



**Family and
Relationship Law**
**I've separated what
should I do?**

We appreciate that marriage and relationship breakdowns are a personal journey, emotional and impactful. We are here to listen carefully, to understand your underlying needs and goals and to guide you through the legal system.

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I've separated what should I do?

If you have separated from your spouse or partner, or you are considering separation in the imminent future, you probably have a lot of questions on what you should do next. We've answered the most common questions to help you understand what is needed and what to look out for to help you to start moving forward.

Who is going to leave the family home?

In most scenarios, one person moves out of the family home by agreement.

If you are the primary carer to children, you should consider remaining in the home so that the children have continued stability.

Where no agreement can be reached as to who should move out or you have safety concerns, we encourage you to seek advice from a family lawyer about your options.

Do I need to gather financial information?

It is important for you to understand the assets, liabilities and financial resources of the relationship as you will likely be negotiating a financial settlement with your spouse or partner. All assets, liabilities and financial resources belonging to the relationship form the 'Property Pool' available for division between you and your spouse or partner. See our section titled **The steps of a property settlement** below to find out more about how your entitlements to the Property Pool are determined.

Where possible, gather financial information and documents such as copies of bank account statements, pay slips, tax returns, financial statements where there is a business and/or trust, and superannuation statements.

If you and your spouse or partner own particular belongings that are valuable, such as paintings or other antique collections, take photographs of the items so that you have accurate records.

It is also important to locate legal documents such as birth and marriage certificates and passports.

Do I need to take my clothes and personal items with me?

If you are leaving the family home you typically will not be returning. It is therefore important that you take with you your personal possessions including clothes, jewellery and sentimental items. This will save time, stress and money down the track having to negotiate with your spouse or partner to collect your belongings.

What do I do if we have a joint bank account?

Where you have joint bank accounts, credit cards and/or offset accounts attached to a mortgage, you should let your bank(s) know that you have separated and regularly check the joint bank balances and redraw facilities.

If you are concerned that your spouse or partner may withdraw funds without your consent you should contact the bank and request that dual signatures be required to authorise any withdrawal.

How do I protect my online accounts?

You should consider whether you need to change your email, internet and banking passwords. This is particularly important if your situation is hostile, unsafe or if there is an imminent threat of litigation.

You should not access your spouse or partner's online accounts nor open mail directed to your spouse or partner without authorisation.

Should I change my will?

Separation does not revoke a will or powers of attorney, only a divorce does. This means your former spouse or partner can still inherit your assets if you die, and make decisions on your behalf should you lose capacity. It is important that you obtain estate planning advice as soon as possible to make a new will and powers of attorney. You should also obtain advice about any binding nominations on place with respect to your superannuation fund(s).

How do I communicate with my spouse or partner?

Keep communication civil. In an electronic era, everything that is communicated to your spouse or partner by text, email, Facebook messenger, WhatsApp or parenting apps can be used as evidence. As a golden rule, if you would not want your spouse's or partner's lawyer or a judge reading that communication, do not send it.

There are parenting apps which you and your spouse or partner can agree to communicate through, to ensure that communication remains child focused.

How do I communicate to our children that their parents are separating?

Whilst you need to communicate to your children that you are separating, they do not need to know the details as to why or of the process. Where possible and if it is safe to do so, you and your spouse or partner should tell the children together. Ensure your communication with your spouse or partner is amicable, as this can impact your children's wellbeing. For children who become entangled in the parental dispute, it is often damaging to their psychological health and wellbeing.

See our section titled, **The approach to parenting matters** below to find out more about how parenting arrangements are determined.

Do I need to keep a record of dates?

Keep a diary. It is important that you document key dates and events such as, the date you separated from your spouse or partner, and any interim agreements or arrangements made between you and your spouse or partner including the dates children have spent time with your spouse or partner and with you.

Do I need legal advice?

Whilst you may never need a lawyer to formally act on your behalf, it is invaluable to obtain initial legal advice regarding your separation. This will assist you to understand your rights and obligations under the relevant law. In relation to financial matters, it is important that any agreement reached is formally documented.

Will I have to go to court?

There are a number of pathways to resolution which do not involve going to court, including negotiations and mediation. All matters however, follow the same steps and concepts governed by the Family Law Act 1975 (Cth). Therefore, when we talk about how to resolve financial and parenting issues, we do so in the context of how the Federal Circuit and Family Court of Australia decides matters.

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The steps of a property settlement

The family law system is a discretionary jurisdiction, therefore there is no exact formula to determine what your entitlement would be if the court decided your matter. The court will make a decision that is considered just and equitable. This can vary, which is why lawyers will often advise you on a range of entitlement rather than an exact dollar outcome.

Typically the court will follow a four step process, once it is established that it is just and equitable in the specific situation to make a property settlement order.

Determine the Property Pool

The first step is to determine what property you and your spouse or partner own. Your property pool will include all assets, liabilities and financial resources.

To assist in establishing your property pool, you and your spouse or partner are obligated to disclose all financial documents up to the date of settlement or court determination. The values of property are assigned by agreement or professional valuations.

It is important to note that the property pool is considered at the date of entering into the agreement, not as at the date of separation.

The court will then consider making percentage adjustments regarding what you and your spouse or partner are to retain based on the following factors.

Contributions

The court considers the contributions made by each of you throughout the relationship to the acquisition, conservation and improvement of the property. This includes financial and non-financial contributions at the start of and during the relationship and after separation.

For a mid to long term relationship where each person has worked hard to contribute in their respective spheres, whether that be as primary income earner, homemaker and/or caregiver, the assessment of contributions is often equal.

There are however circumstances where contributions between you and your spouse or partner are not considered equal. For example, financial contributions where one person brought an asset(s) of value into the relationship or gifts/inheritances received by a person during the relationship.

For shorter relationships, the court will give more weight to the contributions of the individual.

Adjusting Factors (Future Needs)

The Court then considers the future needs of both you and your spouse or partner and will make an adjustment if one person has greater future needs than the other. Factors taken into account include, health, age, income and earning capacity, care of children, and any financial resources.

At this stage the court will determine an assessment of your entitlement as a percentage of the property pool, adjusted from the assessment of contributions.

Just and Equitable

The court will finally contemplate whether the percentage adjustment that they have reached is just and equitable (fair) in all the circumstances. If they do not think that is the case, they may make a further adjustment.

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The approach to parenting matters

Parenting arrangements are individual and unique thereby requiring a more tailored approach. You can however anticipate that your family lawyer will discuss the following concepts with you, in line with the relevant legislation.

Equal shared parental responsibility

Under the relevant legislation, there is a presumption that it is in the best interests of the child for their parents to have equal shared parental responsibility for the child. This does not relate to the time the child spends with each parent, rather the long term decisions in relation to the child's care, welfare and development. This includes the child's:

- education;
- health;
- name;
- religious and cultural upbringing; and
- changes to the child's living arrangements which make it significantly more difficult for the child to spend time with a parent.

It does not extend to day to day decision making, which can be made by the parent with the care of the child.

The presumption will not apply if there are reasonable grounds to believe a parent has engaged in abuse of the child or family violence.

Where the presumption applies, the parents must consult with each other and make a genuine effort to reach a joint resolution in relation to long term issues.

Care arrangements

If the presumption of equal shared parental responsibility applies, the court must consider whether it is appropriate for the child to spend equal time with the parents. The court will ask, is it reasonably practicable? Is it in the child's best interest?

- a) **Reasonably practicable:** in determining whether a shared care arrangement is reasonably practicable the court will consider:
- how far apart the parents live from each other;
 - the parents' current and future capacity to implement an equal time arrangement;
 - the parents' current and future capacity to communicate with each other and resolve difficulties that may arise in implementing a shared care arrangement;
 - the impact a shared care arrangement will have on the child; and
 - any such other relevant matters.
- b) **Best interests:** in determining whether a shared care arrangement is in the best interests of a child, the court's primary considerations are:
- the benefit of the child having a meaningful relationship with both parents; and
 - the need to protect the child from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence.
- c) **Other best interest factors** include but are not limited to:
- views expressed by the child;
 - nature of the child's relationship with each parent;
 - the extent that each parent has taken the opportunity to spend time, communicate and participate in major long term issues of the child;
 - the extent to which each of the child's parents has fulfilled or failed to fulfil their obligations to maintain the child;
 - the capacity of each parent to provide for the needs of the child (including physical and emotional); and
 - the willingness and ability of each parent to facilitate and encourage close and continuing relationships with the other parent.
- d) **Substantial and significant time.** If a shared care arrangement is not considered to be in the child's best interests, the court must consider substantial and significant time, which is:
- the time the child spends with the parent including weekdays, weekends and holidays;
 - the time in which the child spends with the parent allows the parent to be involved in the child's daily routine and occasions and events which are of significance to the child such as birthdays and other special occasions; and
 - spending time with the child during events which are significant to the parent.



What should I do next?

We recognise that everyone and every situation is unique. It is our goal to work together to achieve the best outcome for you. This involves understanding your situation, giving comprehensive advice and providing options as to how best to move forward.

Contact us

Our family and relationship law team is available to assist you with, initial advice, a negotiated settlement, mediation or litigation. Please get in touch with us to find out how we can assist you in taking the right step forward. Call (03) 9843 2129 or email family@moores.com.au

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