



## **Family and Relationship Law**

**I am thinking about  
separating, what  
should I do?**



The breakdown of a marriage or de facto relationship can be an unsettling and stressful time. As a starting point, below is a list of considerations for you to think about.

## 01 Separation Checklist

These steps do not have to be taken alone. We recommend you seek expert legal advice to guide you through the process and address all concerns specific to you and your circumstances.

*If there has been family violence in the relationship, seek advice and support from a family violence professional or service.*

### Before Separation

#### Who is going to leave the family home?

In most scenarios, one person moves out of the family home. If you are the primary carer to children of the relationship and it is safe to do so, you should consider remaining in the home so that the children have continued stability.

Once you have moved out of the home, it can be difficult to move back in. There are also associated financial costs with sourcing alternative accommodation.

#### If I am leaving the family home, do I take personal items with me?

If you are leaving the family home, it is important that you take with you everything you will need including clothes and documentation such as your birth certificate, marriage certificate and passport.

This will save time and money down the track as you will not need to negotiate with your spouse or partner for the return of belongings.

#### Do you have copies of financial documents?

You will likely be negotiating a property settlement with your spouse or partner. To assist with this process, you need to gather and retain your financial documents in a secure location. Relevant financial documents include, bank account statements, pay slips, tax returns and superannuation member statements.

#### Do you and your spouse or partner have joint bank accounts?

If you are concerned that your spouse or partner may withdraw joint funds or increase liabilities (such as the balance on an outstanding mortgage) without your consent, you should contact your bank or financial institution to inform them of your separation.

This may mean that dual signatures are required to withdraw joint funds from a bank account or to increase the amount outstanding on joint liabilities.

#### Should I change my passwords?

To ensure privacy you should consider changing your email, internet, telephone banking and any other relevant passwords. This is particularly important if your situation is hostile, unsafe or if there is an imminent threat of litigation.

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## After Separation

### Keep a diary of key dates

Keep a diary of key dates, such as:

- when you or your former spouse or partner first communicated that you wanted to separate;
- the date you or your former spouse or partner left the family home; and
- dates that the children of the relationship (if any) have spent time with your former spouse or partner and you.

### Communication and social media

Keep your communication with your former spouse or partner civil. In an electronic era, everything that is communicated to your former spouse or partner by text, email, Facebook messenger, WhatsApp or any other digital platform can be used as evidence. Refrain from using social media regarding your separation or former spouse or partner.

### Contact Services Australia

If you have children, contact Services Australia (child support) and find out how much is to be paid to you or is payable by you.

### Discussing arrangements for children

Where it is safe to do so, try and remain as amicable as possible with your former spouse or partner for the benefit of your children. Children often become embroiled in the parental dispute which can be damaging to their long term health and well-being.

### Binding Death Nominations, Wills and Powers of Attorney

Ensure you have a Binding Death Nomination for your superannuation fund and consider whether your current nominated beneficiary of your superannuation entitlements is appropriate.

Separation does not revoke a Will or Power of Attorney, only divorce does. Review your Will to clarify if it includes your former spouse or partner and update it to reflect your current wishes. If you have a Power of Attorney in favour of your former spouse or partner, ensure it is revoked and have a new one drafted, to prevent them from making important decisions on your behalf, should the circumstance arise.

### What can I expect my family lawyer will discuss with me at our initial meeting?

We will provide tailored expert advice in consideration of all your circumstances. You will walk away from the initial meeting with an understanding of your legal position and a pathway forward.

## 02

# Children and Parenting Arrangements

Following separation, reaching agreement on appropriate arrangements for the care of children is a priority of the parents.

You can anticipate that your lawyer will discuss the following concepts with you.

### Best interests of the child

The relevant law in relation to the care of a child is the *Family Law Act 1975* (Cth) (**the Act**). It states that the most important matter when determining a dispute about the future care of a child, is the best interests of the child.

The Act sets out considerations for determining what is in a child's best interests. The law changed on 6 May 2024, and the list of factors which the Federal Circuit and Family Court of Australia (**the Court**) must consider is shorter. They are:

- What arrangements promote the **safety** of the child and child's parents or carers, including safety from being subjected to or exposed to family violence, abuse, neglect or other harm.
- Any **views** expressed by the child.
- The developmental, psychological, emotional and cultural **needs** of the child.
- The **capacity** of each proposed parent or carer of the child to provide for the child's developmental, psychological, emotional and cultural needs.

- The **benefit** to the child of being able to have relationships with their parents and other people who are significant to them, where it is safe to do so.
- **Anything else** that is relevant to the particular circumstances of the child.

In considering the above matters, the Court must take into account:

- Any history of family violence, abuse or neglect involving the child or a person caring for the child; and
- Any family violence order that applies or has applied to the child or a member of the child's family.

For an Aboriginal or Torres Strait Islander child, the child's right to enjoy their Aboriginal or Torres Strait Islander culture is given particular importance.

### Arrangements for the child

There are three main concepts under the Act in relation to children, which the Court can make orders about.

- a) Joint decision making about long term issues. Until 6 May 2024 this was called "parental responsibility". It relates to the responsibility of decision making in relation to a child's long term care, welfare or development such as a child's schooling, health and religion.
- b) With who and where a child lives. This is the parent or carer who the child primarily resides with.
- c) With who the child spends time and how often. This is the parent or carer the child spends time with.

#### *Joint decision making*

When making parenting orders, from 6 May 2024, the Court no longer starts with the presumption that it is in a child's best interests for the parents to have "equal shared parental responsibility". The presumption was removed due to a misconception amongst the community that "equal shared" parental responsibility accorded to a child spending equal time with parents.

The Court will now tailor decisions about parental responsibility (renamed as "joint decision making" about long term issues) to the circumstances of the particular child and their parents or carers.

Unless otherwise ordered by the Court, if it is safe to do so, the parents or carers of a child are to consult with each other about major long term issues in relation to the child and, when doing so, have regard to the best interests of the child as the paramount consideration.

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## Parenting plans and parenting orders

A formal agreement around the care arrangements of a child is often not necessary.

If however a written agreement is required, it can be recorded informally as a parenting plan or, by way of parenting orders made by the Court.

A *parenting plan* is an informal written agreement between parents or carers about the arrangements of the child, which is not legally binding. Parenting plans can be altered at anytime by agreement and that flexibility can be advantageous.

*Parenting orders* are made by the Court and provide for the child's parenting arrangements in a more rigid and legally enforceable way. They can be made as agreed between the parents (by consent) or as decided by the Court where the parents cannot reach agreement.

## 03

# Property and Financial Settlement

Following separation, questions about how the property of the relationship is going to be divided and your financial security are likely weighing heavily on your mind.

In answering those questions, you can anticipate your lawyer will discuss the following steps with you.

### Who can make a claim?

You can seek a property settlement if:

- You are currently legally married or have been divorced for less than 12 months; or
- You were in a de facto relationship and have been separated for less than two (2) years.

If you have been divorced for more than 12 months or it has been over two (2) years since you separated from your de facto partner, you will require leave (permission) from the Federal Circuit and Family Court of Australia (**the Court**) to seek a property settlement

### What are my entitlements?

The relevant law in relation to property settlements is the *Family Law Act 1975* (Cth) (**the Act**). The Act puts in place safeguards to promote the fair division of property following the breakdown of a relationship. There is no automatic 50/50 division of property. Every person's circumstances are unique.

There are five (5) factors that the Court considers in determining a person's entitlements to a property division:

#### 1) Is it just and equitable (i.e. fair) for there to be a property settlement?

The Court will consider whether the circumstances of the parties' relationship and their assets justify a division of property. In most cases, where there are joint assets, or the relationship is of long duration, or there is a child of the relationship, a division of property is likely to be just and equitable (i.e. fair).

#### 2) What property is there to divide?

If it is just and equitable to divide property, the Court needs to understand what the parties' assets, liabilities, superannuation and financial resources are, which can be owned jointly between the parties, individually, by a trust or company. They make up the "property pool" available for division.

It is important to note that the value of the property pool is calculated at the date an agreement is reached between the parties, or if no agreement is reached at the time the matter is determined by the Court, not as at the date of separation.

**Assets** include real estate, businesses, investments, trusts, shares, motor vehicles, bank accounts and any other item of monetary value to the parties.

**Liabilities** include mortgages, personal loans, lines of credit, credit cards, tax debts and any other debt or liability owing by a party to the relationship.

**Superannuation** includes accumulated funds, self-managed superannuation funds and defined benefit interests.

**Financial resources** are an actual or potential right to assets which may or may not have a quantifiable value or is capable of being divided. This may include rights in a family trust or an inheritance which is to be received in the imminent future. Financial resources are not generally considered in the property pool but are taken into account when determining each party's entitlements to the property pool.

The value of the property pool can be determined by agreement between the parties, through a process of financial disclosure (where each party is obligated under the Act to exchange financial documents to evidence their respective financial positions) or the formal valuation of assets. Often parties utilise a combination of these methods.

A party's entitlements to the property pool are determined in the form of a percentage, based on consideration of each parties' respective contributions to the property pool and future needs, discussed on the following page.

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### 3) What contributions have the parties made to the relationship?

The Court looks at the contributions made by each party as at the commencement of the relationship, during the relationship and following separation.

Contributions include:

- Financial contributions – such as assets brought into the relationship, inheritances, gifts or compensation payments.
- Non-financial contributions – such as improvement to a property by way of renovations or working within a family business.

Financial contributions by way of income are considered equal to non-financial contributions as homemaker and parent.

### 4) What are each party's future needs?

The Court will consider whether the contribution-based entitlements should be adjusted further in favour of one party due to their age, health, income earning capacity or having the care and support of children of the relationship.

Usually, a party with the primary care of children receives an adjustment in their favour for future needs. This is because that person will be unable to work in paid employment during the time in which the children are in their care, or their income earning capacity is limited due to being out of the workforce for a period of time.

The Court will also consider whether one party has access to a financial resource to which the other party does not (for example, a family trust), and an adjustment may be made in the other party's favour to recognise this.

### 5) Is the final outcome just and equitable?

The Court will finally look at, after assessing the contributions and future needs of the parties, that the outcome reached is fair in all the circumstances of the case.

## How can I resolve my property matter?

There are different ways to resolve your property matter. These include, through negotiations and/or mediation with or without the assistance of lawyers and as a last resort, litigation. We can assist you in determining which is the right approach based on your circumstances.

It is important to have your property settlement documented in a legally enforceable way to avoid any future "second bite of the cherry" and sever all financial ties following the breakdown of the relationship.





## How Moores can help

*It is important to obtain expert legal advice as soon as possible, prior to or following separation, to ensure you understand your legal position. Please get in touch with us to find out how we can assist you in taking the right step forward.*

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### **[Click here to start online](#)**

If you are not quite ready to talk to a lawyer, Moores Family Law online assistant is designed to help you in your own space and time. The service is confidential and free, and allows you to get some initial answers tailored to your circumstances without needing to speak to a lawyer.

Level 1, 5 Burwood Road  
Hawthorn Victoria 3122  
**T** 03 9843 2100  
**E** [info@moores.com.au](mailto:info@moores.com.au)  
**moores.com.au**