The Top 50 Questions you want to ask about Divorce & Separation

O'Farrell Robertson McMahon Family Law Team

ofrm.com.au/50questions

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The information provided in this guide is general in nature and should not be relied upon as legal advice. You should speak to a lawyer at OFRM about your particular circumstances.

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We recognise that separation is a challenging situation to be in. This guide has been written to make that easier and will help you plan and prepare for the steps that need to be taken with the assistance of O'Farrell Robertson McMahon. It has been written by our Family Law team lead by Accredited Specialist in Family Law, Marika McMahon.

Separating

Can I obtain advice before I separate?

The ideal time to seek advice regarding what would be the likely outcome of Family Law matters regarding both children and/or property matters, is before you decide whether or not to separate.

It is common for us to meet with clients while they are considering whether to separate. The benefit is you can then make an informed decision about the future of the relationship knowing what would be likely to happen from both a property/financial perspective and regarding arrangements for your children.

Often this assists parties in deciding if they wish to separate and if they do, to ensure separation occurs in a manner which does not jeopardise the best arrangements for the children or a likely property settlement.

When you meet with an O'Farrell Robertson McMahon Family Lawyer, that appointment, like everything we do, is confidential - which allows you to speak openly and frankly about your concerns to an independent lawyer who can provide experienced advice to you which can assist you making the right decision.

Do I have to sign anything to be officially separated?

Under Australian law, there is no requirement or way to officially record that you are separated.

Often separation means there is a mutual understanding by both parties that the relationship has come to an end.

The *Family Law Act* considers separation in two different areas:

1. in proving that a marriage has broken down irretrievably as the grounds for a divorce
2. the date on which time commences to run for a de facto property settlement

Under the *Family Law Act* there are a number of factors the Court would take into consideration in determining whether parties were separated.

While there is no official register or such of separation, there are other declarations and documents which the parties may make that confirm separation such as information that they provide to Centrelink.

What is a de facto relationship?

A de facto relationship is a relationship in which a couple lives together on a genuine domestic basis.

To be able to seek a property settlement, a couple need to have been in a de facto relationship for two years unless there are children of the relationship, or if a party has made substantial contributions to property.

The Court will look at the following factors to determine if your relationship is a de facto relationship:

- The duration of the relationship
- The nature and extent of a common residence
- Whether a sexual relationship existed
- The degree of financial dependence/ interdependence

- The ownership, use and acquisition of property
- The degree of a mutual commitment to a shared life
- The public aspects and reputation of the relationship (i.e. How others would have viewed the relationship)

Can I change back to my maiden name?

Changing your name back is relatively easy, mainly because when you originally changed it was simply a change of name by convention rather than law.

You don't have to change your name at the registry; instead it is the reverse of what happened when you initially changed your name. You changed to your married name by simply showing your original identification documents and your marriage certificate. To change back to your previous family name you need your birth certificate and your marriage certificate, effectively showing the chain of names you have used.

There is no central way for this name change to happen, rather you need to approach each organisation: banks, Vicroads, etc., with the relevant identification.

You don't need to be divorced to change your name, nor does your settlement have to be finalised. Sometimes though it is easier to wait until those formalities have occurred.

However, if you legally changed your name overseas or were married overseas you may need to make the changes through the Registry of Births, Deaths and Marriages.

Changing your children's names is more complex, and something that can only occur with the agreement in writing of both parents or a Court Order.

Agreements

We agree, can you see both of us to draw up the paperwork?

Lawyers have a duty to look after their clients' interests and are not able to represent more than one client in the same family law matter, as this would create a conflict of interest.

Quite often, even in matters where parties appear to have reached an amicable agreement, issues can arise that lead to the parties having divergent interests.

However, if you have reached agreement and just need the agreement documented, the best way forward is for one party to engage us as their lawyer, and we can prepare the documents and make arrangements for the other party to effectively sign the documents.

Can we work things out without going to Court?

Yes.

The vast majority of people are able to reach an agreement regarding Family Law matters (both property and children's arrangements) without having to go to Court.

Some can reach agreement themselves; other agreements are reached by the parties engaging lawyers and having negotiations through lawyers. Sometimes this may involve 'roundtable conferences' or Mediation.

Regarding children, often arrangements regarding children are reached through the parties attending Family Dispute Resolution Mediation.

For childrens' matters, if you reach agreement you may just wish to record that as a *Parenting Agreement* or you can complete the documentation to have your agreement made as Orders in the Court. It is often not even necessary to turn up to Court, but the Orders can be made administratively if you have reached agreement.

For property matters, you should always ensure that an agreement is made as a final agreement under the *Family Law Act* either through having it made as an *Application for Consent Orders through the Court* or as a *Binding Financial Agreement*.

Who pays my costs?

The general rule in Australian Family Law is that each party is responsible for the payment of their own legal costs. This was a key component of the *Family Law Act* when it was enacted back in 1975 to try and ensure that there was equitable access to justice.

There are limited circumstances in Family Law where a Court may order that one party pay some of the costs of the other party.

These circumstances are limited to where one party has caused the other party to unfairly incur the costs such as failing to be prepared for a Court date or failing to turn up at Court.

The second area where a party may be ordered to pay the costs of the other party, is where there has been an offer of settlement and the Court outcome ends up being more beneficial to the person who made the offer than was the original terms of the offer.
That can enable an application to be made for the other party to pay the costs from the time of the offer of settlement.

This is a tool used by the Court to encourage parties to make offers of settlement and consider them carefully. However, whether or

not there is a costs order, remains at the discretion of the Court who take into account a number of different circumstances. A costs order is also a little bit like a Medicare scheduled fee, in the sense of, in the costs order there may be a gap between the amount paid, pursuant to the costs order and the actual costs you have incurred.

Are there any time limits?

The *Family Law Act* sets limitation periods in bringing an application to the Court for a property settlement for both married and de facto couples.

For married couples, the time limit for filling an application for a property settlement is one year after a divorce order takes effect. Whilst this time may appear to be short, keep in mind that you must be separated for a period of 12 months before being eligible to apply for a divorce order. Therefore, you effectively have at least two years before time runs out, and the clock doesn't start ticking until you are divorced.

Alternatively, those in a de facto relationship have a time limit of two years after the date of separation.

Due to the time limits, it is important that legal advice is obtained at the earliest possible opportunity, even if this means that action is not taken at that time but in the future prior to the relevant time limit.

How long will it take to resolve my matter?

If you and your partner have been able to reach agreement between yourselves, and are simply seeking for that agreement to be formalised, then documenting that agreement, having you both sign it, having it approved by the Court and then having the settlement transactions take place (including any transfers and refinancing), the best case scenario that you would be looking at for all of those steps to take place would probably be about 6 to 8 weeks' time.

If it is a matter that you haven't been able to reach agreement and there needs to be some exchange of information, negotiation and then settlement, the time from commencing those negotiations to the settlement actually happening would usually take between 3 to 6 months' time depending upon the speed of exchange of information and how long the settlement steps such as refinancing take.

The Family Court and Federal Circuit Court now have a number of processes to try and ensure that matters move more quickly through the Court process and you will generally find that for property matters, parties are getting to the stage of having a Mediation which is where statistically most matters settle, within 12 weeks of commencing proceedings and for disputes regarding children, you would usually get to the stage of obtaining a Family Report within about 12 weeks of commencing proceedings.

If your matter had to go to a Final Hearing, if that Final Hearing occurred in the Bendigo circuit, your best case would be 6 months between commencing proceedings and the matter having a Final Hearing. If your matter was particularly lengthy or complex, you could be looking at 2 to 3 years between commencing proceedings and the matter being listed for Final Hearing.

An important thing is that experienced skilled Family Lawyers like O'Farrell Robertson McMahon Lawyers understand the Family Law system and are able to make sure that your matter proceeds in a way that maximises the chance of it being resolved expediently.

How can I have my matter resolved as quickly as possible?

Some handy hints from our experience:

- Seek legal advice as early as possible.
- Openly and regularly communicate with your lawyer.
- Take your lawyer's advice: they act in your best interests. Try to focus on what your lawyer emphasises as important and do not get caught up in side-issues or insignificant components of your matter.
- Co-operate and follow your lawyer's instructions and Court Orders.
- Be willing to undertake tasks to assist – such as obtaining relevant documents, collating financial documents, writing out accounts of what happened, engage with your accountant or financial planner, etc.
- Read or listen carefully to all advice and correspondence provided to you. If you do not understand something – seek clarification.
- Keep up-to-date with your legal costs.
- Where relevant, engage with other appropriate professional services such as counsellors, psychologists, etc.
- Keep communication with your former partner appropriate and focused.

Of course, your matter can be limited and impacted by the opposing party, such as how co-operative they are, if they receive legal advice and the quality of such advice. We are very experienced and equipped to invoke tactical ways of dealing with such situations that still result in your matter be resolved as quickly as possible.

What Court deals with family law matters?

There are ongoing debates in parliament about how best to streamline our family law court system. Currently (in Victoria):

- Most property matters and childrens' matters are dealt with in the Federal Circuit Court;
- More complex or lengthy property matters and children's matters are dealt with in the Family Court;
- Applications for Consent Orders (where agreement has been reached) can be dealt with in the Magistrates Court of Victoria;
- Divorce matters are dealt with in the Federal Circuit Court;
- Child Welfare matters involving the Department of Health and Human Services are dealt with in the Children's Court of Victoria;
- Family Violence Orders are dealt with in the Magistrates' Court of Victoria;
- Appeals of Family Violence Orders are dealt with in the County Court of Victoria;
- Adoption applications can be dealt with, first in the Family Court of Australia, then the County Court of Victoria;

- Reviews of child support may be dealt with in the Social Security Appeals Tribunal.

It is a maze!

Before commencing court proceedings in relation to a family law issue, it is therefore critical to get the right advice about what Court should deal with the matter.

Children

Can I move interstate with the kids?

Under the *Family Law Act* parents have equal shared parental responsibility for the children until there is a parenting agreement or Court Order that provides otherwise.

This means that unless there is an agreement or Court Order in place, both parents would have responsibility for the decisions regarding the long-term arrangements for the children, which would include a significant change like moving them interstate.

If a parent unilaterally moved without the notice or agreement of the other parent, the Court may order that the parent return with the children until the Court is able to make a final decision or may order that the children return to the other parent.

Do I have to make the kids spend time with the other parent?

The *Family Law Act* sets out the factors and process that a Court must go through in deciding what the arrangements are for the children, that is, where they live and how much time they spend with each parent.

A majority of people are able to work out the arrangements for the children between themselves without having to go to Court. This may occur through their own negotiation or perhaps with the assistance of Mediation.

The approach the Court takes, and the factors that are relevant, are of assistance in helping reach an agreement outside of Court regarding the children.

The *Family Law Act* has as its paramount consideration "the best interests of the children": which means that the arrangements for the children need to be those which are in the best interests of the children. The *Family Law Act* also has an obligation on parents to encourage and support the children's relationship with the other parent to the extent which it is in the best interests of the children. Therefore, there is an obligation that you facilitate the children spending time with the other parent, if that is in the best interests of the children.

If there are current Orders in place which provide for the children to spend time with the other parent, that places an obligation upon you to comply with the Orders.

Will my children get their say?

There is no magical age where a child gets to "decide" who they live with or spend time with. The Family Law Act gives power to the Courts to make parenting orders from children from their birth until they are 18 years old.

The children's views and wishes are one of the many factors considered by the Court when determining what arrangements are in the child's best interests. The importance given to children's wishes can be given more or less significance, having regard to age and maturity of the child, how strongly the views

are held and the existence of other factors, such as the child's safety.

A child's views can be considered in child inclusive mediation or in court proceedings in the tested evidence of the parties, a family report or through an independent lawyer on behalf of the child.

How does a Court decide where the children live?

When determining arrangements for children, the Court firstly weighs up the need to protect children from physical and psychological harm against the benefit of children having a meaningful relationship with both parents.

The Court will then consider:

- any views of your children – this is balanced against how much they understand and how mature they are.
- the nature of the relationship your children have with you, their other parents and other significant people, including grandparents, siblings and relatives
- the extent to which each parent has been involved (or not) with decisions about major long-term issues about the children
- how much time each parent has (or has not) spent with and communicated with the children
- whether each parent has supported the children financially or failed to do so
- the likely effect of any change to where children have been living or staying
- the practical difficulty and expense of children seeing each parent
- how much each parent and any other person (including grandparents and other relatives) can provide for the children's physical, emotional and intellectual needs
- the maturity, background (including culture and traditions), sex and lifestyle of the children and of each parent
- the right of children who are Aboriginal or Torres Strait Islander to experience their culture
- each parent's attitude to the responsibilities of being a parent and their attitude towards their children in general
- any family violence involving the children or a member of their family
- any relevant contested or Intervention Orders; and
- any other considerations the court thinks are important.

The Court will also consider evidence in relation to the history of the relationship and the care of the children; the events that have happened since your separation and the status quo, being the circumstances that have existed since you and the other parent separated.

Does the Court always start with 50/50 for the children?

Firstly, the Court applies a presumption that it is in the best interests of a child for their parents to have equal shared parenting responsibility unless there are reasonable grounds to believe that a parent of the child has engaged in the abuse of a child or in family violence.

If the presumption does apply, then the Court must firstly consider whether equal time with both parents is in the child's best interests.

The Court considers whether it is practical and in the best interests of the child for them to spend 'equal time' or 'substantial and significant time' with each parent.

Substantial and significant time is defined to include both weekday time, weekend time, time on special occasions and holidays.

The Court then considers the practicality of the living arrangements, such as how your child will be impacted by the proposed arrangement, where you and the other parent live and whether there are any practical difficulties that arise from the arrangements. The Court also considers each parent's ability to co-parent and communicate with the other parent.

What is 'parental responsibility'?

Parental responsibility is all the powers, responsibilities and duties parents have in relation to their children. Parental Responsibility includes long term decisions about a child (such as their education, health and religion) as well as the day to day decisions about a child.

The *Family Law Act* provides a presumption that when an Order will be made for parties to have equal shared parental responsibility for children, unless there is an exception. One exception to the presumption is in matters where a Court is satisfied that a parent has engaged in family violence or the abuse of a child.

Family law orders can provide for parental responsibility to be "equal", that is shared by both parents or "sole", that is only exercised by one parent.

In some instances, Courts may Order that parents have equal parental responsibility about some matters relating to a child and sole parental responsibility about other matters.

Parental responsibility and orders setting out whom a child lives with and whom they spend time with are separate matters. Equal shared parental responsibility does not mean that parents spend equal time with their children.

Who pays the school fees and other kids' costs like dental and extra-curricular expenses?

Generally, Child Support is dealt with through the Child Support Agency and Child Support (Assessment) Act through applying the Child Support formula (see questions (#27 to 29)), which sets the rate of ongoing financial support for children of separated parents until they are 18 years old.

Child support is supposed to cover the main costs of children, including their living costs, school, medical, extra-curricular fees and clothing, however, often there are items that fall outside of what is covered and unfortunately, the amount of child support assessed as payable is usually insufficient to fund costs associated with children such as:

- Private health insurance
- Private school fees
- Additional school related expenses such as trips or materials
- Medical expenses

- Dental expenses
- Extra-curricular activities
- Additional costs due to a child's 'special needs'

Parents can agree between themselves about how such costs will be paid. Some parents that are in a better financial position than another parent may be willing to pay such costs in addition to an assessed child support liability. We recommend that such arrangements are formalised through a Child Support Agreement. This is an Agreement between both parents that sets out the full details of the child support payments.

There are two types of private Child Support Agreements:

- Limited Child Support Agreements; and,
- Binding Child Support Agreements.

Both kinds of agreements need to meet very specific legal requirements in order to be enforceable.

Binding Child Support Agreements can be made, whether or not there is a Child Support Assessment in place. It is necessary for both parents to obtain independent legal advice prior to signing.

Limited Child Support Assessments can only be entered into when there is a Child Support Assessment in place. There are rules about the amount of Child Support that can be made payable by the Agreement (it must be equal to or above the assessed rate).

A Child Support Agreement can be drafted to include that non-periodic payments are credited against a paying parent's child support liability or in addition to a liability.

In some instances, there may be an option for assessed periodic Child Support to be paid towards prescribed expenses. A parent paying Child Support may pay (up to 30% of their prescribed Child Support amount) directly towards certain expenses, such as school expenses, medical and dental expenses and childcare fees.

Child Support can be quite a complex area and can result in unintended outcomes if not addressed correctly. It is important that you receive qualified advice about this topic.

Can I do anything if my ex has taken the children without my consent?

What action is taken in such situations depends on the circumstances.

If there are Court Orders in place that provide arrangements that are not being adhered to then the first step is to try and negotiate directly with the other parent to resolve the issue and have the children returned to you.

If those negotiations are unsuccessful, then you can engage with a lawyer to conduct negotiations on your behalf. It may be necessary to make an Application to the Court for a Recovery Order or a Contravention Order.

A Recovery Order can set out specific arrangements for the return of the child/ren and can be provided to police so that they can assist to have the children returned to you. A Recovery Order can be obtained on an

urgent basis and on an ex-parte basis (meaning that the other party is not present at the hearing).

If you do not have any Court Orders in place then again it is important that you firstly try to negotiate directly with the other party and if those negotiations are unsuccessful then you should engage a lawyer to provide you with advice about the next appropriate action, including lawyer assisted negotiation, mediation or a Court Application.

In circumstances in which the whereabouts of a party and children is unknown, the Courts have the ability to make a Location Order to try and locate them. Such Orders can compel another person or organisation to provide information about the children's location directly to the Court.

Fortunately, it is only in extremely rare circumstances that children are not recovered or located.

Can I take my children on holidays interstate or overseas?

The answer is dependent on your circumstances. This includes whether you and the other parent have equal shared parental responsibility for your child/ren (noting that this is the default position, even if there are not Curt orders specifying the same).

If there are Court Orders restricting you from doing so, or requiring you to do certain things (such as seek permission or notify the other parent), then it is necessary for you to meet those conditions.

If you seek to take your children interstate or overseas and the other parent refuses, then you should try to reach an agreement through negotiations between yourselves, through lawyers or through mediation. The child/ren's best interests remains the paramount consideration.

If you are still unable to reach an agreement, then it may be necessary to make a Court Application.
For example, if a parent refuses to provide a passport or sign a passport application, then the Court can determine it is in the child's best interest to do so and can order that the child be issued with a passport or be able to travel even if the other parent disagrees.

Time can be of the essence with such Applications, so it is important that advice is received as soon as an issue arises.

Do I have to attend mediation regarding children?

In most cases, you will need to attend Family Dispute Resolution before you are able to issue Court proceedings for parenting matters. This is a special type of mediation for families. This is because the *Family Law Act* requires that parents must make a genuine effort to resolve parenting disputes and obtain a *60I Certificate* before they can issue proceedings.

A *Section 60I Certificate* is issued by a Family Dispute Resolution Practitioner. The different types of certificates they can issue are:

- You did not attend because the other party refused or did not attend;
- You did not attend because the practitioner considered that in your circumstances it would not be

appropriate to conduct the family dispute resolution;

- You did not attend, and the parties did not make a genuine effort to resolve the issues;
- You and the other party did attend but one of the parties did not make a genuine effort to resolve the issues;
- You and the other party attended but the practitioner considered that it would not be appropriate to continue.

There are exceptions to the requirement for a *Section 60I Certificate*, such as in matters where there has been family violence, or urgent matters.

Court Applications seeking an exemption from filing a *Section 60I Certificate* need to be carefully drafted.

Can someone who is not a parent seek orders regarding children?

The *Family Law Act* provides that "any person concerned about the children's care, welfare and development" can seek Orders in relation to children.

Whilst this seems like it could include a broad range of people, before allowing such parties to seek such Orders, the Family Court places the onus on an Applicant to provide evidence which justifies their need to spend time with the children and evidence that their Application would be in the children's best interests.

The Court will then can consider various relevant evidence such as: the role the person had in the lives of the children in the past, the nature of their relationship and their influence on the wellbeing of the child; the nature of the relationship between that person and the child's parents, the circumstances that give rise to the party making the application.

As always, the Court's paramount consideration is the best interests of the children.

What is a family report?

A Family Report is an independent piece of evidence that can be taken in consideration in family law matters.
A report is prepared by a psychologist (sometimes social workers) who read the court documents, meets with the parties and the children, speak to other relevant people (schools, doctors etc.) and write a report with their recommendation of what are the arrangements that will be in the best interests of the children.

Family Reports often lead to parties settling because:

- it is powerful to hear recommendations from an expert
- issues are clarified
- people don't want to continue the proceedings
- reports helps people recognise what is in their children's best interests

If a matter does not resolve, the report writer may be required to attend Court and be cross-examined during the hearing of a matter. The Judge will particularly ask the report writer about their thoughts on what the Orders should be. The court employs a small amount of these staff directly and contracts others, but the vast majority are private reports where the parties are required to pay the costs associated with the report.

Can I obtain a family report without having Court proceedings?

Yes. A family report (see page 11) is a useful step in family law proceedings and in some instances, particularly where both parties have legal representation, a private family report can be obtained without Court proceedings on foot.

Such reports need to be paid for by the parties (usually jointly). They can provide great insight into the issues of the matter, provide recommendations for parties to consider and can be utilised to assist parties to reach an agreement or narrow issues. This can result in the minimisation of parties' legal costs and avoid protracted negotiations or proceedings.

I have current orders regarding children; can I go back to court to change them?

If there are current Orders in place regarding children, thanks to a 1979 case called *Rice -v- Asplund*, a Court first needs to be satisfied there has been a significant change in the circumstances since the making of Final Orders before the Court would consider changing Final Orders.

What can I do if my ex-partner won't let me see the kids?

If there are no Court Orders in place, then the first step is to try and negotiate parenting arrangements directly with the other parent. If such negotiations are unsuccessful, then mediation (with or without a lawyer) is usually the next necessary step. There are, of course matters where mediation is not suitable, such as matters involving family violence or allegations of child abuse.

Lawyers can assist to negotiate with the other parent on your behalf and can encourage them to obtain legal advice.

If parenting arrangements cannot be agreed, then it may be necessary to commence Court proceedings to seek parenting orders.

If there are Court Orders in place and a parent is not complying with such orders, then it may be appropriate to issue a *Contravention Application* which can result is a parent being found to be in breach of an Order, Orders being varied or make up time being arranged.

Family Violence

There was family violence in my relationship – will this be taken into account?

The Family *Law Act* refers to family violence as:

> *"violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful."*

Family Violence is behaviour by a person towards a family member of that person if that behaviour:

- is physically or sexually abusive; or
- is emotionally or psychologically abusive; or
- is economically abusive; or
- is threatening; or
- is coercive; or
- in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person.

Family Violence can include psychological, emotional and economic abuse.

Under the *Family Law Act,* family violence Is considered when assessing what arrangements for the children are in their best interest, balancing the benefit to the child of having a meaningful relationship with both parents with the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The Family Court can also take Family Violence into consideration when determining a property settlement. In the 1997 case of Kennon the court considered:

> *"...where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions"*

Child Support

What is Child Support?

Children have a right to receive a proper level of financial support from their parents.

In Australia, *Child Support* usually refers to the minimum level of financial support provided by a parent for the children based on a formula applied by the Child Support Agency, considering a family's circumstances, such as the income of the parents, the ages of dependent children, the care arrangements for the children, etc.

That financial support usually occurs by one parent ("the liable parent") making regular payments to another parent or non-parent carer. However, parents can come to agreements where Child Support consists of paying school fees, private health insurance, orthodontics, overseas holidays, etc.

How do I get Child Support?

Some parents can reach a private agreement for the payment of Child Support by one parent to the other.

It is possible to have the amount of Child Support to be paid assessed by the Child Support Agency, but for payment arrangements to be made directly between the parents. For many, both assessment and payment occurs through the Child Support Agency.

Do I have to pay Child Support?

If your child is under 18, or still attending secondary school, and you are separated the child's other parent, you may be assessed as liable to pay child support to the other parent (or non-parent carer).

A parent or non-parent carer can apply for an assessment from the Child Support Agency to calculate whether child support needs to be paid by either parent and how much.

You can use the online Child Support Estimator to get an idea of that an assessment may look like in different circumstances.

Your Shared Home

Can I change the locks?

The short answer is yes. Even if a property is jointly owned, a party is within their rights to change the locks.

Changing the locks should not be used as a way of notifying the other party that a relationship has broken down, rather it should be used in circumstances where a party is concerned about ongoing joint use of the home, and has a need to feel safe and secure.

You should also keep in mind that your ex-partner is also within their rights to change the locks too - you certainly do not want to start a tit-for-tat of engaging locksmiths.

Should I move out of our shared home?

Following a separation, parties may wish to remain separated under one roof for an extended period. Some parties do this successfully, however most find it becomes an unsuitable arrangement and it is generally necessary for one of the parties to move out of the shared home.

Regardless of your living arrangements, ownership of the property remains the same until an agreement or Court orders are made dealing with the asset.

Sometimes the concern about whether or not to move out of the home is a tactical one – would not being in the home mean you lose the chance to try and keep the home as part of a settlement, does it mean the property might sell for less?
Neither of these necessarily follow the fact that you have left the property, and if an agreement cannot be reached it is possible to seek Court Orders to protect against those things, including having the property appropriately prepared for sale or the property maintained pending a settlement.

Can I make my spouse move out of our shared home?

Parties are encouraged to reach an agreement about who remains in the shared home and who moves out. Where no agreement can be reached, it may be necessary for a party to make a Court application for a "sole use and occupation order".

The Court needs to be satisfied that the sole use and occupation Order is necessary, as it is not reasonable for both you and your former spouse to remain living together in the property, taking into account:

- The means and needs of both you and your spouse including any hardship you or they may suffer;
- The level of conflict between you and your spouse;
- The conduct of each of you; and
- The needs of any children of the relationship.

Orders regarding the use of a home can also occur through Family Violence orders in the state Magistrates Court.

Assets

How do I find out what assets and income my spouse has?

Most separating couples usually have a good idea of the assets that they and their ex have, simply as a result of having been together. That's a fact that is often overlooked by inexperienced family lawyers!

However, if you are concerned that you don't have a comprehensive understanding of the assets and income of your spouse then the Family Law process includes "*pre-action procedures*" where each party is obliged to exchange all of the relevant financial information with the other party. This includes bank statements, superannuation statements, income tax assessments, employment contracts, wage slips, business account statements, details of trusts and any other relevant financial documents.

If your matter ends up in court, each party in property proceedings is also required to file a sworn or affirmed document being either an Application for Consent Orders or a Financial Statement which sets out in detail all of their assets and income. If there are concerns about the accuracy of the information exchanged, documents can be subpoenaed.

Do I have to tell my spouse about my assets/income?

Yes, you do.

Parties in family law matters have a *Duty of Disclosure.* This requires you to provide all information relevant to an issue in the case to the other party. This duty starts with Pre-Action Procedures before the case and continues until the case is finalised.

The Duty of Disclosure is set out in the *Family Law Rules* and extends to both your direct and indirect financial circumstances. It requires disclosing all sources of earnings, interest, income, property (including property that you actually have, and contingent or future interests in property) and other financial resources. It includes property, financial resources and earnings owned by you directly or by some other person or beneficiary, for example, your child or de facto partner as well as assets held in corporations, Trust companies and other structures.

The Duty of Disclosure continues throughout the Family Law proceedings which mean that there is an onus on all parties to continuously disclose and provide information regarding any changes to their financial circumstances.

There are consequences if you do not comply with the *Family Law Rules* disclosure requirements, the Court may:

- refuse to allow you to use that information or document as evidence in your case
- stay or dismiss all parts of your case
- order costs against you
- fine you or imprison you on being found guilty of contempt of Court for not disclosing a document.

It is vital that you understand your disclosure requirements and the other party complies with their obligations, by working with an experienced lawyer, like O'Farrell Robertson McMahon.

How can I find out if my spouse is hiding assets?

You can be reassured that it is extremely rare that a party in family law proceedings is able to hide assets.

The Family Law process includes "*pre-action procedures*" where each party is obliged to exchange all relevant financial information, which includes historical bank statements. Reconciling bank statements to things like records of property transactions, tax returns and so on, will usually reveal if there are any movements of assets or money that has not been disclosed. For example, going through a bank account might reveal that there are transfers to an account that has not been disclosed.

If a party is not co-operatively disclosing information, then there are powerful ways in which the Court can ensure that this occurs including issuing subpoenas, making Costs Orders if people do not comply with Court Orders regarding disclosure, or ultimately drawing conclusions in the Court Orders or striking out a response and hearing the matter on an undefended basis.

Prior to filing Court documents, a party must sign either an Affidavit or a Statement of Truth. If it is later found that a party did not tell the truth or was hiding assets, then not only is there the risk that the Orders will be set aside and the Court will make a new settlement, but also there is the potential that criminal charges regarding making false statements.

There is an extremely strong onus on people to tell the truth because:

1. Experienced family lawyers and Judges can easily pick up where things don't add up and trace the missing information.
2. The risk of not telling the truth and that being found out later is so significant it is not worth doing.

On a practical level though, the open exchange of information early in your Family Law negotiations is the best way of making sure that you minimise both the time and cost of sorting out your Family Law property matters.

My matter will involve complex tax and financial issues – are you able to assist?

To figure out what is a fair, or "just and equitable" family law settlement, it is necessary to not just take into consideration the value of your assets and liabilities but to also look at the potential impact of any taxation and financial issues

This can include the treatment of outstanding tax liabilities, any tax consequences of the orders, Stamp Duty, Capital Gains Tax and so on.

Inexperienced family lawyers or lawyers who only dabble in family law may miss such issues or fail to draft orders which protect a party against unintended tax or financial issues.

At OFRM, our family lawyers keep up-to-date with both how these issues may effect property settlements, advising you when your accountant needs to be involved in the process, and making sure the orders are right for your situation.

How will gifts or lump sums I received during the relationship be treated?

In a property settlement, the consideration of lump sum contributions can be quite complex. Lump sum contributions can be made by parties through windfalls, gifts they have received, inheritances, compensation payouts and the like. The way the family law courts treat gifts and lump sums received during a relationship depends on the circumstances of each matter. Generally, such lump sums are treated as a contribution made by the party who received it (unless there was evidence to suggest that the monies were specifically contributed by or for both parties).

The Courts do not take a strict mathematical approach to how the lump sum contributions should effect the percentage division of the property pool; there is not a maths formula that calculates dollar-for-dollar what the lump sum should represent in the overall settlement. Instead, Courts have wide discretion when assessing the weight to be attached to such contributions. It forms just part of the overall holistic approach to arrive at an overall settlement.

There are some key factors which can impact on how such contributions are taken into account, including:

- The amount of the lump sum;
- The context of the lump sum in regard to the overall asset pool;
- The timing of the lump sum. for example: less weight could be given for a contribution made at the start of a long-term relationship, as opposed to a contribution made during a short relationship, or near the end of a relationship, or after separation;
- The effects of the contribution on the parties' financial status and the asset pool, such as how the funds were applied or utilised by the parties;
- How the lump sum came about.

What happens to the assets I have acquired since separation?

In family law matters, the asset pool (that is, property, liabilities and super) to be divided between parties is assessed, not at the date of separation, but at the time of the court hearing or trial.

Until a final property settlement, parties must potentially ride the wave of the highs and the lows of their asset pool value.

If, for example, a party receives an inheritance post-separation; accumulates significant assets or liabilities; increases or decreases investments; implements good saving methods or acquires property, then it is taken into account in the asset pool and the settlement.

The fact that the property pool is not assessed until the date of the trial, obviously can increase the risk of not finalising a property settlement in a timely manner. You should contact us to receive advice as soon as possible (even prior to separation).

Property Settlements

How does a Court determine a property settlement?

The Court follows the process set out in the *Family Law Act* to determine who gets what in a property settlement.
That is a four-step process of determining:

1. The assets and liabilities of the parties
2. (a) Contributions – how have each of the parties contributed to obtaining, keeping and improving of those assets including contributions made directly (such as the deposit for a house or the cost of renovations) and indirectly (contributions that otherwise assisted such as paying bills, buying groceries and so on).

   (b) The non-financial contributions of the parties including contributions as homemaker and parent.
3. The future needs of the parties, which includes factors such as your ability to earn an income, your responsibility for others and so on.
4. The fourth step is that the Court will look at what is the effect of applying those first three factors and then consider is that a just and equitable outcome

What is the right percentage?

You've probably heard about Family Law property settlements being about each party receiving a certain percentage of the total pool of property. You've probably also heard a few myths about that!

How is the percentage determined?

There is no set percentage and there is no magic formula, rather the percentage division is arrived at by applying the 4 step approach a court must follow in property matters.
Having determined it is necessary for there to be "an adjustment of property between the parties", the court then arrives at a percentage division by considering:

1. First, the court determines what is the pool of assets to be divided. This is where the existence of assets or the value of them is decided
2. Next, the court looks at how each party has contributed to the acquisition, conservation and maintenance of the property both financially and non-financially as well as directly and indirectly
3. The court then evaluates whether the percentage should be adjusted given the future needs of the parties
4. Finally, the court checks that the proposed division gives an outcome which is "just and equitable".

Do I have to share my super?

Under the *Family Law Act* superannuation is considered property, although the Court does recognise that until you can realise your superannuation, it is property a little different to assets like your house or a bank account.

The general approach is that during the relationship you have each contributed, whether it be directly or indirectly, to the building up of each other's superannuation. This is particularly relevant where you may have had one party to the relationship in paid employment and accumulating superannuation when the other may have had some time out of the paid workforce, especially caring for children.

The usual approach that the Court would take with regard to superannuation, is to consider that it is treated separately to the non-superannuation assets and that it is equalised, that is there is a superannuation split so you both end up with half of the total superannuation that you both have as part of your property settlement.

There are many exceptions to this situation, depending upon the nature of the superannuation, what superannuation you had at the commencement of the relationship and what other property you have.

It is essential that you seek specific advice regarding what would be an appropriate way to deal with superannuation in your particular circumstances.

Will we have to sell/close our family business?

A fundamental principle in family law property settlements is the need to end all financial relationships between parties. Ending the financial relationship between parties involved in owning and operating businesses including farms can be quite complex due to the practical, financial and at times, emotional ramifications.
Whether or not you will be in a position to keep the farm or business would depend on what the overall property settlement is.

Despite the principle that separated parties should end all financial relationships, in some circumstances ex-partners are willing and able to continue to own and/or operate the business or farm jointly, although such arrangements are generally discouraged.

What is the difference between a property settlement and a Divorce?

A Divorce is an Order made by the Court to end a marriage. This is an Order which is made on the application of either one or both of the parties which can only be made 12 months after you have separated. A Divorce officially ends your marriage; sometimes it is handy to think of it as the official tearing up of your Marriage Certificate!

By contrast, a property settlement is not ending your marriage, you can have a property settlement without being divorced and you can enter into a property settlement immediately upon your separation if you wanted to; you don't have to wait 12 months.

A property settlement or property Orders divides the assets and liabilities that you each have.

What happens if my spouse refuses to negotiate?

Unfortunately it is not rare that one party to a relationship will initially refuse to enter into negotiations regarding a property settlement. Sometimes they do that thinking there is some tactical advantage, at other times it is because they are refusing to acknowledge the end of the relationship or because they are "sticking their head in the sand".

The *Family Law Act* tries to encourage people reaching an agreement for a property settlement without having to resort to Court proceedings. The way in which this is done is by encouraging people to enter into what the *Act* refers to "pre-action procedures".
Pre-action procedures is essentially a process by which the parties are obliged to exchange

documents which will show what are the assets and liabilities they each have as well as exchanging their opinion on values of those items and a proposal for settlement.

If a party refused to enter into negotiations just ignoring the requests, it is possible that proceedings could be commenced in Court and the Court can order that the party who was refusing to enter into negotiations pays the costs of the other party. However, whilst that process is technically available pursuant to the legislation, it is extremely rare to see the Court making a costs order like that at that stage.

Does it complicate my property settlement if I have re-partnered?

Entering into a new relationship after the breakdown of a previous relationship does not necessarily complicate an unresolved property settlement, however it is a factor that needs to be taken into account.

As part of the approach for determining what an appropriate settlement is, consideration must be given to whether there should be an adjustment due to the 'future needs' of a party. Section 75(2)(m) (or section 90SF(3)(m) for de facto couples) requires the Court to consider

> *"if either party is cohabitating with another person – the financial circumstances relating to the cohabitation".*

Therefore, if you are living with a new partner, their financial circumstances (including income and assets) must be taken into account when assessing what your future needs are. However, as always, there is wide discretion for the Court when considering the impact of a new partner's financial circumstances on the overall property division which can make it all the more important that you receive adequate advice about the possible ramifications of your new relationship.

Likewise, if your former partner has cohabitating with a new partner then their financial circumstances will also be considered.

What is spousal maintenance?

Spousal Maintenance is a payment made by one party to the other party in circumstances where a party is not able to adequately support themselves following separation, and the paying party has the capacity to make the payments. Spousal Maintenance can be paid periodically or as a lump sum.

The right to periodic payments of Spousal Maintenance ends if person receiving the maintenance gets married again, unless there are special circumstances, or if the person paying maintenance dies.

Spousal Maintenance may also end if the person receiving the payments improves their financial situation by commencing a new de-facto relationship; or their responsibility for caring for children changes significantly; or their earning capacity increases.

Can I make a pre-nup?

In Australia, “pre-nups” or pre-nuptial agreements are called Binding Financial Agreements.

The *Family Law Act* provides that you can enter into a Binding Financial Agreement that acts like a pre-nup, either before or during your relationship. When used that way, the Binding Financial Agreement is like contracting out of the Family Law system and instead agreeing that if you separate what are the arrangements for dividing your property.

Should I make a new Will and Powers of Attorney?

It is absolutely critical that you ensure that your Will and Powers of Attorney are appropriate for your circumstances.

If your Will and Powers of Attorney are not updated upon separation then this can lead to unintended consequences - your former spouse may inherit your property or may be listed as your Executor, meaning that they could be in control of the administration of your estate.

At OFRM, we are experienced at drafting Wills and Powers of Attorney to reflect your wishes, which can include excluding your former spouse from benefiting under your Will.

Can I get a Divorce even if my ex-partner will not co-operate?

Yes, a party can make a sole Application for Divorce. You do not need the other party’s consent or co-operation. The Application will, however, need to be served on the other party and the Court must be satisfied that the other person has received the Application or has sufficient knowledge of the Application.

An Affidavit (a specific Court document providing evidence) from or on behalf of the Applicant outlining attempts at service of the documents can also be useful in such matters.

Our Family Lawyers

If you require further information or assistance about your personal situation, please contact a member of the Family Law Team.

Marika McMahon — **Accredited Family Law Specialist, Director**

One of Victoria's leading Family Lawyers Marika McMahon is experienced in dealing with complex family law matters whether they be children or property issues.
"When I work with my clients to achieve the best resolution of their Family Law matters, they are not just receiving the benefit of my 25 years' experience as a lawyer but I also bring my life and board experience as well as a passion about caring for the individual, not just a file".
Marika is also sought after for her talent as a mediator in family law property matters.

03 5445 1045 — m.mcmahon@ofrm.com.au

Gabrielle Howley — **Family Lawyer**

Gabrielle Howley is an experienced family lawyer who provides valuable support to our family law clients and team by looking after lots of the detail in the background. With the flexible and innovative approaches OFRM takes to work arrangements, Gabrielle works remotely providing additional capacity in our case preparation as well as court appearances.

03 5445 1064 — g.howley@ofrm.com.au

Tom Wolff — **Family Lawyer**

Family law is not easy. It's a complex area of law that requires a skilled family lawyer who knows not just the legislative process of family law, but also how it is being applied in the courts. It also requires lawyers with great people skills; to understand what is needed, to anticipate the next step, and to realise when things are tough for you. Tom Wolff is just that type of family lawyer. There's no just guessing the vibe of the law from Tom, as he is passionate about keeping up-to-date with the latest issues and precendents in family law.

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Demi Rayner — **Family Lawyer**

Family Lawyer Demi Rayner enjoys making the concepts and process of Family Law easy for clients, making sure that they understand what is happening, step-by-step. Demi works across our Family Law team including with matters where settlements are negotiated as well as in court matters.
Demi ensures her clients have all the information and advice to make the right decision for them.

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