

PARTING WAYS

DIVORCE AND SEPARATION

A GUIDE TO YOUR RIGHTS
AND RESPONSIBILITIES



STREETERLAW

Introduction



Relationship breakdown and separation impacts people of all ages, sexual preferences and backgrounds. As every relationship is different, so too is each person's experience of separation. There are steps you can take, however, to simplify the process in what is often a very difficult time emotionally and financially.

Moving out of the home you shared as a couple is an extremely important decision requiring thought and forward planning where possible. There will be both practical and financial consequences of your decisions for you, your former partner and/or and the family as a whole.

Where amicable communication between you and your former partner remains possible there are many ways in which the process of separation, financial and/or parenting issues can be progressed without going to Court.

The advice in this guide aims to assist you to prepare for separation generally. We recommend that you seek advice from a specialist family lawyer regarding your individual circumstances.

Legal Separation

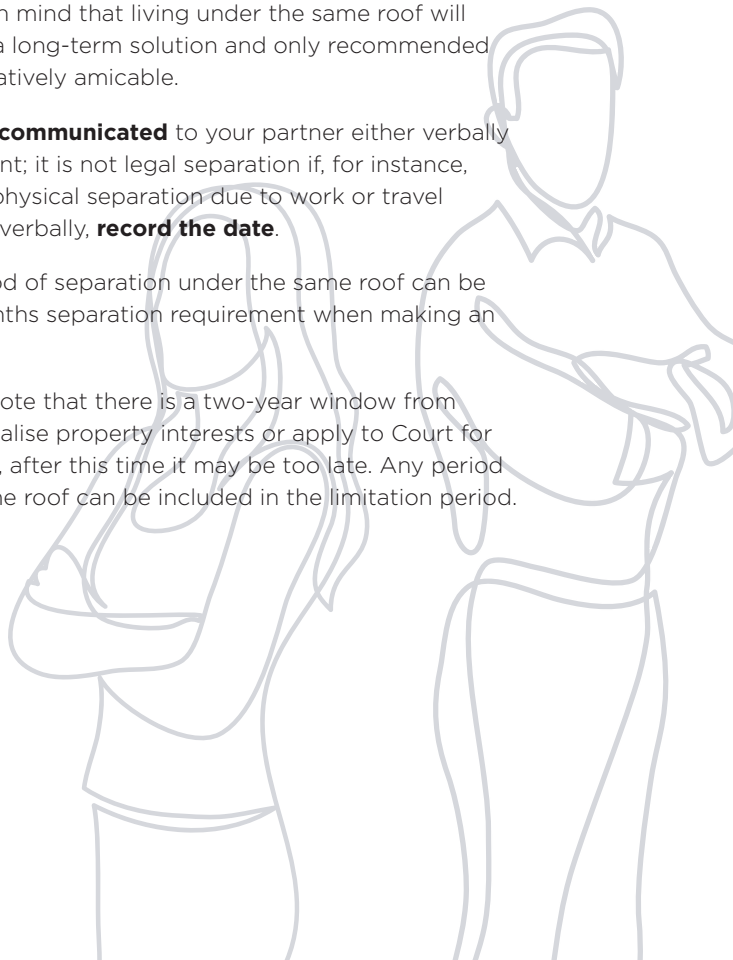
Separation has a specific meaning within the *Family Law Act*. It is possible to be 'separated under one roof' and still be 'separated' for the purposes of Family Law. This is not recommended in cases of family violence, for which your personal safety and that of any children is always paramount.

Living under the same roof for a short period of time, where possible, can be helpful while you are negotiating arrangements for finances and parenting schedules. Keep in mind that living under the same roof will be stressful and is far from a long-term solution and only recommended where the relationship is relatively amicable.

Separation must be **clearly communicated** to your partner either verbally or in writing. This is important; it is not legal separation if, for instance, there has been a period of physical separation due to work or travel purposes. If communicated verbally, **record the date**.

If you are married, any period of separation under the same roof can be counted towards the 12 months separation requirement when making an Application for Divorce.

For de facto relationships, note that there is a two-year window from the date of separation to finalise property interests or apply to Court for property adjustment orders, after this time it may be too late. Any period of separation under the same roof can be included in the limitation period.



Moving out and moving on: practical considerations



Moving out of the home is a major decision. Family living is a very efficient and practical financial arrangement where expenses are shared such as rent/mortgage, utilities, internet, phone, groceries and other incidental costs of living. It costs more to live separately than together. Before moving out consider the following:

- 1.** Can you meet these previously shared expenses alone?
- 2.** Is there domestic or family violence? Do you have fears for your safety upon leaving the home? Speak to the police about your concerns and connect with Crisis Support providers to provide access to crisis accommodation, counselors and ancillary support services if necessary.
- 3.** If you have children consider:
 - a.** the location of your new accommodation to the children's schools/ day care and the other parent's home. Will the distance make it more difficult for you or the other parent to spend time with the children?
 - b.** a proposal for parenting arrangements. Where will the children live, and what are the time arrangements for contact with the children?
 - c.** Can you effectively communicate with the other parent regarding the children? You may want to consider mediation to discuss parenting arrangements and related issues. Mediators can assist you to formulate a written parenting plan. If mediation is not suitable due to issues such as family violence, obtain legal advice.
- 4.** If you have pets, consider:
 - a.** Who will be responsible for the care of the pet?
 - b.** If taking the pets, is your new accommodation pet friendly?
 - c.** Can you meet the expenses associated with keeping the pet?

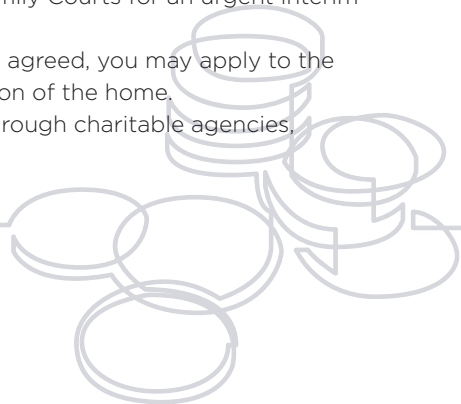


Assessing the financial situation



Before moving out of the home, you should try and familiarise yourself with, and document, the following facts and information:

- 1.** Calculate yours and your former partner's incomes from **all** sources;
 - a.** Employment income, director's drawings, bonuses, shareholding dividends, investment properties, trust distributions, superannuation payments, government benefits and pensions.
 - b.** Gather or request supporting documentation of the above.
- 2.** Analyse your current household expenditure on items such as groceries, vehicle maintenance and transport costs, utilities, rates, mortgage or rent, personal loans and credit cards, insurances including health insurance, phone bills, clothes and shoes, home maintenance, medical and dental costs, pharmacy, educational expenses, entertainment, gifts and holidays.
 - a.** Break the expenditure down to a weekly amount.
 - b.** Use this to calculate projected costs of living separately.
 - c.** Prepare a budget and allow a buffer for unforeseen expenses.
- 3.** If you cannot afford to move out, there may be other options available to you such as:
 - a.** Having your former partner pay you spousal maintenance (a sum of money towards your interim personal support) to help you with the costs of transition to separate accommodation and living expenses. If not agreed you may apply to the Family Courts for an urgent interim spousal maintenance order.
 - b.** Having your partner move out. If not agreed, you may apply to the Family Courts for exclusive occupation of the home.
 - c.** Emergency crisis accommodation through charitable agencies, family or friends.



Dividing the assets and debts



Before you can begin negotiating a property settlement you need to understand what there is to divide between you. This is known as the **'asset pool'**. The first step is to compile a list known as a **Balance Sheet**. Your Balance Sheet should include the following information:

1. Assets owned by you, your former partner or jointly

- a. This includes real estate, bank accounts, vehicles, shares, businesses, furniture/furnishings, appliances, tools and jewellery for instance.
- b. Estimate the value of each item:
 - i. Where there is a document or online facility available, refer to it for accuracy (eg. account balance, share price)
 - ii. In cases of real estate, obtain at least one market appraisal in the first instance and in case of disagreement, obtain a paid valuation.
 - iii. Online valuation services may assist in research regarding the second-hand value of vehicles. You should note the make, model and year of manufacture.
 - iv. When estimating the value of other chattels (furniture, furnishings, jewellery for instance) you should research the second-hand value of such items.
- c. In your list, include information such as the date the asset was purchased and the purchase price.
- d. Note the legal ownership of each item (whose name is it in?).

2. Liabilities (debts) owned by you, your partner or jointly

- a. This includes mortgages, personal loans, lines of credit, margin loans, student loans, credit cards, taxation debts and unpaid bills.
- b. Estimate the value of the debt, using source evidence where available.
- c. Note the legal ownership of each debt.
- d. Note the creditor and account details and interest rate (if applicable).

3. Financial Resources

- a. Include the details of any trust in which you or your former partner are beneficiaries, along with the name and type of trust, and an estimate of distribution and whether or not you or your former partner are directors or appointors of the trust.
- b. Obtain a copy of all trust deeds and documents.

4. Superannuation

- a. Record full details of each fund you or your former partner are a member of including:
 - i. Correct name of the fund
 - ii. Full name and registered address of the member
 - iii. Member number
 - iv. Current balance

5. Try to obtain copies of all relevant documents before you move out of the home and take your original documents with you (eg. Certificate of Title, birth certificate, passport, graduation certificates, last will and testament). It may be difficult to obtain them afterwards if negotiations become hostile and you require entry to the home.

6. You should also take a photograph of items in the home prior to leaving the home as evidence of what existed at that time as well as any items in your possession.

Having this information available when obtaining legal advice will greatly assist your solicitor and may reduce your legal fees. You and your former partner have a legal obligation for full and frank disclosure of all finances. If you have difficulty obtaining the documents from your former partner, your solicitor can help.

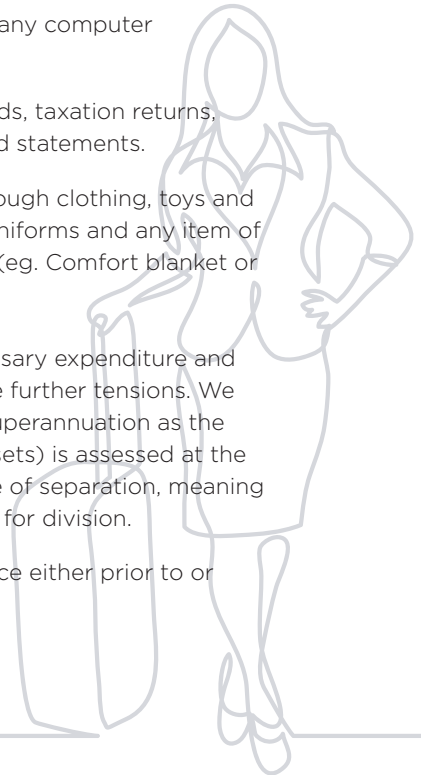
Moving out

If possible, gather the following from the home before moving out, as during the adjustment period the relationship between you and your former partner may be further strained:

- 1.** Your clothing, shoes, accessories and personal effects
- 2.** Your original personal documents (birth certificate, passport, share certificates, last Will etc.)
- 3.** Your photographs (if in hard copy) or a copy of any computer hard-drive containing these.
- 4.** Copies of financial documents such as trust deeds, taxation returns, notices of assessment, bank, loan and credit card statements.
- 5.** If taking your children, ensure that they have enough clothing, toys and personal effects including school supplies and uniforms and any item of emotional significance and comfort to the child (eg. Comfort blanket or soft toy).

During the period of separation, avoid any unnecessary expenditure and manage money conservatively if possible to reduce further tensions. We advise against further voluntary contributions to superannuation as the value of the superannuation interest (as with all assets) is assessed at the date of settlement or court hearing, not at the date of separation, meaning any further growth becomes part of the asset pool for division.

We recommend you seek specialist family law advice either prior to or soon after separation.



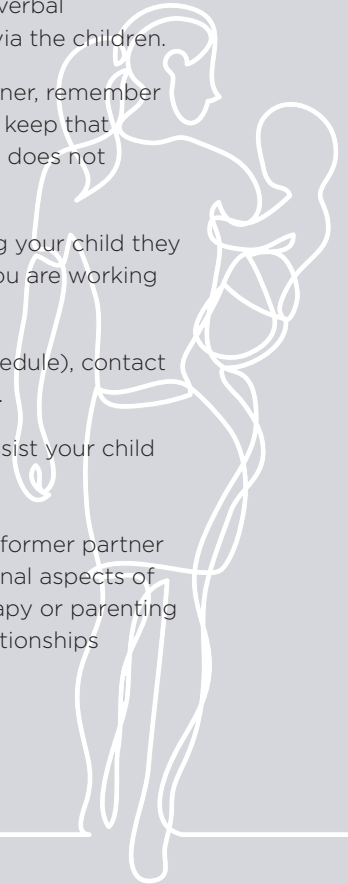
Parenting separately



Separation is also very difficult and unsettling for children. There are things you can do to reduce the stress and anxiety felt by children after separation, including:

- 1.** Reducing their exposure to conflict between you and the other parent. Changeover is not the time to enter discussions about finances or other contentious issues.
- 2.** Communicating with the other parent in writing where verbal communication is problematic. Do not send messages via the children.
- 3.** Whatever your own experience is with your former partner, remember that your child's relationship with them is unique. Try to keep that relationship positive for your child's sake. A bad partner does not always make a bad parent.
- 4.** Keeping to a routine as much as possible and reassuring your child they are loved very much by both parents. Let them know you are working together to make decisions that are best for them.
- 5.** If you need help in making a parenting plan (access schedule), contact a mediation service to assist you early in the separation.
- 6.** Considering family therapy or counselling services to assist your child through the separation.

There are many resources available to assist you and your former partner to come to an agreement around the practical and emotional aspects of parenting separately. These include mediation, family therapy or parenting after separation courses run by organisations such as Relationships Australia, Unifam and Catholic Care.

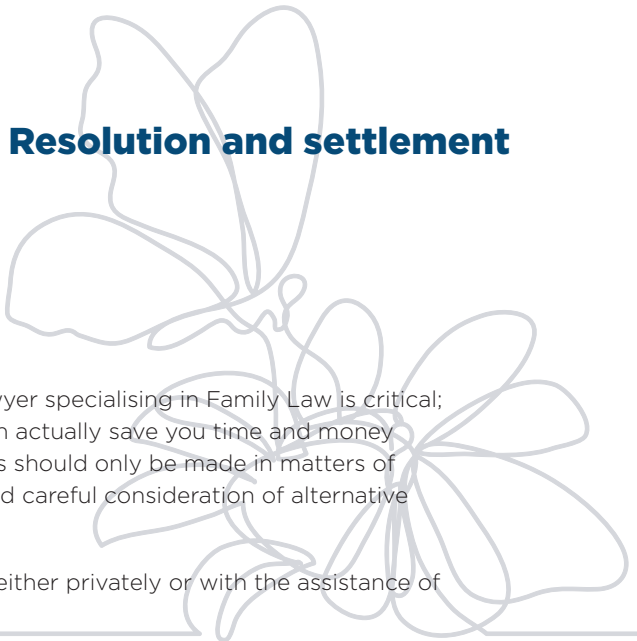


Alternative Dispute Resolution and settlement

Obtaining early advice from a lawyer specialising in Family Law is critical; and contrary to popular belief can actually save you time and money in the long run. Court applications should only be made in matters of urgency following legal advice and careful consideration of alternative options such as:

1. Negotiation with your spouse either privately or with the assistance of lawyers;
2. Mediation;
3. Collaborative Law (which involves you, your former partner and your respective collaboratively trained lawyers meeting together in a series of meetings to workshop issues and facilitate a negotiated settlement of parenting and/or property disputes); or
4. Arbitration – where the matter is more complex and requires a quicker decision than is possible with a Court hearing.

Any settlement can be converted to a court order by way of an Application for Consent Orders filed with the Family Court and has the same effect as if the Order had been made by a judge for a fraction of the time and expense.



Frequently Asked Questions

1. How do I get custody of the children?

- a. If there is agreement between the parents about who the children will live with and the amount of time the children will spend with the other parent, this can be entered into a **Parenting Plan** which is a written agreement. If you require legally enforceable orders, you should document the parenting plan in the form of consent orders filed with the Family Court.
- b. When there is no agreement as to some or all of the arrangements for the children upon separation, you will need to attempt **mediation** (some exceptions apply) as a first step before you can file an application for parenting orders in the Family Courts. Alternatively you should consider engaging in **Collaborative Law** to resolve the dispute.

2. How will a Court decide custody disputes?

- a. The Court must always consider what is in the **child's best interest** before making a parenting order. The parent's interests are secondary to the child's best interest.
- b. In determining what is in a child's best interest, there are a number of things the judge must consider, such as family violence or risk of family violence, protection from physical and emotional harm, the benefit to the child of having a meaningful relationship with both parents and many other factors such as the child's wishes, the child's relationship with each of the parents and significant others, the child's culture, the capacity of each parent to provide for the child's needs, among them.

3. Can I take the children and move interstate or overseas?

- a. Before taking your children to live interstate, overseas or even significantly out of the local area (making it substantially more difficult for the other parent to spend regular time with the children), it is essential to consult with the other parent and obtain their prior consent. If the move is opposed by the other parent you will need to attend mediation to attempt to resolve the issue and if that fails, you will need to file an Initiating Application for parenting orders seeking to relocate the children. In the event that one parent unilaterally moves the children away, they risk a Recovery Order being made to bring the children back to the local area.

4. My ex-partner threatens to take my child and return overseas, what can I do?

- a. If the threats are credible, you should seek **urgent** legal advice and obtain an order to place the child's name on the Airport Watch List. This will prevent the child from leaving the Commonwealth of Australia until such time as parenting orders are made dealing with the issue.

5. How much child support will I receive/have to pay?

- a. Child support will be different in each case. The amount is calculated by way of a formula by the Department of Human Services, based on each parent's income, less a self-support amount, the number and ages of the children and the amount of nights each child spends with each parent, among other factors.
- b. Parents should apply to the Department of Human Services for an assessment of the exact amount of child support to be paid.

6. Can we make our own child support arrangements?

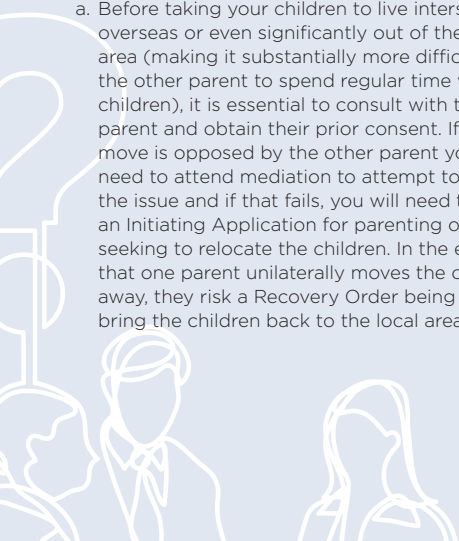
- a. Yes. There is no requirement to involve the Department of Human Services in your child support arrangements but until an assessment is in place, the Department cannot help enforce late payments.
- b. You can make a private Child Support Agreement providing for child support to be paid above any assessed amount and include additional payments such as school fees, extracurricular expenses and medical costs.
- c. Lawyers should draft a **Binding Child Support Agreement** as it has strict legal obligations and cannot be altered unless terminated by a further agreement. It also requires that both parties to the agreement receive independent legal advice prior to signing it. The Binding Child Support Agreement can be registered with the Department of Human Services, who may help to collect payments of child support if required. They cannot enforce such things as school fee payments or other non-periodic expenses. Enforcement of non-periodic child support is via an application to the Federal Circuit Court.

7. When can I apply for a divorce?

- a. You can apply for a divorce 12 months and one day following the date of separation.

8. What is a de facto relationship?

- a. A relationship between either heterosexual or same sex couples who live together on a genuine domestic basis and are not married or related by family.



- b. In addition, couples must have been living together on a genuine domestic basis for at least two years to be considered de facto **but** a Court may still hear a financial case between a couple of **less than two years** if:
- i. there is a child of the parties; or
 - ii. Significant contributions were being made by one party and the failure to issue an order would result in a serious injustice to that party.
- c. De facto financial claims are heard in the Family Courts (the Family Court and the Federal Circuit Court), the de facto provisions within the legislation mirror those for married couples.

9. What rights do same-sex couples have when the relationship ends?

- a. Exactly the same legal rights and obligations as a heterosexual couple under the *Family Law Act*.

10. How can I protect my assets against a claim from my partner?

- a. Provided that both you and your partner agree (consent is essential), the only protection is to enter into a **Financial Agreement** (also known as a 'BFA' or a 'pre-nup') which complies with the provisions of the *Family Law Act*, prescribing who gets what in the event of a separation.
- b. It is a private contract in which you opt out of the protections otherwise available through the Family Courts on the breakdown of the relationship.
- c. Both parties need to obtain independent legal advice on the Financial Agreement or it will not be legally binding.
- d. Consult a specialist family lawyer to draft the Financial Agreement. Any agreement that does not meet the strict legislative requirements or is badly drafted may be declared invalid if challenged in the Family Courts.
- e. A Financial Agreement must be proved invalid in Court before a Court can make orders in relation to the property of the parties.

11. When can I make a Financial Agreement?

- a. You can make a Financial Agreement dealing with the division of property interests at any stage of a relationship. There are six different types of Financial Agreements:
- iii. before a de facto relationship (S90UB)
 - iv. during a de facto relationship (S90UC)
 - v. Following separation from a de facto relationship (S90UD)
 - vi. Before marriage (S90B)
 - vii. During marriage (S90C), and
 - viii. Following divorce (S90D)

12. We are still on good terms, why do I need a lawyer?

- a. Even if you have come up with a settlement plan you both agree on, we strongly recommend you obtain legal advice so you can make an informed decision whether that agreement is just and equitable in all of the circumstances.
- b. We also strongly recommend that any agreement for the adjustment of property is documented by way of an Application for Consent Orders filed with the Family Court. This is a jointly prepared document which accompanies proposed draft orders and neither party needs to attend Court. If the Registrar is satisfied the orders sought are just and equitable, they will make the order in chambers and sealed orders will be sent in the mail.
- c. The drafting of the orders is best left to the lawyers to ensure they can be complied with and properly enforced if things go wrong.

13. Why do I need Orders or a Financial Agreement for property settlement?

- a. Without the protection of a Consent Order or a Financial Agreement documenting the transfer of property or superannuation between parties on the breakdown of the relationship, there is a risk that the other party will make a further claim in the future. The risk is higher for married people who separate but do not divorce for many years as they can make an application for property adjustment in the Family Courts at any time until the first anniversary of the divorce date.
- b. Orders are enforceable by the Court if something goes wrong and a party can seek enforcement of a term in a Financial Agreement through the Court system if required.

14. Do time limits apply in Family Law financial cases?

- a. Yes. Time limits are different for married and de facto couples and it is important to be aware of them.
- b. **For de facto couples:** parties must settle their financial issues via a Consent Order or otherwise file an application for property adjustment in the Family Courts within **two years** of the date of separation.
- c. **For married couples:**
- ix. There is no time limit if the parties are separated but not divorced.
 - x. If divorced, parties must finalise their financial settlement by way of a Consent Order or otherwise file an application for property adjustment in the Family Courts within **one year** of the Certificate of Divorce.



S
STREETERLAW