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FAMILY LAWYER

Accredited Specialist
Keeping Families Out Of Court

Answers to the 5 Most Commonly Asked Questions about Divorce and Separation



There's a lot of information out there when you are separating isn't there?

I know it can be hard to work out what information is correct, and what is right for you and your situation.

Nearly everyone will have well-meaning friends who are keen to give advice, but most often it is best to get your advice from expert and trusted sources.

I hope you will find the information in this document a useful starting point.

You and your partner are very welcome to contact me if you need some extra help at any time.

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Dividing Assets after Divorce

It is important to know that the Family Court of Australia aims to honour financial and non-financial contributions, and to reach equitable outcomes. Generally speaking the Court does a good job of this.

But most people do not need to go to court. You can get advice and support for negotiations without going near a court.

You and your spouse can go about dividing your assets in different ways, but first, decide to be rational about it. It will save enormous amounts of money, time and stress. Every lawyer and every judge will tell you the same thing.

You can:

- Make your own decisions about division of assets;
- Mediate;
- Collaborate;
- Have your lawyers negotiate between you;
- Arbitrate;
- Go to court.

As a guide to what the law takes into account, the Family Law Act says that a Court needs to:

1. Identify your assets and value them, then calculate your liabilities and deduct them to arrive at a nett asset pool;
2. Look at what each of you contributed during your marriage or relationship, and weigh contributions up against the pool of assets.
3. Look at what each of you will need in the future;
4. Consider whether the division that has been arrived at seems equitable in all of the circumstances.

Your Financial Planner, Accountant, or lawyer can help you to identify your assets and liabilities. You will probably need legal advice about contributions, future needs and your overall settlement.

Any legal advice you receive will quote you a range of outcomes. Advice cannot be confirmed until your lawyer has all of the facts and information.

There is no formula for dividing assets. There are no fixed percentages that you will get because you are a man or a woman, or because you were the breadwinner. Every case depends on its own unique circumstances.

Contributions

The law looks at non-financial contributions as well as financial. The most common example of non-financial contributions is the care of children and a home, but it can include building and maintenance of a property, or unpaid work in a business for example.

All financial contributions are looked at. The most significant are not wages and salaries, but what are called extraordinary contributions. That would include assets held at the start of the relationship, significant gifts from family, including inheritances.

The larger and more recent the extraordinary contribution is, the more relevance a court will place on it. There is no formula or method for deciding on the significance of contributions. You will need legal advice if it is an issue for you.

Needs

Both spouses and any children are entitled to a standard of living that is reasonable in the circumstances. If your current standard of living can be maintained by dividing wealth and providing spousal maintenance to do so, you are wise to negotiate on that basis.

If there need to be changes to the standard of living your family has been accustomed to, that is a more difficult conversation, and most people need help with it. Legal advice is helpful, but often the work of a financial planner can be the secret to success in these discussions. They can take the sting out of it, and allow the conversation to be about the numbers.

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Child Support

Australian parents have a legal obligation to support their children. Those payments are known as 'child support payments'.

It is not necessary to involve the Child Support Agency in your child support arrangements, and you can make your own agreements. It is my personal recommendation not to involve the agency if it can be avoided.

The Formula

The Child Support Agency has the responsibility of assessing and collecting child support when parents or one parent asks it to do so. It is a Commonwealth Government agency, cooperating with the tax office.

Child Support Agency Assessments are based on factors such as the nights children spend with each parent, the age of the children, and the income of each parent. The formula and the rules are complex.

[CLICK HERE](#) to go the Dept of Human Services website and use the online estimator to work out how much the agency will require you to pay for your children, or how much you will be entitled to receive on behalf of your children

Some parents will find that the formula works for them, and others will find that it does not. The Agency has limited discretion to vary payments to suit the particular circumstances of any one family. Most people will report that it is not easy to deal with the bureaucracy of the Agency.

Private Child Support Arrangements

If you make your own agreements and arrangements for supporting your children, there is no legal requirement for documents, or a formal collection procedure. However, it is always prudent to keep records, particularly if payments are being made or received in cash.

Private arrangements cannot usually be enforced, so they work best for parents who have a high level of trust and co-operation.

You can have a private child support agreement, either a short term (Limited Child Support Agreement) or a long term (Binding Child Support Agreement). Legal assistance and advice will be required to draw and register these agreements, which are then enforceable by the Child Support Agency or the Court.

You can agree to pay or receive less or more than the Child Support Agency assessment calculation, but be aware that if you are also receiving Centrelink, it is necessary for the payments to be at a minimum level, to avoid your parenting

payment being reduced. You should check with Centrelink for current rules.

How much should I pay or receive?

If you choose to use the Agency assessment, the amount will be clear.

For many families, it is more realistic to look at past expenditure on their children in deciding how much needs to be allocated for their ongoing support.

The Agency formula caps parent's incomes when assessing payments. For higher income families, an assessed payment may not be adequate to maintain the current standard of living for their children. Parents then have to make spending decisions, or accept that their children's standard of living will fall.

Private School Fees

School fees are not included in a Child Support agency assessment payment. The question of who pays and in what proportion will depend on your respective incomes and overall financial circumstances. Your intentions about private education will be considered too. Your intention is usually evidenced by the completion and signing of a school enrolment form, or current attendance of your child at a private school.

Child Support for the Over 18s?

While children are under the age of 18 or still at secondary school, they will be covered by child support law. Once a child leaves school, or turns 18, whichever is later, they are entitled to adult child maintenance, and are no longer covered by child support law.

Adult children who are students or have a disability will often have an entitlement to support from one or both parents. There is no formula and the amount payable will depend on the needs of the child and your income and ability to pay. Generally, tertiary students will be expected to access part time work and any government entitlement before determining their needs.

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Protecting Your Assets During Separation

It pays to remember that money leaves a trail, and panicking about your spouse moving assets around can be a waste of energy. But not always of course.

Protecting Real Estate

If you are registered on the title of any real estate, you are protected against it being sold without your knowledge. If you are not registered on title, or you are not sure, your lawyer can search the title and let you know if you are registered or not. If you are not registered on the title, your lawyer can register a caveat on the title, which will prevent it being sold.

The greatest risk associated with real estate is that your spouse may continue to draw down on a mortgage, even if that is in both names. The only way you can prevent that from happening is to ask your partner to agree that you both have to sign any withdrawals, or speak to the bank yourself. If you are not on the title and the mortgage, the bank cannot help you. Your lawyer can advise you about preventing further borrowings. That can be done by court order, or by an undertaking for example.

Family Trusts

The word 'trust' ironically seems to create mistrust, as often there is a belief that a trust is somehow a secret device for hiding money and assets. In a typical Mum and Dad trust, you will both be trustees, or co-directors of a company that is the trustee. If only one spouse is the trustee, that is no cause for alarm, as the trust income and assets are most likely to be part of the family assets, and the information has to be shared.

A trust is mainly a vehicle for reducing tax, by sharing the income between spouses or spreading it around the family. A trust must file an annual tax return, and all its income and assets are recorded, and that information has to be shared. Lawyers, financial planners and accountants are very familiar with trusts, and can give you the advice you might need about their operation. Your lawyer can give you advice about sharing of trust assets and income as part of the regular division of assets you will be doing.

There are some situations where trust assets may not form part of the asset pool. That is relatively unusual, and you will need legal advice about such a technical matter.

Operation of Family Companies

If you are a co-director of a company, you have a right to see all books and accounts. If you have not done so in the past, now is a time to be vigilant about what is occurring in a company. If you are not a Director, you have rights as a spouse to know about the operations of a family company, because it will be an asset of the marriage. If you can't request this information from your spouse, you may need a lawyer to do that for you.

If you are a director of a company and have been its operator, you will need to continue its operation as normal. It is not an option to run a company down, and most people don't want to do that in any event. It is a wise plan to give an uninformed spouse disclosure about the company, as it builds trust, and is information that your spouse has a right to, and will be given by a court if necessary.

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How and When do I Become Legally Separated and get a Divorce

In Australia you cannot file for 'legal separation'. There is no formal method or legal document for making separation official.

Separation is simply when you stop living together, but can happen when you still live in the same house, or are 'separated under the one roof'.

Most people establish separation using some form of evidence of the date of their separation. If you begin to live separately, there will be a rental lease, a sale of a home, or change of residence for one or both of you that creates a record. There might be other events that are recorded, such as a change to mailing addresses at work or schools, banking arrangements, emails, notification to schools, or mediation about your children's residence. All of that information can be used to establish a separation date if needed at any time.

If you separate but remain living in the same house, it is a good idea to actively create a record of the date you agree that you are separated. That date can then be used in a divorce application, or to establish the time limit for filing court proceedings for division of property if you have lived in a defacto relationship.

The date of your separation can be important.

If you have lived in a domestic partnership/defacto relationship, any court proceedings for division of property must be filed within two years of the date of your separation.

If you are formally married, you cannot apply for a divorce unless you have been separated for a year and a day, which includes being separated in the same house.

The law accepts that there may be a difference between income, gifts, inheritances, purchases and liabilities that were acquired during a marriage or relationship, and those acquired after separation. You will need legal advice on this topic that is specific to your circumstances. If you want to make this kind of 'before and after' distinction, you will need to record the date of your separation.

You may need to advise Centrelink or the Child support agency of the date of your separation.

[CLICK HERE](#) to go the Family Court website page, which has a step by step guide, and complete information about divorce, including overseas divorce.

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How and When do I Need to get a Divorce

In Australia, the only time you actually need a divorce order is if you want to remarry.

You do not need to be divorced to start negotiating arrangements or court proceedings for division of property, time spent with children, spousal maintenance or child support.

You are eligible to apply for a divorce order after you have been separated for one year and one day, including being separated in the same house. If you have been separated in the same house, you will need to file an affidavit that there was a change in your marriage that amounts to separation.

One of you needs to be an Australian citizen, or have lived here for at least a year.

If you have been married for less than two years, you need a counselling certificate.

You do not need a lawyer to make the divorce application for you, but in Victoria you will need a lawyer or a justice of the Peace to witness the application. An application can be made together with your spouse, or separately. It can be done by applying online electronically via the Family Court of Australia website. If you need a lawyer to do the application for you, the cost varies from \$500 to \$1500 plus the filing fee payable to the court.

The filing fee for a divorce application is currently \$865, but you may be eligible for a reduced fee. The fee changes annually.

If you make a joint application or do not have children under the age of 18, you do not need to go to the court.

Once your Divorce order is final, you must file any court proceedings for division of property within one year.

There are good reasons to get a divorce order apart from remarriage. If you don't have a Will, your ex spouse might get everything if you are not officially divorced. If you have a Will, it might leave everything to your ex spouse, who will still be seen as your spouse unless you divorce or change your Will.

Most people these days have some superannuation and or life insurance policies. If you have nominated your spouse as the beneficiary of any of those policies, you will need to change them or get a divorce to avoid your ex getting the funds.

Children and Separation

Most people are shocked to learn that parents don't have any rights to their children after separation and divorce. That goes for both Mums and Dads.

The people who have rights under Australian law are the children. They have a right to a meaningful relationship with both of their parents.

There are no rules or formulas in Australia for who the children live with, or for how much time they spend with either parent. The law says that the most important thing is the best interests of the children. Parents always agree with that, but often have different ideas about what is in the best interests of their children.

Parents do not need court orders. Most families can live by a less formal agreement, being a Parenting Plan, which is a written, dated and signed document setting out the time schedule for the children and other agreed principles and values.

There is a common belief that children should spend half time or week about with each parent. Sometimes that is best for children, but it is not what the law says, and it is not the right of either parent to have that arrangement. And 50:50 care is not always in the best interests of children.

If you are not a 50:50 parent, that does not mean that your children will feel that you love them less. It is true to say that parents count the days, and kids count the quality of the days they spend with their Dad and Mum.

Some points to remember are about always putting your negative feelings for each other aside, keeping conflict away from your children, and seeing the situation through their eyes. The age of your kids and the relationship they have with each of you makes a difference to what arrangements are going to be best for them. The kids don't always need to go in pairs or packs, and it is OK if they spend separate nights and days with one parent.

Most often, the best people to decide what is best for your children are you and your spouse. That does not mean that you have to 'go it alone' in working out a Parenting Plan. You can ask the help of a child psychologist, a mediator, family or friends with experience and wise suggestions. Most families find that the arrangements for their kids need to and do change over time. The way you start out does not have to be the way you go on for all time.

If you cannot decide what is best for your children, it is vital to ask for help so you can avoid court. Speak to a child psychologist, a mediator, a lawyer, your GP. Child psychologists who work in child custody cases will all agree that children and families are damaged by litigation and conflict.

Sometimes you have no alternative but to go to court. That can be the case where one or both parents are experiencing a mental illness, personality disorder, dependency issues or are a high conflict personality. In those cases, the damage and cost of litigation is often better than an ongoing unresolved battle between parents. Enlisting the help of a child psychologist early on is good advice if you find yourself in this situation. Make sure that your lawyer has experience in such cases. This is not a situation where your children will be helped by inexperience, no matter how modest the fees of an inexperienced lawyer.



For more information about collaborative divorce please visit my website

[VISIT SITE](http://www.margueritepicard.com.au)