



MARRIAGE SEPARATION

Your Question Answered



MARRIAGE, SEPARATION, DIVORCE - AN OVERVIEW

Getting married is one of the happiest days of a couple's life. The reality is however that about one third of marriages end in divorce, with the average length of a marriage in Australia being 12 years.

Separation can be one of the most stressful events that an adult can face. It creates significant upheaval and stress and most people are confused and anxious about what happens to their children and assets as a result of separation.

In our initial meetings with clients, we are often asked the same questions because the issues that cause people the most stress following separation tend to be the same. This e-book captures those questions and provides you with the answers we know you're looking for.

In reading this e-book, you will get a general overview of the family law system following separation. You will also get a better understanding of the processes involved and the issues which you might have to deal with.

It should not be relied upon as legal advice or as a substitute for legal advice. If you want advice specific to your circumstances, please call Lawpoint on 02 9517 1887 or email reception@lawpointlawyers.com.au to arrange an appointment.





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CAN I GET “FULL CUSTODY” OF THE KIDS?



The term “custody” is no longer used in the family law system. Instead, the court now deals with who the child “lives with” and how much time they will “spend with” and “communicate with” the other parent.

The most important factor that the court must consider when deciding who a child lives with is what is in the best interests of the child.

The law is designed from a starting point that every child has a right to know both their parents. Equally, every child has the right to be protected from harm. Unless there are issues with violence or abuse, the law expects that each parent will have equal parental responsibility. This doesn’t mean that each parent gets to spend equal time with the child. Instead, it refers to parents having an equal role in the long term important decisions affecting a child, such as where they go to school, or what medical treatment they receive. Day to day decisions, such as what will the child eat or can the child go to the park to play with friends are decisions left up to the parent with whom the child is spending time on a day to day basis.

If the child spending equal time with each of parent is reasonably practicable, and in the best interests of the child, then the court will try and make orders that are consistent with that.

However, the reality is that often equal time is not practical, especially with young children because constant changeovers from one parent’s house to another’s causes disruption to the children. If this is something you are considering by agreement, then you should consider an arrangement that results in your child spending blocks of time with each parent (such as one week with you and one week with the other parent). That is likely to be less disruptive than a child having to pack up and move houses between parents every two or three days. There are many other considerations that affect whether equal time is practicable such as how far apart will each parent live? Does one parent have work commitments which make equal time impractical? How well do the parents get along and communicate with one another?

If it is not reasonably practicable for a child to spend equal time with each parent, the next question to decide is whether it is practical for the child to spend substantial and significant time with the other parent. Again, this must be in the best interests of the child.



HOW DO WE AGREE ON PARENTING ISSUES?

Arrangements relating to children can come about in different ways. For example, they can be an informal agreement between you and your spouse or partner as to who the children will live with and who they will spend time with. If you can reach an agreement informally, there does not need to be any involvement of the court.

However parties will generally put that agreement in writing and sign it. These informal agreements are known as parenting plans. Parenting plans must be signed by both parents. A parenting plan can also include third parties such as grandparents, if the children are to spend time with those persons as well.

It is very important to remember that a parenting plan is not legally enforceable. Although a court must consider the most recent parenting plan if the matter does get to court (if it is in the best interests of the child to do so) the court does not have to make orders that reflect that plan. If a parent breaches a parenting plan, the court does not have the power to enforce the plan as it does with court orders.

The reality however is that most people cannot reach an informal agreement after separation and an agreement comes about after negotiation once each party has appointed a lawyer. Those agreements are known as consent orders. Once signed, they are lodged with the court for approval and once approved, they become legally enforceable court orders just like any other court order.

WHAT HAPPENS IF WE CAN'T AGREE ON PARENTING ISSUES?

In the case where no agreement can be reached, one party will make an application to the court and the court will decide what the parenting orders should be (taking into account the best interests of the child).

It is important to remember that the court requires separating families who have a dispute about children to make a genuine effort to try and reach agreement through family dispute resolution before an application is filed with the court, unless an exemption applies (such as family violence, child abuse or there is an urgent need to file the application).

There are practical benefits of trying to reach an agreement without going to court such as avoiding the stress associated with court proceedings, resolving the dispute quickly and avoiding the costs of a contested court application.



WHAT'S THE DIFFERENCE BETWEEN PROPERTY AND PARENTING ORDERS AND DIVORCE?



A divorce and a property settlement or parenting orders are not the same thing. You do not need to be divorced to have a property settlement or parenting orders. Property settlement refers to the division of the property assets of the parties after a couple have separated. These decisions can start as soon as the couple separate and are not affected by whether a divorce has been granted. The same applies for parenting orders.

A divorce is the formal legal end of the marriage. It is granted by the court and once granted, allows you to remarry. The definition of separation in marriage is a straightforward one. You must have been separated for a continuous period of 12 months before you can apply for a divorce. However, should you and your partner reconcile, then the 12 month period may start again, depending on the length of the reconciliation. If you reconcile for more than 3 months, the 12 month period will start again if you separate once more.

Sometimes, separation under one roof is the only practical solution for parties. The law understands and allows this as long as the parties can satisfy the court that they were genuinely separated and that there was a genuine breakdown of the marriage.

If there parties were separated but living under one roof, it is a requirement when you file for divorce that you file an affidavit verifying that you were in fact separated under one roof and not living as husband and wife. A third party (usually a family member or close friend) must also provide an affidavit also verifying that the parties were indeed separated but living under one roof.



IT WASN'T MY FAULT WE BROKE UP. DOES THAT HELP MY CASE?



It can be emotionally devastating for a person if the breakdown of the marriage is caused by the fault of the other person, such as where one person commits an act of infidelity. However, fault is not a factor in whether a divorce is granted by the court.

The court only needs to be satisfied that the marriage has broken down irretrievably. In other words, if the court is satisfied that there is no chance that the parties will reconcile and the parties have been genuinely separated for 12 months, the divorce will be granted.

There are some other steps that the court will take such as ensuring that proper arrangements for the care of children aged under 18 years exist between the parties. Also, couples whose marriage has broken down within 2 years of the marriage are required to attend marriage counselling to discuss or attempt reconciliation before the divorce will be granted.

Fault is also generally not something the law considers when determining a property settlement or parenting issues. You will not get more of the asset pool because your spouse cheated on you.

However, in some cases, "fault" can be relevant to what orders the court makes. For example, if separation has been caused by domestic violence, that will certainly be a relevant factor in determining what is in the best interests of the children when making parenting orders.



EVERYTHING IS IN HIS (HER) NAME. WHAT DO I DO?

Assets that are acquired during a marriage are considered to be joint marital assets, regardless of whose name the asset is held in. There are many reasons why couples may place a property in only one party's name including for asset protection reasons if one party is self-employed.

Regardless of whose name that asset is held in, the law gives the court the power to adjust ownership of property to ensure that the party who is not the registered owner of that asset gets a just and equitable share of that asset.

In addition, it is not just assets that are acquired during the marriage which form part of the asset pool. Depending on the length of the relationship, assets owned before the marriage can also be treated as joint marital assets and be subject to a property adjustment in the same way. This includes the superannuation interests held in each of the party's names.

People are often surprised to learn that assets that are acquired by one party after the date of separation can also form part of the asset pool that is to be split between the parties. This is why it is important for you to finalise a property settlement as quickly as possible after final separation to prevent post separation assets forming part of the pool of assets to be divided between the parties.

I DON'T HAVE ANY MONEY OR ACCESS TO OUR BANK ACCOUNTS. CAN I GET SOME MONEY TO LIVE ON?

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HOW MUCH WILL I GET?

There are various steps in working out how the property of the marriage will be divided after separation.

First, the value of the assets need to be determined. Sometimes this can be done by agreement and other times a valuation might be required.

Secondly, the court will look at the contributions of each of the parties to the marriage. Contributions that are financial and non-financial are both relevant. So for example, if one party worked whilst the other party was a homemaker and cared for the children full time, each of those contributions is relevant. The court does not consider financial contributions any more or less important than homemaking and parenting contributions.

Contributions can also include contributions to specific assets such as your home and may include financial contributions from income or savings to pay the mortgage or the deposit to buy the home, or non-financial contributions such as using your labour and time to undertake repairs, renovations or cleaning and maintaining the property.

Next, we need to look at factors which will impact on each party in the future. The most important of these are the earning capacity of each of the parties into the future and which of the parties has the greater share of responsibility for the care of the children. Naturally, where the children live with one party for long periods and they are young, this will impact upon that parent's capacity to obtain full time employment.

Lastly, the court considers whether the outcome is "just and equitable" in all of the circumstances.

The court's powers to make property orders are discretionary. This means that although there is an established framework within which the court must work, ultimately there is no strict formula for calculating the property that each party gets. Each case will be assessed on its own facts.





HE (SHE) WON'T MOVE OUT. CAN I LOCK THEM OUT OF OUR HOUSE?

It is not unusual after separation that one party will make the decision to voluntarily move out of the family home, leaving the other party to live there alone or with children.

However, in some cases, both parties will dig their heels in and refuse to move out, even though continuing to live under the same roof results in increasing conflict.

The first thing to remember is that there are no adverse consequences to a party because they moved out of the family home. People often wrongly believe that if they move out, they are giving up their right to the home or the court will give them less of a share in the value of the home because they moved out. Not only is this incorrect but this belief often results in escalating tension and conflict within the home, which can have very negative emotional impacts on each of the parties and in particular on children.

If each party refuses to move out and the property is jointly owned by the parties, then they each have a right to continue living in the home and neither person is entitled to lock the other party out.

However, the court has the power to grant what is known as an order for "exclusive occupancy" of the family home after an application is made to the court for such an order. These orders are not easy to get because the court takes very seriously the decision to exclude a person from their own home. However, it is possible to obtain such an order in certain circumstances. The court will consider a number of things including the needs of the children, the means and needs of each of the parties, the hardship caused to each of the parties or to the children and the conduct of the parties.

Importantly, it is not simply a case of convincing the court that it would be better or more peaceful for you to live in the house if the other person was excluded. There must be more and the court will need to be satisfied that it is no longer reasonable or sensible for the parties to continue to live under the same roof. The court must be satisfied that the order is necessary having regard to the physical and emotional needs of the person applying for the order and any children who that person has the care of.

I DON'T KNOW WHAT SHE (HE) HAS? HOW DO WE FIND OUT?

Sometimes when parties separate, one party finds themselves in a situation where they are no longer able to meet their financial needs because they have been reliant on the other party's income during the relationship. Is there anything that party can do to force their former spouse to financially assist them?





The answer is yes. The law allows the court to make an order for what is known as spousal maintenance. Spousal maintenance is an order requiring a party to a marriage who has a capacity to do so, to financially assist their former spouse if that person cannot meet their own reasonable expenses from their personal income or assets.

Spousal maintenance is separate and distinct from child support. Child support is a payment that one parent makes to the other but which is paid for the benefit of the children to meet costs of raising the children. Spousal maintenance on the other hand is a payment made for the benefit of the spouse.

Child support is payable pursuant to a statutory formula that the Child Support Agency applies. It takes into account various factors including each parent's income and the number of nights that each parent spends with the children. Spousal maintenance on the other hand is ordered by the court and the court has a discretion when calculating the amount that one party must pay the other party by way of spousal maintenance.

There are numerous factors that the court must consider when deciding whether to order a party to pay spousal maintenance. These include whether the person seeking the order cannot support himself or herself adequately, whether the other party is reasonably able to pay, who has the care of the children, whether a party has an earning capacity which they are not exercising, the age and health of the parties and the assets and financial resources of each party.

Spousal maintenance does not operate indefinitely. In most cases, spousal maintenance is ordered for a short period between the time that parties separate until the property settlement is finalised to allow one party to adequately support him or herself until they receive the proceeds of their share of the assets (although this is not always the case and it can be ordered for longer periods of time). It can be ordered to be paid as periodic payments or as one lump sum.

WHAT DO I DO NOW?

Separation is a very difficult decision and an emotional time for all involved. You will feel a roller coaster of emotions as you try and navigate your way through what is unfamiliar territory.

It may help if you have a plan to try and resolve issues following separation as quickly as possible. The two checklists on the following pages may help. They cover parenting and property.





PARENTING CHECK LIST



- ☐ Always remember that your children are likely to feel the emotions of your separation more strongly than you and your spouse, especially if they are very young. It is therefore important to try and limit (or eliminate completely) acts of anger or fighting in front of children.
- ☐ Try to agree on a plan to tell the children what is happening and reassure them that despite your separation, they will still see and be loved by each parent.
- ☐ Try to reach agreement on who the children will live with and who and how often they will spend time with the other party.
- ☐ Try to maintain your children's daily routine as much as possible and try to agree with your spouse on who will be responsible for taking the children to each of these activities.
- ☐ Try to maintain your children's relationships with each other significant person in their life, such as grandparents. Preventing the children from seeing a grandparent they love out of anger towards a spouse does not punish the spouse or grandparent as much as it punishes the child.
- ☐ Inform your children's school of your separation so that the school keeps a closer eye on your child to ensure that there is no change in your child's behavior that may indicate distress resulting from your separation.
- ☐ Do not alienate your children from the other parent. This is not only harmful to your children's long term emotional health and wellbeing but is an action which is viewed very negatively by the courts. It may result in you losing time with your children as a result of your actions (i.e. the court ordering the child to spend more time with or to live with the other parent).
- ☐ Consider attending relationship counselling with your spouse in an attempt to reach agreement on parenting arrangements for the children post separation.
- ☐ Contact a lawyer to seek legal advice which is tailored to your personal circumstances.





PROPERTY CHECK LIST



- ☐ Try and agree on who will vacate the family home and be practical when deciding whether you are able to live separately under one roof.
- ☐ Consider how you and your spouse will support yourself following separation.
- ☐ If either party was reliant upon the other's income, try and reach agreement on one party assisting the other financially until such time as the property settlement is finalised.
- ☐ Try and reach agreement on who will continue to pay the mortgage and/or other joint marital bills and expenses until a property agreement is reached.
- ☐ Try and reach agreement as to the value of the assets that each of you will retain and who will be responsible for the joint or sole liabilities accrued during the marriage.
- ☐ Try and agree on the distribution of the furniture and personal effects in the family home.
- ☐ Tell your bank and other lenders that you have separated and try and negotiate reduced payment of your liabilities in the short term so as to try and prevent a default occurring on any of your loans due to a lack of access to funds.
- ☐ Consider converting any bank account or mortgage redraw account from 'either to sign' to 'both to sign' so as to prevent your spouse from making any unauthorised large withdrawals from those accounts.
- ☐ Consider whether your wages or other income will continue to be paid into a joint account or whether you should have those funds paid into an account in your sole name to avoid your spouse making unauthorised use of those funds.
- ☐ Contact a lawyer to seek legal advice which is tailored to your personal circumstances, which may include taking urgent action seeking spousal maintenance or orders to prevent your spouse disposing of property