstate or overseas, can affect these relationships. The court can make orders to return the children if it is deemed not in their best interests to move, or if there was no mutual agreement. It is imperative to obtain legal advice before making significant changes.

WHAT IF MY CHILDREN ARE NOT RETURNED?

You may be able to apply to the court for a Recovery Order. Contact our office as soon as possible to explore your options.



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