HICKS
OAKLEY
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LAWYERS & NOTARY

No animosity, no court, no fuss.

Getting through a separation in four steps.

Navigating a separation can be straightforward
when you know what to expect.

Foreword

Thanks for reading.

There is nothing easy about separation, but it is my hope that this book will help prepare you for what is ahead so that you can get on with your life, as seamlessly as possible.

The intentions of the book are simple:

No animosity

Reduce the pain and animosity as much as possible throughout the process - for you, the spouse or de facto partner you are separating from and if you have them, your children. Separation affects everyone close to you - including family and friends - but navigating through the process with respect and a calm attitude will make life easier for everyone involved.

No court

Where possible and where appropriate - it is always our goal to keep you out of a courtroom. Using the court system in a separation is not only expensive, but emotionally draining. It also means that you are letting someone else (a judge) determine your future (and potentially your children's future). If court can be avoided, it should be.

No fuss

By getting an understanding about every step of the process, you will be able to get through this period with as little fuss as possible. Separation is not something that you were ever planning for - and as such, it's hard to know what's ahead. It is our hope that this book will give you some more certainty - and perhaps even flag a few ideas or issues that you may not have considered.

We have designed this book around the four key steps as a way to guide you through a no animosity, no court, no fuss separation.

These are our team's insights, based on decades of experience practising as family lawyers and seeing how preparation and knowledge of what's ahead can deliver favourable outcomes.

As always, please do not hesitate to contact us if you would like to discuss your unique situation.

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Step 1

Preparing yourself for separation
(CHAPTERS 1 AND 2)

It is important that you mentally prepare yourself for separation and have all of your "ducks in a row" before talking to your spouse or de facto partner.

We cover some of the most practical things you should consider in preparation for the process ahead, as well as how to handle the initial discussion if you are instigating the split.

Step 2

Dividing property and other assets
(CHAPTERS 3-8)

The division of assets requires forethought and often expert opinions - whether it is from lawyers, accountants, valuers or other financial advisors.

This step requires a practical mindset, negotiation and compromise. It is often the step where an amicable relationship can go pear-shaped, and as such, it is worth taking extra care when discussing the division of property and other assets.

Step 3

Children and separation
(CHAPTER 9)

If you have children, whether it's in this relationship or another, it is in your best interests to come to a mutually agreeable position with your former spouse or de facto partner.

Our advice is pragmatic and will keep your relationship with your former spouse or de facto partner in tact for the future, for the benefit of your children.

Step 4

Applying for divorce

If you are married, applying for divorce is actually a straightforward process. However, there are some rules to familiarise yourself with.

Being granted a divorce is absolutely necessary if you wish to remarry again in the future.

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Step 1

Preparing yourself for separation

CHAPTER 1

Planning to separate with your spouse or de facto partner

Often, couples will experience a period of unhappiness and conflict before a decision is made by one or both parties to end the relationship.

This is likely to be a tense and uncertain time, with each of the parties wanting to know how the decisions and actions that they may take now, will affect them financially and on a practical level in the future.

It is preferable for both parties to have as much information as possible, well before deciding about separation, concerning the options available in either attempting to repair and continue the relationship or, choosing to end the relationship.

Therefore, obtaining legal advice as to the options before separation is recommended.

You may wish to canvas the possibility of attending marriage guidance/relationship counselling with your spouse or de facto partner.

If the decision has been made to separate, each party will want to ensure that they do not do anything, or do not allow anything to occur, which will prejudice them in the future.

If you are considering remaining in the relationship, there may be value in attending personal counselling, which may also serve to assist in deciding whether to remain in the relationship or not.

When does ‘separation’ occur?

In many instances, there will be dispute as to whether a separation has occurred or not, or precisely when the separation occurred. Once you have obtained legal advice and a plan put in place for moving forward, it is important to then communicate the fact that separation has occurred to the other party, so that dispute as to the date of separation will be minimised. Communication can be verbal and, if appropriate, confirmed in writing – via text or email.

Often parties remain living “under the one roof” for a period of time, despite being separated for family law purposes, until one party leaves the common residence.

Separation in the context of family law is when either the married or de facto partnership breaks down. The date of separation is particularly important in a de facto relationship, where the time limit for commencing court proceedings in relation to property division is two years from the date of separation.

Other matters relevant to obtaining a divorce are outlined in Chapter 10.

The date of separation is also important if you are married. If you obtain a Divorce Order, you cannot bring a claim for property division in a Court, following failed negotiations, 12 months after the date the Divorce Order is made.

It is worth immediately considering the answers to these questions.

Who is going to leave the common residence?

Neither party can require the other to leave the home, in the absence of an agreement to leave, or a Court Order to the contrary.

If a party chooses to move out of the home, they generally do not lose any rights or entitlements concerning the home, to which they would otherwise have been entitled, had they remained living in the home. By leaving the property, that party has not abandoned his or her entitlements, although that party would then find it very difficult to attempt to return to live in the home without the consent of the remaining party.

Should you change the locks?

The party remaining in the home may wish to change the locks in order to ensure their privacy and to "draw a line in the sand" as to living arrangements and access to the home. However this can cause conflict because the party, who has left, may feel that they are entitled to continue to have access to the common residence, until a property division has been completed.

If that party receives legal advice, they would then be aware that they do not have to have a key and access to the home to maintain their entitlement to a property division which includes the home.

Should you update your wills, powers of attorney and superannuation?

Parties to a relationship will usually appoint their spouse or de facto partner as executor and beneficiary of their Will. Similarly a party will usually appoint their spouse or de facto partner as attorney in their Power of Attorney and as beneficiary in the Binding Death Benefit Nomination of their superannuation policy. After separation, each party should consider whether they wish to make changes to those documents to appoint different executors, attorneys and beneficiaries, particularly if there are children.

What financial matters should I have in order?

A clear understanding of the assets, liabilities and entitlements of each party, held either jointly or separately, is essential for negotiating a property division. Often one party to the relationship leaves most of the financial matters to the other party, and has little information about the parties' finances.

This is particularly likely to be the case where one party is involved in business enterprises, and may have income and assets in complex corporate structures. Before separation, it is advisable to have copies or continuing access to financial documents (kept in a safe place, preferably not in the home), such as tax returns, bank statements, contracts for the purchase and sale of substantial assets, superannuation statements, loan documents and company documents.

If the relationship was a marriage, then a copy of the Marriage Certificate should be retained.

Who will pay the mortgage and household expenses once we separate?

The party remaining in the home is usually expected to pay the mortgage instalments and utilities whilst they are in sole occupation of the property. If both parties are remaining in the home, then this would be a matter for negotiation as to how the payments would be shared, usually with the "status quo" remaining as to payments.

The party leaving the home would be likely to be incurring their own accommodation and utility expenses, and may not have the financial ability to also pay or contribute to the mortgage payments. In some cases though, the party leaving may meet both their new living expenses and those of the home.

If the mortgage payments are not paid, the bank may seek to enforce the home loan contract against both parties pursuant to the contract, and not just against the party in occupation of the home.

CHAPTER 2

Having the hard discussion about separation and what lies ahead

Separation is a stressful, sensitive and emotional time. It is important to attempt to keep as much perspective as possible, in order to ensure that the parenting and financial arrangements can be negotiated with a minimum of acrimony. It is helpful if, rather than "playing the blame game", both parties attempt to keep the conversation as civil and courteous as possible.

When it first becomes clear that you are separating, it will be advantageous to:

- Stay calm
- Listen to the other party, and
- Take time to hear each other's concerns and wishes.

It may be appropriate to confirm with your partner that there will be no immediate drastic changes, and that there is a genuine intention to negotiate future arrangements on an amicable basis. It may be that one of the parties needs time to process the changing situation, and it is usually prudent to allow the time needed to pass.

If there are children, it will be beneficial to reach agreement as to when and how you will tell the children about the separation, and it may be at this point that assistance from a counsellor can be sought. More information on children and separation can be found in Chapter 9.

If any discussion about the separation and future arrangements ends in an argument or impasse, it may be worthwhile to consult a counsellor or mediator with a view to de-escalating conflict by having an independent dispassionate third party present.

Step 2

Dividing property and other assets

CHAPTER 3

Identifying the asset pool - the property and assets of the relationship

The identification and valuation of the asset pool is a vital preliminary step in negotiating financial arrangements.

The asset pool will consist of all assets (such as the family home, investments including shares, business assets, cars, boats, caravans), all debts including home loan, credit card debts, business debts and taxation liabilities) and all superannuation entitlements (including self-managed superannuation funds).

We have included a helpful checklist in Appendix A.

It may be possible to agree on the valuation of various assets, for example, the parties' home, but it is advisable to have three free market appraisals from different real estate agents to ensure a greater degree of certainty about the estimate valuation.

If there is disagreement between the parties about the market appraisals, then, at a later stage, it is appropriate to obtain a formal valuation prepared by a valuer certified by the Real Estate Institute of Victoria who can be jointly appointed with the fees being equally paid by the parties, for the purposes of a more comprehensive valuation, which can be used for Court purposes, if required.

Usually with superannuation entitlements, a recent superannuation statement showing the parties' resignation benefit is sufficient for preliminary negotiation purposes, however self-managed superannuation funds may need to be valued by an accountant, and a defined benefit fund will need to be valued.

Did you know?

Experts can be engaged to prepare valuations for business assets, more unusual investments such as cryptocurrency, and vehicles.

What is the value of the furniture and contents of the home?

The contents of the home generally have a lesser value than most people expect, unless there are valuable antiques, artwork or other valuable items. The estimated value of the furniture and contents of the home will be the second-hand value, if the items were sold at an auction house or other second-hand sale venue, rather than the purchase or re-purchase price or the insurance value.

Even though it would cost a great deal to replace all of the furniture and contents in the home, the dollar figure for doing so is not the valuation for family law purposes of those items.

Here are some of the critical factors to consider:

The date of valuation

The asset pool is to be valued as at the date of the division of property, rather than, for example, as at the date of separation, particularly if there is a reasonable amount of time between the date of separation and the date of final settlement. All assets are valued at market value, rather than the amount that the parties may consider to be the minimum sale price.

Assets and liabilities in a party's sole name

Whether an asset or a liability is owned or listed in one party's name, rather than in joint names, the asset or liability is considered to be part of the "pool".

As a general rule, provided that the asset or liability was acquired, conserved or improved during the relationship, it will be considered to be part of the pool.

Assets acquired after separation

Even if parties have been separated for some years, it is still possible for assets acquired after separation, such as an inheritance, to be considered as part of the property pool to be divided between the parties.

It is therefore important that a property settlement is completed in a timely manner, because new property that is acquired prior to the property settlement being completed can complicate the process.

Financial disclosure

Both parties have a duty to disclose all assets, liabilities and entitlements which they have, whether in their own name, or in their name with any other person, or in a company or trust structure where they have an interest in that company or trust structure.

The consequence of non-disclosure can be that a property settlement can be later undone, due to one party not being informed of material information concerning the property pool.

CHAPTER 4

Practical answers to common questions about property division

How are assets owned by one party before the relationship treated in a separation?

Even though an asset may have been owned by one party prior to the marriage or de facto relationship, and may have remained in that party's sole name during the relationship, the asset is still part of the asset pool for division between the parties.

It will be considered that the owner has made a contribution to the pool with that asset but, over time, it is anticipated that both parties will have contributed directly and/or indirectly to its maintenance or improvement. Therefore, the longer the duration of the relationship, the less weight is given to pre-relationship contributions in the property division.

How will loans from parents or family members be handled in a separation?

Sometimes loans are made to the parties, or to one party, by parents or other family members, during the relationship. If the loan is documented by a formal Loan Agreement prepared by solicitors, setting out the terms and conditions of the loan, and is signed by all parties to the loan, then it is likely to be accepted as a loan which must be repaid as part of the property division.

However, many loans are made informally without clear information about the parties to the loan, i.e.

- Is it a loan to both parties or to only one party?
- Is there interest payable and if so at what rate?
- What is the term of the loan?
- Are periodic payments to be made? and
- Is the loan repayable on demand?

In the absence of a Loan Agreement, there may be dispute as to whether the monies were paid by way of a loan or a gift.

Gifts are treated differently to a loan and are usually treated as financial contribution made on behalf of the party from whose family member the monies were received, and are not repayable to the gift-maker.

What happens with inheritances?

An inheritance received by one party will usually be included in the asset pool, and considered to be a financial contribution made on behalf of that party. If the inheritance is received by a party shortly before separation, or even after separation but before Court Orders are made, then more of the value of the inheritance is likely to be retained by that party.

In circumstances where the inheritance was received early in the relationship, and was applied to the parties' finances, the weight attributed to the inheritance is reduced.

What will happen if there is a business involved and how will it be divided?

Even though only one of the parties may have worked in the business that they owned and had sole authority concerning business decisions during the relationship, both parties will generally be entitled to a share of the value of the business, once separation has occurred.

This does not mean that the business must be sold, that the business has to be shared equally or that the non-business party will have the right to make decisions concerning the operation of the business.

Usually the business operator will retain the business as part of the division at an agreed value and the other party would receive an adjustment against other assets.

How is superannuation divided?

As part of a property division, a parties' superannuation entitlements can be 'split' or each party can retain the whole of their own entitlements.

If it is agreed that each party is to receive, for example, a 50/50 split of the combined value of both parties' entitlements, then this can be effected by the appropriate sum being paid from one party's fund to the other party's fund (by way of a properly documented and implemented superannuation split) in order to equalise the parties' entitlements.

How are bank accounts divided?

Most joint bank accounts are set up to permit either of the parties to transact the account, including withdrawing funds held in the account.

After separation, one party may be concerned that the other might, without consultation or notice, take all or a substantial portion of the funds. In response to this risk, the party may opt to arrange with the bank that both parties be required to authorise any withdrawal, or alternatively the party might take a share of the funds while leaving sufficient funds for the other party and informing them of the transaction.

Parties should give consideration as to whether any offset and redraw accounts should be changed to require both parties' authorisation for withdrawals, so that one party does not unilaterally alter the parties' debt level.

How can I protect real estate assets?

If a real estate property is registered in the sole name of one of the parties, the other party has no control over whether the property is sold, transferred, mortgaged or otherwise dealt with. In this situation, the non-owner party should consider whether they have grounds to secure their interest in the property by lodging a Caveat at the Land Titles Office on the Title of the property.

The Caveat serves as a warning to the public, including a prospective buyer or lending institution, that there is a claim on the property that must be dealt with before any transaction can be effected concerning the property.

However if the property is owned in the joint names of one party and another person, it may not be possible to lodge a Caveat (and there may be adverse financial consequences for doing so) so other protective techniques should be explored.

This can be a step that many people approach with haste, but it is not as simple as splitting everything down the middle. A multitude of factors affect how the assets should be divided. Importantly, the value of assets as at the time of settlement is the relevant value.

CHAPTER 5

How should you actually divide the assets?

Once you have identified and valued the assets and liabilities (and addressed the matters set out in the sections above), you can begin to think about negotiating with your former spouse or de facto partner *who gets what* out of the identified asset pool.

It is helpful for both parties to obtain independent legal advice as to what each person's respective entitlements are, so that each party has realistic expectations of the outcome. This said, it is not compulsory and negotiations can result in a settlement wherein each party is satisfied with the result, without having sought any legal advice.

Looking at the contributions to the asset pool of each spouse or de facto partner to the marriage or relationship is perhaps the most important consideration. This includes: initial contributions; contributions made during the relationship or marriage; and contributions made after separation and before settlement.

Initial contributions

It is often the case that both parties enter a relationship and that neither party has any assets of significance.

However, if one party has significant assets at the commencement of the relationship, such as savings, shares or real property, this may result in the contributing party being entitled to a greater distribution of the pool of assets.

Another common example of an initial contribution which affects the overall property settlement is when one party's parents have contributed a lump sum gift, perhaps in order to assist the parties to purchase their first home.

Generally, any extra entitlement of that contributing party is dependent on the size or value of the initial contribution, as well as how the initial contribution assisted or contributed to the parties acquiring the assets available to be distributed between them now, and how long ago that contribution was made.

Contributions during the relationship

The parties will have also made contributions of a varying nature and kind during the relationship and/or the marriage.

For example, one or both of the parties will likely have worked and earned an income and applied that income towards acquiring assets, maintaining the joint household and paying for day-to-day expenses of both parties to the relationship or marriage, as well as children.

The financial contributions, or the majority of them, may have been made by only one party. For example, when the other party did not work during the relationship or marriage, or worked much less and/or earned a lesser income, it is common that the other party was instead responsible for looking after the children, carrying out the majority of the household chores, and otherwise making contributions of a non-financial nature.

It may be that these financial and non-financial contributions are considered to be equal, the consequence of which is that there is no adjustment or deviation from a 50/50 position in either party's favour. This is the case particularly if the relationship is considered to have been 'long', and/or if there are children of the marriage or relationship.

If the relationship was relatively short, it may be that one party made overwhelming financial contributions that could not be justly cancelled out by any non-financial contributions of the other party.

It may be also that during the relationship or marriage, one party received or made a significant financial contribution; for example, an inheritance being received and applied towards reducing the mortgage liability encumbering the former matrimonial/de facto home.

Contributions of this kind may again entitle the contributing party to a greater percentage of the overall asset pool and an adjustment made in their favour. There is, however, no determinative formula to deduce how much more the contributing party should receive, and importantly, it is not likely to be a "dollar for dollar" entitlement.

Post-separation contributions

The third category of contributions to consider is whether one or both parties made significant contributions after separation, which should be taken into account.

For example, one party receiving a “windfall” that they apply to pay down a home loan, thus increasing the equity in the home.

In all family law property settlements, the effect of contributions is dependent on the unique circumstances of each individual relationship or marriage.

What are each party’s needs?

Another important consideration, when deciding whether one party should receive a greater division of the available assets, is whether that party has particular needs which may cause them to be more dependent on the settlement they receive. Some needs that might create this effect include: where one party has primary care for the children of the relationship, and is earning a far lesser income than the other party; or if one party suffers from physical or mental health issues which may prevent him/her working and earning an income.

The overall effect of these needs may be more important in circumstances where the value of the asset pool is relatively low.

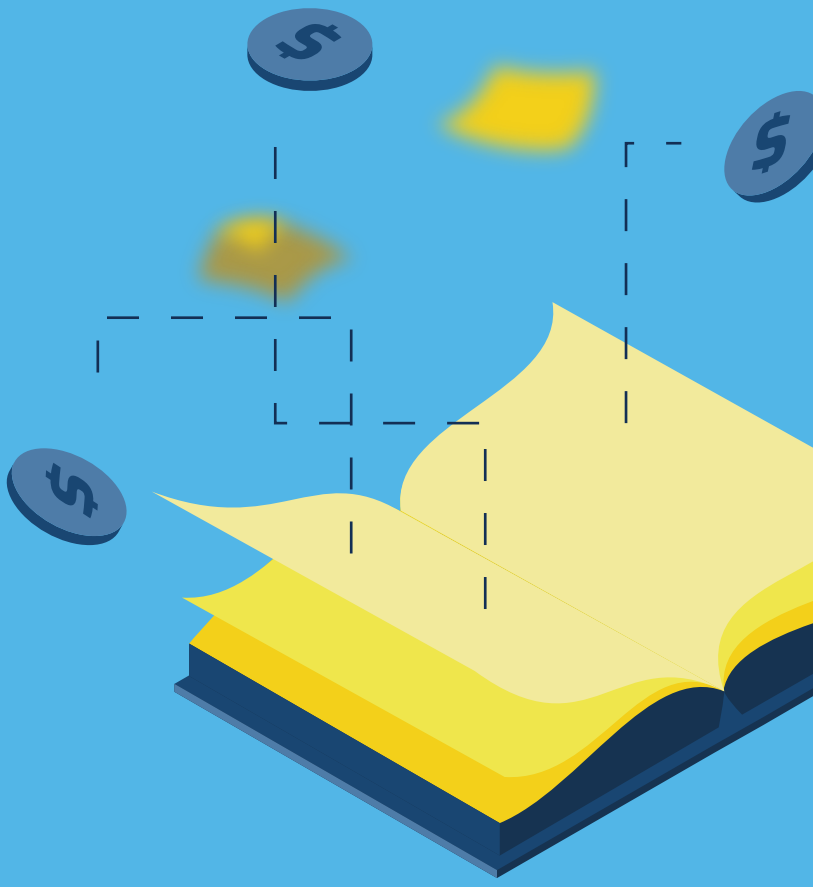
Reaching agreement

The most effective way to achieve a final resolution of property matters with a former spouse or de facto partner is to meet with each other and attempt to reach an agreement as to what each party is entitled to. This process is outlined at Chapter 8.

CHAPTER 6

What input should you get from accountants and other financial advisors?

It is often necessary to obtain specific advice from an expert such as an accountant or financial advisor before making decisions about a family law property division. Both the parties' own accountant and a jointly appointed independent accountant will have separate roles in providing advice and information.



Advice on taxation consequences following property division

An accountant can provide advice as to the taxation consequences of a proposed property division, such as capital gains tax implications, which is essential to avoid unintended taxation consequences of the sale or transfer of assets.

Accountants are usually the ones who are engaged to prepare business valuations for trust and business assets, and they can provide advice to assist in understanding complex company structures.

A couple's own accountant will be able to provide information about their personal and business income, and to explain the various structures that may have been established for the parties such as family trusts, corporate trustees and other financial arrangements.

Advice on superannuation, in particular SMSFs

Where the parties have a Self-Managed Superannuation Fund (SMSF), it will be important to have an accountant's advice as to the most effective way of dealing with the SMSF, including matters such as the transfer of members accounts, resignation of parties as office bearers and transfer of shares. The accountant would prepare the documentation required to implement the property division. Taxation advice will also be required particularly if there will be a sale or transfer of assets owned by the SMSF.

On occasion there may be the need to have an accountant prepare a valuation of an accumulation of superannuation entitlements or a defined superannuation benefit.

Advice on stamp duty

Generally, there is no stamp duty payable on the transfer of an asset, from one party of a relationship to the other, on the breakdown of the relationship. However, the usual stamp duty exemption does not always apply, even if the asset is dealt with as part of a family law property division, such as when the asset in question is held in a company name, or on the re-sale of the asset.

Advice on property division and next steps

A financial advisor will be able to provide guidance to a party as to whether a proposed property division is affordable and advantageous for them.

If a party is to receive a sum of money as part of the division, a financial advisor can recommend appropriate investments to which the money can be applied, and if a party is to receive shares or real estate, the advisor can suggest whether the asset should be sold or retained.

CHAPTER 7

Reaching a financial agreement with the other party

Once all relevant advice and information has been obtained, you and your former spouse or de facto partner will attempt to reach an agreement if you wish to avoid any third party intervention. Clearly, an agreement requires both of you to be willing to accept the resulting outcome.

Negotiations will be required.

It may take a number of meetings and multiple discussions with your former spouse or de facto partner, or their legal team, in order to achieve a final resolution by agreement.

Remember that reaching an agreement will almost necessarily require that each of you compromises from your desired outcome in order to avoid other losses. Losses that can be suffered are not only financial but also loss to the state of the relationship between you going forward. Avoiding or minimising that loss is particularly important where there are children.

We can’t reach an agreement easily, who can help?

There are a number of third parties who can assist you to reach an agreement.

For example, there are a multitude of Mediation Centres which offer family dispute resolution services for a fee – the fee is generally dependant on the combined annual income between you and your former spouse or de facto partner.

Should mediation fail completely, or even in part, the next step may be to have your legal representatives attempt to assist in the negotiation process.

Formalising the agreement

Once an agreement has been reached, it is advisable that the agreement be formalised. If the agreement is not formalised, even if it is actioned, the other party may be able to, years down the track, come back onto the scene and "have another go" at a property settlement.

Obviously, if there has been a change in circumstances – for example, you have received an inheritance years after separation – you could lose out at a future date because of the failure to formalise the agreement into Court Orders.

While there are time limits involved for bringing any such application, the time limits can be overcome by the other party. In effect, formalising the agreement at the time that it is made will avoid any application being brought against you at some future date.

Entering into a formal agreement at the time that it is achieved means that you can rely on the outcome in order to plan your financial future going forward. It is ill-advised and risky to your financial security to leave yourself open to further claims, when you have relied on the outcome that you otherwise believed to be final.

Court orders and financial agreements

Court Orders being made by consent in the Family Court of Australia are an advisable way to formalise an agreement with your former spouse or de facto partner. Court Orders do not require any physical appearance in Court (eliminating the intimidating aspect of resolving matters before a Court), and there is also no requirement for both parties to have legal representation.

There is, however, another method of formalising an agreement, by entering into a Financial Agreement which becomes binding upon each party once executed in accordance with the provisions of the *Family Law Act*. Financial Agreements require each party to be formally represented (potentially creating higher legal costs).

Applying for consent orders and financial agreements

Application for Consent Orders (and Financial Agreements) requires that each party fully discloses their financial circumstances as at the date of signing the application form and entering into the proposed Orders by agreement.

Generally, it is recommended that the disclosure process is adhered to, as discussed in Chapter 3 and although this is not essential, it is of great assistance when completing the application form itself.

Another factor to be aware of is that specific processes must be complied with for the Orders to be made by the Court.

For example, for Consent Orders or a Financial Agreement to be binding on the superannuation fund, if there is a superannuation split as part of the agreement, the superannuation fund needs to be consulted about the terms, which, once the matter is finalised, will bind it. This is because, although not a party to the Orders or Financial Agreement, the Superannuation Splitting Orders purport to bind and hold the superannuation fund to the terms of the agreement.

There is little point in obtaining Orders or an agreement which cannot be enforced and become redundant. It is again recommended that legal advice is obtained to assist in this endeavour.

The Orders may require particular drafting in order to affect the desired outcome, and therefore it is beneficial and time efficient to engage legal representation to assist with the drafting of the Orders. This can be a cost saver ensuring that the correct agreement is formalised, and that the Orders are acceptable by the Court.

The Court will make an assessment

Once an application to the Court is made, the Court will make an assessment in line with the provisions in the *Family Law Act* to ensure that the overall outcome of the agreement is a just and equitable one in all of the circumstances. For this reason, it is important to provide to your lawyers and include in the application as much information about the relationship as possible. It is of course, generally recognised that an element of commerciality is involved in agreements made by consent.

This process is generally referred to as the “settlement” of the agreement, similar to settling the sale of a property.

CHAPTER 8

Implementation of the financial agreement / court orders

Once the agreement has been reached and formalised by way of Court Order (i.e. received back from, and stamped by, the Court – or in other words, approved by the Court), or a Financial Agreement has been fully executed by both parties, the next step is to ensure that the terms of the agreement are implemented.

It is often the case that the Orders will provide that the settlement of the Property Orders or agreement is to take place at the time that a particular property is sold. However, if there is no process where a property is to be sold and, for example, a property is to be transferred and a payment made to one party, there will be clear provision for when this process should take place (i.e. no later than a specified date).

This date will be included in the Orders and therefore each party will have the ability to work towards that date.

Be aware of any tax implications

One issue that may arise at the time of settlement is that tax or other fees and duties will be due on any sale or transfer of property. Generally, with the transfer of property between spouses or de facto partners (be it from both parties' names to only one party's name or, from one party to the other) it will be exempt from *Capital Gains Tax*. It may be beneficial to elect for CGT to be payable on the transfer, from the joint monies.

More often than not, though, it is beneficial for the *CGT Rollover Relief* available to spouses or de facto partners (such that CGT is not required to be paid) to be applied and implemented. There may be other fees, taxes and expenses that need to be paid before any division of the sale proceeds, however, all of these payments and the way in which they should be paid out will be specified in the agreement itself.

Some other processes that are required to be followed include:

- the closure of joint bank accounts;
- the transfer of registration of motor vehicles;
- the division of chattels in the home;

for which the final agreement reached should specify the procedure to be followed for these steps to take place. Again, there will be specified dates and deadlines in the agreement itself which set out the timetable for carrying out all of the settlement procedures.

In particular, it is important to ensure that a superannuation fund is served (in other words provided) with a copy of the relevant Superannuation Splitting Orders. All necessary forms are to be completed so that the proposed and agreed/ordered split is effected by the superannuation fund.

It can be very difficult to have settlement of historical Orders effected and it may impact the actual sum that is paid, depending on the terms of the agreement. For example, would interest be payable, or do the Orders provide that a percentage of the balance of a superannuation entitlement is paid, which may increase as the total investment balance increases?

Once this step is complete, all financial ties with your former spouse or de facto partner should be finalised. This is particularly the case for de facto relationships, and it is generally the initial goal of each party to conclude the financial relationship.

The implementation of the agreement is generally the final step in a property settlement. It can be detrimental to both parties for this final step in the process to be neglected.

Step 3

Children and separation

Chapter 9

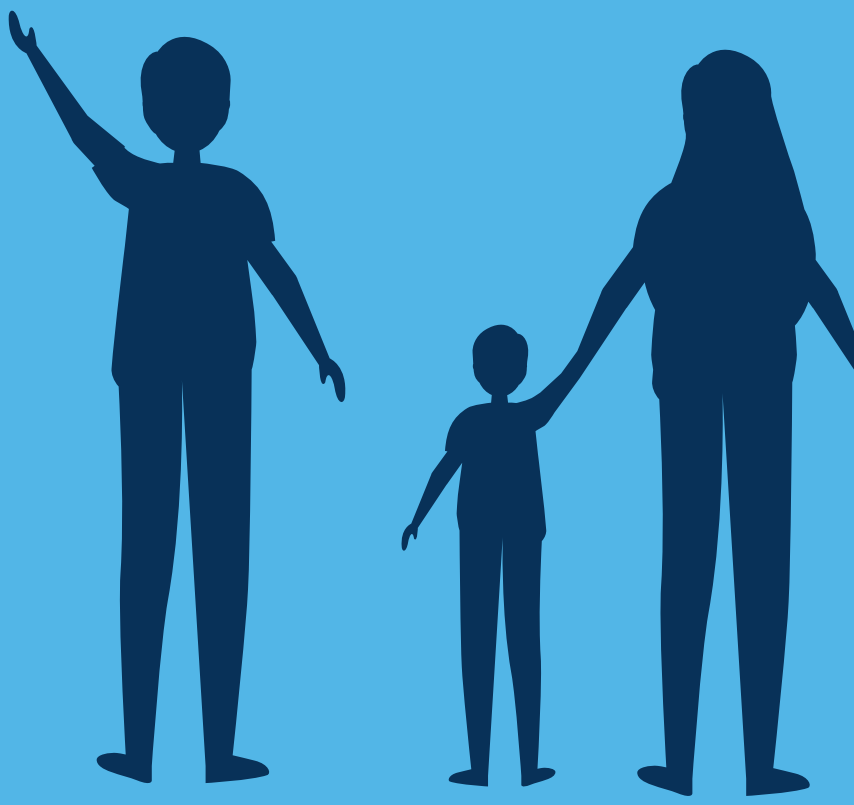
Negotiating children's arrangements with your former spouse or de facto partner

CHAPTER 9

Negotiating children's arrangements with your former spouse or de facto partner

Many separated couples are able to discuss and make arrangements, in respect to where the children live and how the children spend time with each parent, without the need for any Court Order or other formal agreement.

It is only a relevant discussion if there are children of the marriage or relationship under the age of 18 years (and generally, only if the children are younger than approximately 15 years old).



Setting out an agreement

If an agreement can be achieved and negotiated, it may not be necessary to develop a formal agreement or Court Order; however, it can be beneficial for parents to set out, for the sake of clarity, the agreement reached between them by way of an informal Parenting Plan, or otherwise, a Court Order.

The agreement recorded will most likely set out the minimum arrangements, and should include provisions for changes to be made by agreement, in order to allow sufficient flexibility between parents and to avoid breaches of a Court Order.

In the event that an agreement cannot be reached, it may be that a third party is required to assist – that third party may be:

- A family therapist;
- A mediator;
- Lawyers or legal advisors; or
- There could be intervention in the matter by the Federal Circuit or Family Court of Australia.

Consideration of living arrangements

When considering the living arrangements most appropriate for your children, it is important to bear in mind that what matters is not how much time each parent would like to spend with the children, but instead, what arrangement is in the best interests of the children.

Continuity may include agreeing to arrangements which allow the children to remain living in the family home (if this is financially possible). It would also include the children remaining in the same school and maintaining a consistent routine, which is important and is a significant consideration as to the child/children's best interests.

Flexibility from both parents is commonly encouraged, if it aligns with what is best for the children.

It is also crucial that both parents are child-focussed, although this does not necessarily involve asking the children what they want to happen, given (young) children are unlikely to have a sufficient level of maturity to provide measured input on the matter.

It is also important that the children are not involved by either parent in any dispute between you and your former spouse or de facto partner, and that you ensure, particularly on an emotional level, that the children are not negatively impacted by the potential conflict or made to feel like they are in the 'middle of mum and dad'.

Generally, there will be a consensus that it is in the child's or children's best interests to maintain a relationship with both parents. That said, children should have a primary base, particularly at a young age when they require stability and continuity.

Discussing a new partner with your children

Another aspect of negotiating and agreeing to parenting arrangements after separation is to consider how new partners may affect relationships. It is important that the potential introduction of a new partner to the children is well thought out, including consideration of the effect of such an introduction on the children when they are already dealing with the difficult experience of their family breaking apart. It would certainly be discouraged (perhaps an understatement) to introduce your new boyfriend/girlfriend to the children as “your new dad/mum”.

If it is possible, conversations about new partners should be between parents before any discussion with the children takes place, and it is important to maintain effective communication with the other parent in relation to issues such as this.

What is child support and how is it assessed?

In terms of children and financials, another aspect in relation to parenting matters is of course deciding whether and if so, how, child support should be paid to one parent by the other.

The Child Support Agency is the governing body for child support, and it is a department within the Department of Health & Human Services (DHHS).

Child support is usually payable to the primary parent or the lower income parent until all the children of the marriage or relationship reach the age of 18 years old (or if applicable, the end of secondary education).

There is a limit for child support payable, as assessed by the agency, although parties can deviate from the assessed sum, and it does not need to be paid via the Agency. The Child Support Assessment derives a level of child support which is payable at a minimum – there is every option to offer and agree for the amount of child support paid to be over and above the minimum assessment. For example, a parent may pay the other parent child support as assessed, in accordance with the formula used to calculate the assessment, in addition to:

- School fees (private or semi-private);
- School expenses (excursions, school uniforms, school books);
- Medical expenses (which may require agreement by both parents);
- Insurances (such as health insurance);
- Payment of agreed extra-curricular activities.

Whilst the payment of child support is not a prerequisite to a parent spending time with his or her children (if the children do not live with that parent), it is always recommended to keep up to date with child support as assessed.

The adequate financial support of children is a compulsory question to answer in the event that parties wish to obtain a dissolution of the marriage – in other words in order to obtain a Divorce Order (which process is outlined in Chapter 10).

Step 4

Applying for divorce

Chapter 10

Divorce is the final formality to end the marriage

CHAPTER 10

Divorce is the final formality to end the marriage

If you are married, at some stage you may want to apply for a divorce.

This step is completely separate to negotiating a property settlement or indeed, children's arrangements.

When a lawyer is asked to help a client divorce his or her former spouse the lawyer will think that you simply want to end the marriage. It is generally advisable that this step be taken second in priority to negotiating a property settlement.

A divorce is needed for a number of reasons, including:

- In order to re-marry (in Australia, you cannot be married to more than one person at the same time); and
- If you fail to formally divorce your former spouse, it may have an effect on the way your estate is dealt with if you die without a valid Will at the time of death.

This step is completely separate to negotiating a property settlement or indeed, children's arrangements.

Filing for divorce

A few things to keep in mind when applying for a divorce are:

- Unless there are exceptional circumstances, you cannot apply for a divorce if you have been married for less than two years. In this scenario, the Court will usually require that you engage in counselling before accepting an application for divorce. You can of course separate from your spouse or de facto partner less than two years after the marriage, but you must wait until the expiry of two years to apply for a divorce.
- You must have been separated for no less than a period of 12 months before you can apply for a Divorce Order. Separation can be physical separation, but it can also include the situation where you have decided the relationship is over, but, perhaps for financial reasons, you have continued living together in the same house (which is referred to as "living separately and apart under the one roof"). It is important to prove that separation occurred more than 12 months before you filed your application for divorce.
- The divorce initiates the running of the limitation period for commencing proceedings for property settlement and maintenance (if those matters have not already been addressed – 12 months from the date of divorce).

The Divorce Application itself is a user friendly, questionnaire-type Court form.

It is important that any Property Orders are referred to in the Divorce Application, as well as any other Orders about children or property, including Intervention Orders, together with agreements in relation to children.

You must set out in detail in the application a number of matters, which include, if there are children of the relationship under the age of 18 years old:

- How they are supported financially;
- What are their living and spend-time arrangements with each parent;
- How they are progressing in school; and
- Any other factor which may affect the Court's decision to grant the Divorce Order.

It is also important that a copy of the Marriage Certificate is located and filed at the time that the Divorce Application is filed with the Court.

What happens after you have completed the application?

Once the Divorce Application is filed, you will be given a date for your divorce hearing before a Registrar in the Federal Circuit Court of Australia – this may be a considerable period of time after you file your application.

You may or may not be required to attend the divorce hearing.

Circumstances in which you are not required to attend are generally when the Divorce Application is made jointly with the other spouse party, and even if not made jointly, when there are no children of the relationship under the age of 18 years.

If there are matters listed in the Divorce Application which would seem to require an explanation to the Registrar to ensure that the Registrar has all of the information required to decide whether or not to grant the divorce, you may be required to attend at the hearing.

If you do not make the application for divorce jointly with your former spouse, there are requirements that it be served upon him or her within a specified period of time and no later than 28 days before the date of the hearing.

Service is generally required to be upon the other party personally, unless the other spouse party has a legal representative who advises in writing that he/she has instructions to accept service of the application in another way.

As long as the requirements of service are complied with, there should be no issue in the Registrar issuing the Divorce Order at the hearing.

Finally, and critically, the marriage is not legally terminated until one month and one day after the Registrar grants the Order.

This means that you cannot re-marry until one month and one day after the Order is made by the Court. It is not advisable to plan a wedding until a Divorce Order has been granted as some issues may arise which will prevent the new marriage from going ahead.

If queries in relation to a more complicated situation in respect to applying for a divorce exist, an expert family lawyer should be consulted.

Appendix A

Property and assets checklist

Assets

Description	Amount
Real estate (including principal place or residency and investments)	$
Superannuation	$
Shares and managed funds	$
Personal loans given or as a guarantor	$
Cash and bank accounts	$
Business/es (share value)	$
Life insurance	$
Cryptocurrency	$
Cars and other vehicles (e.g. boats, motorcycles, etc.)	$
Items of value in the home (e.g. furniture, appliances, etc.)	$
Items of sentimental value	$
Leave entitlements from employer (e.g. long service leave)	$
Valuable collections (e.g. art, jewellery, etc.)	$
Other	$
TOTAL	

Liabilities

Description	Amount
Credit cards	$
Home loans	$
Personal loans	$
Tax debt	$
Centrelink debt	$
Alternative ownership arrangements (timeshares, etc.)	$
Nursing home / aged care / retirement village bonds	$
TOTAL	

About

Hicks Oakley Chessell Williams

Who we are...

- Hicks Oakley Chessell Williams is a well-respected law firm whose origins began in 1961.
- Hicks Oakley Chessell Williams is an incorporated practice, initially formed as a partnership in 2000 by a merger between the firms of Hicks & Oakley and Chessell Williams.
- The current Directors and Principal Lawyers are Matthew Hicks, Lachlan Vallance and Vincent Caruso. Together with Sarah Lindsey, Principal Lawyer and General Manager, Michelle van Niekerk make up the Executive team.

HICKS OAKLEY CHESSELL WILLIAMS
LAWYERS & NOTARY

Why choose our firm...

Our experienced solicitors at Hicks Oakley Chessell Williams provide high quality legal services to clients including corporate, small business and private. With extensive years of professional experience we provide specialist advice from experienced advisors. Lawyers in our Melbourne office and Mount Waverley office, in the south eastern suburbs of Melbourne, are able to assist you with a wide range of practice areas.

We have lawyers who are Law Institute of Victoria Accredited Specialists in:

family law

commercial law

commercial litigation

commercial tenancy law

wills & estates

About our family law team

Our specialist family and divorce lawyers aim to provide our clients with the most sensible advice in dealing with complex family matters.

Our family lawyers have the support of specialists, both within and outside our law firm, for expertise in accountancy, financial planning, real estate, litigation and dispute resolution.

We offer family law advice in the following areas:

- financial agreements
- complex financial matters
- property division and property settlement
- divorce
- spousal maintenance
- domestic relationships (de facto)
- parenting and children's arrangements
- relocation
- intervention orders
- child support
- residence & contact (custody & access)
- general advice

Generally there are two kinds of approaches:

1. Immediate, acrimonious and often expensive litigation. People are left drained both emotionally and financially and future relationships with their partner can be more difficult; and
2. Resolution by reasoned negotiation, mediation and using the most common sense and fair approach. In this way we aim to minimise emotional and financial stress and leave clients with the best possible outcome.

HICKS OAKLEY CHESSELL WILLIAMS
LAWYERS & NOTARY

Our family lawyers encourage and support clients to try the second approach first. Our aim is to achieve the best result for our client in the most cost effective way.

However, there are some matters where it becomes necessary to litigate the matter in Court. This may be due to a matter of urgency to protect children or property and in those matters we work with experienced family law barristers to achieve the best result for our clients. Our family law specialists offer constant advice as to how the case is progressing so that a decision can be made early as to whether to proceed with Court action or not.

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HICKS
OAKLEY
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LAWYERS & NOTARY

Updated: February 2025

Disclaimer

The information you obtain here is not, nor is it intended to be, legal advice. It is necessarily general in nature. You should consult a lawyer for advice regarding your individual situation. We invite you to contact us and welcome your calls, letters and electronic mail. Contacting us does not create a lawyer-client relationship. Please do not send any confidential information to us until such time as a lawyer-client relationship has been established.

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