

Family Matters

A PRACTICAL GUIDE
TO FAMILY LAW



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SIDE.

Introducing Family Law

Australia's family law system helps people resolve the legal aspects of family and domestic matters including divorce, property settlement after marriage or de facto relationship breakdown, spouse maintenance and issues relating to parenting arrangements after separation.

The system encourages people to agree on arrangements without going to court, however when that is unavoidable, the courts that exercise the jurisdiction are the Family Court of Australia and the Federal Circuit Court of Australia.

This booklet will guide you through the key areas of family law and some of the important things you need to do, consider and decide upon in different situations.

Contents:

1. Separation
2. Family Dispute Resolution
3. Preparing for and Filing Property Proceedings
4. Parenting Arrangements and Orders
5. Non-Compliance and Breach of Orders
6. De-Facto Relationships and Property under Family Law



Breaking up is hard to do

Separating from a spouse or partner is difficult, there are no two ways about it. We know that half of all relationships end up in divorce but not one of us ever expects it to happen to our own relationship.

Whether the break-up is your choice or not, the grief you feel can be overwhelming in those early days. You might experience feelings of loss, anger, sadness and resentment, and you may also have to deal with how everyone else reacts to the separation – your partner, children, parents, friends and acquaintances.

Just when you're feeling the most vulnerable, you find yourself with some incredibly difficult issues to work through. How will you and your partner tell the kids? How will you share the parenting? Where will you both live? How will you agree on who gets what? And here's a big one, how can you avoid a long and expensive court process?

Unfortunately, separations can become ongoing arguments which leave everybody feeling damaged. This is what you want to avoid, and the good news is that you really can avoid it if you and your separating partner work together to resolve differences. There's no such thing as a fun separation, but there are separations where both sides keep their dignity intact so that they can move on positively to the next phase of their lives.

“We're separating, now what?”

Talking to each other

One of the most important things you can do when separating is to communicate clearly and calmly with your partner. If the break-up is coming from you, be clear about your decision to end the relationship. If it's coming from your partner, take some time to pull your thoughts together, get support and work out what your next steps are.

At this point it's crucial to recognise that you and your former partner may be in different stages of acceptance of the situation, and so you should approach this life change with as much understanding and flexibility as possible.

Counselling and mediation are useful tools to help you both clarify your thoughts and expectations. Being articulate and realistic about what you want will be a big help when it comes to agreeing the outcomes of your separation.

Talking to the kids

If you have children together, it's important to talk to them about the end of the relationship. It will be one of the hardest things you have to do and you will most likely have to explain it more than once.

Talk to your children about the change of situation in a way that makes sense to them, and encourage them to ask questions and communicate their feelings and concerns with you. If possible, sit down and share the news together taking care not to blame or demean each other. Be prepared for anger, tears, blame and confusion. If your children are young, there's a good chance you'll have to explain what's happening again and again.

It's not going to be easy but having these discussions calmly and amicably will have a big impact on how well your children handle the separation.

Understanding the legal process

Where to start

You can't formally register a separation under law and the law requires you and your spouse to be separated for at least 12 months before you can apply for a divorce. It makes sense to confirm your separation date in writing as proof should you decide to get divorced later on.

If you and your spouse live in the same home during part or all of your 12-month separation period, it's best to talk with a lawyer to ensure you maintain the required level of independence to qualify as separated. Down the track, you may need to provide extra information to the court through an affidavit (a written statement prepared by a party or witness) before you can apply for a divorce. A lawyer can guide you on the information needed in the affidavit as well as witnessing your statement.

You should also seek legal advice if you wish to obtain an order to exclude the other party from your home.

How legal advice can help

Seeking legal advice when you're separating doesn't necessarily signify the beginning of a long and painful legal battle. A good family lawyer will help you understand your rights and responsibilities and avoid confusion about the informal and formal procedures you can take.

The role of the lawyer is to provide you with information and help you identify your options and potential outcomes. You should meet with your lawyer with a set of questions in mind. Take a support person with you if you would feel more comfortable.

Legal advice may help you to resolve the matters between you and your former partner. Though some court applications may need to be made urgently, the issues can often be resolved by consent through well-positioned and considered negotiations.



Property and finances

The need to make lots of important decisions in a short time frame greatly contributes to the stress felt by many people in separation. Who will live in the house? What do we do with our bank accounts or other joint property? Where will the children live and who will take care of them?

Avoiding a drawn-out court process is an important step in achieving a positive outcome. The more you and your former partner can make informal short-term agreements until final long-term agreements can be made, the better for everyone.

When it comes to property, try to reach an informal agreement about how to divide things. It's then a relatively simple process to apply to the Court for 'consent orders' that officially state how your property, including debts, will be divided.

Children

If you have children, you and your former partner can decide on parenting arrangements or a 'parenting plan'. This should allow for as close to equal time spent with both parents as possible, and be mindful of the role of grandparents and extended family. These plans should remain as

flexible as possible to allow for the inevitable change of circumstances for the child or children, particularly as they grow in years and their school commitments and sporting interests develop.

Whilst there are many options for child support payments, these are strictly determined on the basis of the parent's income, and amount of time spent with each parent.

You and your former partner may choose to make a financial agreement covering issues such as money and child or spousal maintenance. For these agreements to be binding, you both need to seek independent legal advice. It may also be worth seeking financial advice from private advisers such as an accountant or financial planner and check your obligations with Centrelink.

Reaching a settlement

It's not always easy agreeing what to do about property and parenting arrangements and you and your former partner may not see eye to eye on everything. A good family lawyer can help you to address a wide range of property and child-related issues and negotiate a settlement with your former partner without going to court. This can often save a great deal of time, money and heartache.

Don't forget to look after you

When you're experiencing stress, one of the first things to get overlooked is often your own well-being. However this is exactly the time when you should be really looking after yourself and monitoring your physical and mental health. Keep up a nutritious diet and moderate exercise, and avoid self-destructive behaviour like drug use, drinking or gambling. Whatever you do, don't ignore signs of stress or depression.

There are many resources available to ensure you maintain your wellbeing at this difficult time. Relationships Australia NSW offer in-person and online counselling, family therapy and mediation, and can be contacted on 1300 364 277.

The Law Society of NSW offers comprehensive online literature regarding children and separation as well as divorce.

If you're feeling anxious and overwhelmed contact organisations such as Beyond Blue, by phone on 1300 224 636 or via online web chat, or Lifeline on 13 11 14.



If you and your former partner are disputing about children and property, Australian law requires you to make a genuine effort to resolve issues through family dispute resolution ('FDR'). This must be undertaken before filing an application in court for orders.

Using counselling, mediation and negotiation, it's been shown that as little as 5% of cases require a final hearing in a family law court. There are many advantages of avoiding court:

- You may be able to move on and come to terms with the situation sooner
- Reduced financial cost
- Empowerment to make your own decisions rather than having a court decide for you
- Maintaining or improving communication with your former partner

It is the job of an FDR practitioner not to give legal advice, but to help you and your former partner discuss the issues, assess options and help you to reach an agreement.

A typical mediation may include:

- An opening statement by the mediator

- Statements by you and your former partner
- Agenda setting and issue identification
- Negotiation and private meetings with the mediator
- Determination of an outcome or resolution

It is the duty of an FDR practitioner to provide you with information about parenting plans.

Because you and your former partner are the focus of this process, your lawyer takes a back seat and plays a support role, providing information and giving you advice. They will help you develop options and draft settlements, but not be an 'advocate' as they would in a courtroom.

If you and your former partner can't reach a solution through dispute resolution, the FDR practitioner will issue what is called a '601 Certificate' which will permit you to apply to the court seeking orders.

It is important to note, mediation is often not appropriate in cases that involve child abuse or family violence. You should seek legal advice in these instances as these cases are regarded as exceptions to the FDR requirement.

To find a certified FDR practitioner contact your lawyer. You can consult the Family Dispute Resolution Register at www.fdrregister.gov.au

This section outlines what to expect when you are filing property proceedings in the Family Court, from beginning to end.

Pre-action procedures

Before filing an application seeking to alter the property interests between you and your former partner, there are some pre-action procedures contained in the Family Law Rules that need to be complied with.

With the help of your lawyer you must provide your former partner with a copy of the pre-action procedures brochure and an invitation to participate in dispute resolution. This is because Australian family law requires you to make a genuine effort to resolve the dispute before proceeding to court. If they refuse to take the opportunity your lawyer must issue a notice to them setting out the issues, orders to be sought, another offer to resolve the dispute and an allowance of 14 days for the person to respond.

Before court, you and your former partner must exchange documents such as a schedule of assets, incomes and liabilities; a list of other relevant documents including three most recent tax returns and assessments; a superannuation information form; and, if applicable, business documents. You should exchange copies of documents on this list.

The role of your lawyer at this stage is to help you resolve the dispute prior to legal action, discourage ambit claims, estimate costs of legal action, advise you to make full and frank disclosure and withdraw from the case if such disclosure isn't made.

The application

The application to alter a property interest in final orders is called an "Initiating Application (Family Law)". If you're seeking property settlement orders you must also file a financial statement and superannuation form.

The application form must state clearly the orders sought, detailing who is ordered to perform some act. The type of orders sought varies from case to case, depending on the type of property, encumbrances and your wishes. You will be asked to review draft orders by your lawyer before filing.

The Federal Circuit Court has the additional requirement of an affidavit when filing an Initial

Application, covering important information such as dates of birth of the parties and any children, cohabitation, marriage and separation. Your lawyer can recommend in which court to file an application.

The financial statement

Both parties must file a financial statement. You have an obligation to make full and frank disclosure of all relevant financial circumstances. Failure to do so can result in penalties.

The response and reply

If you're responding to your ex-partner's Initiating Application and wish to oppose those orders or seek different orders you must file a 'Response to Initiating Application' at least seven days before the case assessment conference.

Case assessment conference

When you file an initial application for financial orders, your first court event (and perhaps the most important) is a Case Assessment Conference.

The conference is managed by a Registrar or a Magistrate in the Federal Circuit Court. In the session, which lasts roughly one hour, you and your former partner will identify the agreed and controversial issues as well as determining whether any other persons are entitled to be a party to the proceedings.

The aim of the conference is to enable the Registrar to assess the possibility of resolving the matter in the early stages of proceedings. They will often begin by explaining the purpose of the conference and answering questions from yourself or the other party. The Registrar must ask if there are any issues of family violence affecting the ability to participate in negotiation. It's important to note that the Registrar cannot give legal advice. If an agreement isn't reached, you will be asked to participate in a conciliation conference.

Conciliation conference

The conciliation conference helps you to reach a conclusion about the matter with the Registrar. These conferences may not be ordered in especially urgent cases, where there are special circumstances, or if it would not be practicable to require the parties to attend a conference.

In preparing for this conference, outstanding copies of any documents requiring exchange must be transferred between the parties as well as any additional documents set out at the case assessment conference. 21 days after the case assessment conference a financial questionnaire must be lodged by both parties. The applicant must prepare a balance sheet for the other party and within 21 days of receiving it the other party must review and add any items and return it. 14 days after it is returned, final edits must be made and it must be filed with the court.

If the matter is resolved at the conciliation conference, consent orders formalising the agreement may be made. If not, the Registrar will hold a procedural hearing to set out further steps to be taken perhaps including a 'first day before the judge'.

The docket system

All matters in the family law courts are conducted under a docket system. The judge is appointed to the matter after a failed conciliation conference and the same judge will run the matter from then until the end of the hearing. This enables the judge to become familiar with the parties and their circumstances.

It's important to note that the Federal Circuit Court case management system is far simpler than that of the Family Court.

Within 14 days of the first court date the parties must serve on each other, as with the case assessment conference, the copies of three most recent tax returns and assessments, superannuation information form and any relevant business records.

Settlement options

Through a variety of methods, you can choose to settle the matter at any stage in the proceedings.

You may choose to use a financial agreement signed by you and your former partner with a Certificate of Independent Legal Advice from both your legal representatives. The court is not involved in this process. This agreement can only be terminated by another financial agreement or termination agreement. Another option is consent orders where an application is filled out and both parties swear an affidavit.

Although parties can separately implement their settlement without the benefit of court orders or a financial agreement, this is discouraged because a party may change their mind and there may be a dispute about the terms some time after the settlement.

This section outlines the processes and procedures following a separation where children are involved.

Pre-action procedures

Similar to starting proceedings for property and financial disputes, there are things the courts require you to perform before filing an application. However these procedures may not apply if your case is one of urgency or involves allegations of child abuse and family violence. A lawyer can tell you how to proceed in these cases.

You must first attempt to resolve the dispute by way of Family Dispute Resolution with a certified practitioner.

If you're unable to resolve the issues through Family Dispute Resolution, you need to exchange written correspondence with your former partner to identify those issues still in dispute and provide them with a 'Notice of Claim'. This notice states your intention to commence a court case and specifies the following: the orders you wish to seek, a genuine offer to resolve issues and an allowance of 14 days from the date of the letter for your former partner to respond.

If you're the recipient of a notice, you must reply within the timeframe either accepting the offer to resolve issues, or setting out the orders you will seek, a genuine counter offer and another allowance of 14 days for the other party to respond.

The duty of disclosure is the same in these proceedings concerning children as they are for property and financial disputes.

Parenting plans

If you succeed in resolving the issues through dispute resolution, you can choose to informally agree through a verbal arrangement. However, greater certainty is provided from creating a parenting plan.

A parenting plan is a written and signed agreement that states how children will be cared for. There are no essential items of these agreements though typically they include where the children will live, day-to-day arrangements, holidays and special occasions. The plan can be changed at any time with the agreement of both parents.

The benefits of a parenting plan are that you are less likely to encounter arguments and misunderstandings, you have more control over the process, money and time can be saved by avoiding court proceedings and ultimately the co-operation of parents is seen to be in the best interests of the children.

Through parenting plans aren't legally enforceable they will be taken into account if the matter eventually proceeds to court hearings and orders. Parenting plans can also be made the subject of consent orders by the court.

Child dispute conferences, family consultants and the child responsive program

As an initial order by the court, disputing parents may be referred to a child dispute conference. This conference is designed to identify the family situation and disputed issues and help a family consultant make a short-term decision about arrangements for the children. However you as parents may also choose to reach a final agreement in this conference.

The family consultant is a qualified social worker or psychologist with expertise in working with families. He or she will help you, your former partner and the judge achieve the best outcomes for the children.

Child dispute conferences, as well as meeting between the family consultant and parents individually, constitute the child responsive program. Children are also included in this process by way of interview to ensure they have an opportunity to express their feelings and wishes.

Less adversarial trial

If the parents are unable to come to an agreement through all previous procedures, less adversarial trial procedures will be commenced. This trial is flexible, less costly, inclusive and typically less formal than a traditional trial.

At least 28 days before the trial commences parents will have filed and served a parenting questionnaire.

4. Parenting Arrangements and Orders



At the trial the judge will have read the questionnaire and will focus on what is best for the child or children. Evidence will be collected (including expert evidence) if the case proceeds to final stages of the trial. The family consultant is available throughout the entirety of the trial.

Parenting orders

The court makes orders only when the parents can't agree on the dispute concerning children. Parenting orders made by the court are not substantially different than what would be contained in a parenting plan. It may address who the children will

live with, how much time will be spent with each parent, allocation of responsibilities, communication arrangements and any other aspects concerning the welfare of the child. If the orders need to be changed at a further date, an application will need to be filed with the court.

Parenting orders create obligations. You must take all reasonable steps to put the order into effect and positively encourage children to comply. It is an offence attracting imprisonment to take a child out of Australia without the consent of the other parent.

Orders remain in force until new ones are made or the children reach the age of 18 years old.

5. Non-Compliance and Breach of Orders

Non-compliance and breach of any order made by family law courts are taken very seriously. Contravention of an order can take the form of intentionally failing to comply, making no reasonable attempt, intentionally preventing compliance or aiding and abetting contravention.

In such a situation the first thing you need to do is seek legal advice. A lawyer can identify your rights and responsibilities under an order and may be able to facilitate rectification without going back to court.

The party alleging non-compliance can file an application for contravention of orders. An affidavit and a certificate from a Family Dispute

Resolution practitioner will also need to be filed unless the case is an exceptional one. The filing party must set out what steps can be taken to remedy the situation. The contravention must be proved on the balance of probabilities (over 50%).

If the court determines a person has failed to comply it must also decide if there was a reasonable excuse for doing so, such as not understanding obligations or reasonable belief that the actions were necessary to protect the health and safety of a person.

Depending on the orders and type of contravention the court may vary the primary order, order a post separation program, compensate for time and reasonable expenses lost, order community service, a bond, paying costs, a fine or imprisonment.



If you're separating from a partner with whom you had a de facto relationship and are seeking property distribution, the Family Law Act applies to you in the same way it applies to married couples.

However for the courts to have jurisdiction over your matter, it needs to be established that you were in a de facto relationship as defined by the Act, that the relationship has 'broken down' after 1 March 2009 and that you meet the geographic requirements.

A de facto relationship

The relationship must be a de facto 'marriage type' relationship. The courts do not have jurisdiction in relationships such as those between a carer and relative. The court may consider the length of the relationship, whether it was sexual in nature, living and financial arrangements and whether there are any children of the relationship. Gender is not a

relevant consideration, so same sex couples meet the definition. Documentary support (e.g. joint bank accounts, leases, tax invoices) can help you prove a de facto relationship.

Property settlement application

To be able to make an application you must fulfil one or more of the following: you had a de facto relationship lasting at least two years, you have a child with your de facto partner, you made a substantial contribution to the property and finances, your relationship was registered, or you lived at least one third of your relationship in any Australian state or territory except Western Australia (where the uniform family law legislation does not apply). You must apply for the settlement within two years of the end of the relationship.

However the court will first encourage you to reach an agreement between yourselves regarding the property, which can be enforced with the court through consent orders. The court may refer you to mediation and conciliation so that you can attempt to reach an outcome.

Court considerations

To determine how to fairly divide the property the court considers a range of factors. What did each party own before the relationship? What is the net value of the current assets you share? What contributions (direct and indirect) did you each make to the relationship? What are the future needs of each party?

Once those considerations are made and a determination is reached, the court will make orders specifying how the assets are handled and whether ownership is transferred.

Above all, you are encouraged in the same way as married couples to reach an agreement together. This may mean you can move on more quickly, reduce your financial costs and perhaps maintain or improve communication with your former partner.

Want to talk?

Sydney Law Group is an experienced team of family lawyers who are passionate about achieving the best possible legal results for our clients. We exist to help you through this difficult time and to guide you to a positive outcome without extra emotional or financial stress. We're on your side, every step of the way.

Call us for a confidential chat on
(02) 8819 4399. We're here to help.



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