

WE'VE DECIDED TO SEPARATE... WHAT HAPPENS NOW?

How to deal with the Practical issues of Separation and Divorce
for Married or De Facto Couples



INTRODUCTION

Making the decision to separate from a long term relationship is rarely easy. Couples often make the decision to separate after a period of emotional turmoil and conflict.

On top of the day to day practicalities, like where you're going to live and who will have primary care of the children, you may also need to consider the legal and financial ramifications.

This guide aims to cut through the confusion and stress by helping you understand and navigate the common issues you might encounter.

It will also help you to understand your legal options, empowering you to make the best decisions for your personal situation.

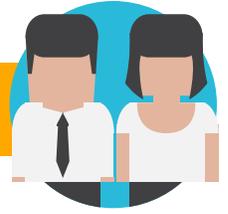
We've helped thousands of married and de facto couples work through separation issues. We've seen what works and what doesn't. We'd like to share our experience and show you solutions that are far less stressful and more cost-effective than you may expect.

If you have any questions about the information in this publication or our websites, please feel free to contact us on **Freecall 1800 608 088**.

CONTENTS

<u>Introduction</u>	2
<u>Who can use this Guide?</u>	4
<u>Have you explored all your options? Is separation really the best answer for you?</u>	4
<u>We have decided to separate - how do we legally separate?</u>	5
<u>What needs to happen after we separate?</u>	7
<u>Children’s issues</u>	7
<u>Child support payments</u>	8
<u>Help to communicate with your ex about children’s issues</u>	10
<u>How to change your name after separation</u>	11
<u>Property Settlement: dividing assets and liabilities</u>	11
<u>Verbal or written private agreement</u>	12
<u>Consent orders</u>	13
<u>Court proceedings</u>	13
<u>Binding Financial Agreements</u>	14
<u>Does a financial agreement stand up?</u>	15
<u>The duty to make full disclosure of your assets and liabilities as part of the property settlement process</u>	15
<u>What happens if you can’t talk to your partner?</u>	16
<u>Time limits</u>	17
<u>Time limits for court orders</u>	18
<u>Time Limits for Consent Orders</u>	19
<u>Time Limits for Binding Financial Agreements</u>	19
<u>Transfer of property after separation or divorce</u>	20
<u>Capital Gains Tax exemptions</u>	21
<u>Stamp duty exemptions</u>	22
<u>Reviewing your will and estate planning arrangements</u>	23
<u>Applying for a divorce</u>	24
<u>Looking to the future - protecting your children’s inheritance</u>	25
<u>Summary</u>	27
<u>Who we are?</u>	28
<u>Disclaimer</u>	29

WHO CAN USE THIS GUIDE?

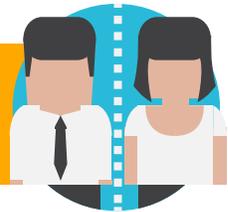


This guide is suitable for both married and de facto couples. The process of separating is quite similar in both circumstances and much of the information presented applies to either type of relationship.

As such, for ease of readability, we will use the term de facto or married relationship interchangeably. That is unless specifically noted the information applies to both married and de facto couples.

If a section applies to married couples only we will let you know.

HAVE YOU EXPLORED ALL YOUR OPTIONS? IS SEPARATION REALLY THE BEST ANSWER FOR YOU?



Sometimes the decision to separate is made without trying to work through or resolve the source of conflict in the relationship.

At other times, a quick decision is made without thinking through all the consequences especially if overwhelming feelings of anger, rage, guilt, fear or rejection are present. These emotions can be overpowering and paralysing.

People may regret separating if they have not explored all the options, including keeping the relationship together.

Before making the decision to separate, we encourage couples to utilise the many services that are available throughout Australia. There is no need to suffer in silence or struggle to work through your issues alone.

If you are having difficulty communicating with each other or working through difficult and emotional issues, engaging the help of a third party or relationship counsellor or mediator may be of great assistance.

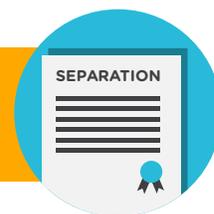
There are many counselling and mediation services available for people who are experiencing difficult times and are in need of extra support.

Sometimes just talking through your issues with another person outside the family is all that is needed. Other circumstances may call for alternative strategies and options to help you address problems and move forward with renewed optimism and hope.

We suggest you find a recommended family and relationships counsellor in your local area or [view a comprehensive list](#) of relationship support and dispute resolution services available Australia-wide.

By exploring the different options and working through some of the emotional issues, you can be more certain that the decision to separate is what you really want.

WE HAVE DECIDED TO SEPARATE - HOW DO WE LEGALLY SEPARATE?



There is no way to register a separation, which is seen under Australian law as bringing the marriage or de facto relationship to an end.

However, it's a good idea to make sure that you can demonstrate that the separation was effected on a particular date, by putting it in writing, an email perhaps or a text.

Separation can take place by either partner (or both) moving out of the marital home. Couples also have the option of separating under the one roof if that is a better option for their circumstances.

Couples may choose to separate under the one roof for financial reasons, as a short term arrangement or until the family home is sold.

If you are separating under the one roof, you will need to satisfy two conditions:



One or both parties must intend to sever the relationship and actually communicate their intention to sever the relationship to the other; and



The parties must physically separate. This can be done by moving to separate bedrooms in the home and cutting financial ties between you.

After separating from your spouse, you may need to inform relevant agencies such as:-



Centrelink; and



the Child Support Office.

Read more about [how to separate](#).

WHAT NEEDS TO HAPPEN AFTER WE SEPARATE?



After separation, there are three main issues to address:



Children:

If children are involved, you will need to decide on parenting issues such as child custody, access and child support obligations.



Property settlement:

Dividing the assets and debts, deciding whether spousal maintenance will be paid, dealing with any real estate and finalising any other financial issues.



Applying for a divorce:

Although there is no need to formalise your separation by obtaining a divorce, you can file for divorce after being separated for at least one year.

CHILDREN'S ISSUES



If you have children, you will need to address issues such as:

- where the children will live;
- what times the children will spend with each parent;
- the time that will be spent with relatives and grandparents;
- how parenting decisions will be made;
- schooling and medical issues;
- any other aspect of parental responsibility relating to the care, welfare and development of the child.

If you can **negotiate and agree with your spouse on parenting issues**, you will eliminate the need to have the Court determine these matters on your behalf which **will save you a great deal of time, money and stress**. This is done by formalising the arrangements in a written agreement such as:



a [parenting plan](#) OR



[consent orders](#) approved by the Court.

If you are unable to agree with your partner about children's issues, you can apply to the Court to have these issues decided for you.

Before you apply to the Court, you will need to be able to show that you have genuinely made an effort to resolve the issues in question between yourselves and that you have attended family dispute resolution.

For more information about applying to the Court on parenting issues, see [here](#).

More information about making a [parenting plan](#).

CHILD SUPPORT PAYMENTS



Separated parents need to decide how to support their children, not just emotionally but also financially. Even though the marriage may have ended, the obligation and responsibility to care for your children continues. Generally, one parent will be required to make child support payments to the other, in order to assist financially in raising their children.

Once the decision to separate has been made, we recommend that you contact the Child Support Office, which is a part of the Government's Human Services Department.

The Child Support Office will assess your circumstances and issue a Child Support Assessment Notice. This will inform you of:



how much child support you are legally entitled to receive from the other parent **OR**



how much child support you will need to pay.

The assessment is based on the income of each party and each party's percentage of care.

You can vary the amount payable under the Assessment Notice, if you both wish and agree to do so, by either increasing or decreasing the amount payable. You can do this by either:-



A private arrangement, agreed between yourselves. For example, your ex-partner can agree to pay an extra \$200 to your account each month, above and beyond his or her payment obligation under the Assessment Notice. Note, however, that your partner will not be legally bound to pay the extra amount, only the assessment amount;



Alternatively, you could enter into a child support agreement. There are two types of child support agreement:

- ➔ a binding child support agreement will make your agreed change to the assessment amount legally binding and can either increase or decrease the child support amount payable;
- ➔ a limited child support agreement can only be for an amount equal to, or higher, than the original assessment amount.

You can find out more about child support agreements [here](#).

Child support should not be confused with spousal maintenance, which is a separate issue and is covered below.

HELP TO COMMUNICATE WITH YOUR EX ABOUT CHILDREN'S ISSUES



If you are finding it difficult to talk to your ex or reach an agreement about children and parenting issues, then get help.

There are a variety of services available to help facilitate respectful and meaningful communication with the aim or resolving any issues between you.

Counselling and mediation services offered throughout Australia can greatly assist separating couples to negotiate effectively and reach their own agreement on parenting issues following separation. This reduces the need for the couple to resort to court based action, which is expensive, stressful and inherently uncertain for all concerned.

[Relationships Australia](#) can assist with counselling, family dispute resolution and a range of other services.

More [support services](#).

HOW TO CHANGE YOUR NAME AFTER SEPARATION



Generally you do not need to apply for a change of name after you have divorced or separated. A Certificate of Divorce is usually sufficient for an organisation to change your name back to your maiden name on their records.

If you have separated but not divorced, you are still entitled to revert back to your birth name. You can do this by providing a copy of your Birth Certificate and the Marriage Certificate and evidencing the link between the two.

Many women assume their husband's surname by virtue of marriage without lodging an official change of name application with the Department of Births, Deaths and Marriages, by relying solely on the Marriage Certificate. In this case, you can revert back to your maiden name at any time. You will generally need to provide your Birth Certificate and Marriage Certificate, to establish the link between the two names, in order for organisations (such as banks) to adjust their records.

If you officially changed your name after marriage with the Registry of Births, Deaths and Marriages, you may wish to lodge the appropriate forms to note the change.

However, strictly speaking, this is not necessary and you can take on your maiden name at any time by adopting its use consistently.

Detailed information about [reverting back to your maiden name](#).

PROPERTY SETTLEMENT: DIVIDING ASSETS AND LIABILITIES



You can finalise finances and property division at any time after separation.

For married couples, this can be done before or after you apply for divorce meaning there is no 12 month time period to formalise a property settlement.

There are four options available to finalise the division of your assets and liabilities. They are:-



A private agreement (written or verbal).



Consent orders through the Family Court.



Applying to the Court for property orders.



A binding Financial Agreement made under the Family Law Act.

VERBAL OR WRITTEN INFORMAL AGREEMENT



Once you and your partner have agreed on how you will divide your assets, you can essentially shake on it and go your own separate ways. This is known as an informal agreement. However, there are issues with making a verbal agreement to finalise property settlement, the most pertinent being:-



these types of handshake deals are not legally binding in Court; and



this does not stop a party from applying to the Court at a later date for a property settlement order, which may be seen as another bite of the cherry.

If you have assets of little value, then you may opt on settling your finances by a verbal agreement. However, if your assets are more substantial, you may want the security of formalising your affairs in a way which is legally binding.

Important: an informal agreement will not allow for the substantial stamp duty exemptions if the transfer of real property is involved. Transferring property under an informal agreement may also trigger Capital Gains Tax (CGT) obligations on investment properties.

CONSENT ORDERS



If you agree about how to divide your assets and liabilities, you can obtain consent orders by submitting the details of your agreement to the Court by way of an application for consent orders.

The Court will review your proposed settlement and if it is satisfied that the arrangement is just and equitable, it will consent to your agreement. You and your partner must make full financial disclosure to the Court, that is, list all your assets and liabilities (individually or jointly held). This enables the Court to decide whether the proposed property division is fair.



You can also make consent orders about parenting arrangements.

You can apply for consent orders using the Court's [Consent Orders Kit](#). There is a fee to submit your Application for Consent Orders.

If you would like assistance in drafting and filing Consent Order, we can help. Please call us on Freecall 1800 608 088 for further information.

COURT PROCEEDINGS



This avenue is only to be used as a last resort by those couples who are unable to reach an agreement.

When you apply to the Court for orders, the court will make a decision on your property and family issues. The process is expensive, time consuming and stressful for all involved.

It takes the final outcome out of the hands of the parties, as it is the Court that ultimately decides on the issues and formalises its decision by issuing “property orders”.

This avenue may, however, be the only option available to a couple who cannot reach agreement between themselves.

Before you can apply to the Court for orders, you must make a genuine effort to reach agreement. If you cannot reach agreement between yourselves, you must attend family dispute resolution or other mediation before initiating court action.

Information about [Court proceedings](#).

BINDING FINANCIAL AGREEMENTS



Financial agreements are intended to alleviate the pressure on the family courts in circumstances where couples agree about how their property is to be divided.

Financial agreements are a special type of agreement, recognised by the Family Law Act as a legally binding alternative to Court action. They’re an **attractive option for parties wishing to formalise their property settlement privately, avoiding the Court system.**

Financial agreements are ideal for use where the parties can agree about how their property and financial issues are to be dealt with and wish to formalise their agreement privately, affordably and expediently within the law.



Financial agreements do not need to be approved by, or filed with, the Family Court in order to be effective.

You can make a financial agreement if you are separated or divorced. It makes no difference.

Read more about [financial agreements](#).

DOES A FINANCIAL AGREEMENT STAND UP?



A financial agreement will be binding on the parties if it is made in accordance with the provisions of the Family Law Act. That is:-

- a financial agreement must be in writing and signed by both parties;
- each party must receive independent legal advice before signing the agreement so they know exactly what they are entering into;
- each party must receive a statement by their independent solicitor stating that the legal advice was given; and
- each party must provide a copy of their solicitor's statement to the other party and receive a full copy of the fully signed agreement.

For a more detailed discussion relating to the binding nature of financial agreements, see [here](#) and [here](#).

THE DUTY TO MAKE FULL DISCLOSURE OF YOUR ASSETS AND LIABILITIES AS PART OF THE PROPERTY SETTLEMENT PROCESS



When making a financial agreement, consent orders or applying to the Court for property orders, you and your partner have a duty to make full and complete disclosure of your assets and liabilities to the other, as these make up the property pool.

When making a financial agreement, the disclosure needs to be accurate as at the date the agreement is signed. A financial agreement or consent orders can be set aside or terminated, if a party dishonestly or fraudulently misrepresents their assets, or the true nature or extent of their assets.

More information on your duty to make [full disclosure in property settlement proceedings](#).

WHAT HAPPENS IF YOU CAN'T TALK TO YOUR PARTNER?



Separation is a painful experience and you may find it difficult to talk with your partner or agree on important and emotionally charged issues such as property division and children's matters.



There are many useful resources and options available to help couples facilitate meaningful and respectful discussion and negotiation – whether you are still trying to keep the relationship together, have decided to separate or you are divorced.

Counselling and mediation services assist parties work through the inevitable emotional and financial issues that can result from a relationship breakdown.

In some instances, mediation is a requirement of the law. For example, before you are allowed to start a property settlement or custody application at court, you must be able to demonstrate that you have sincerely tried to reach a private agreement between yourselves, by attending mediation services.

Having couples attempt to resolve their issues privately:-

- ▶ helps minimise the load on the Court;
- ▶ keeps control of outcome in the hands of the parties; and
- ▶ encourages the parties to reach their own mutually beneficial arrangement.

Ultimately, it is desirable to reach agreement with your ex without having to resort to court proceedings.

Read more about [counselling, mediation and other relationship services](#) available to separating couples.

TIME LIMITS



You need to be aware that there are time limits for certain legal actions that can be taken after separation or divorce.

These are:-

- ▶ Court Orders
- ▶ Consent Orders
- ▶ Binding Financial Agreements

TIME LIMITS FOR COURT ORDERS

If you cannot agree with your ex-partner about how property should be divided or about parenting or other family issues, you can apply to the Court to decide on these matters for you.



Parenting issues – no time limit, you can apply at any time, either before or after the relationship breakdown.



Financial or property matters



Married couples – you must apply within one year of the divorce being granted.



De facto couples – within two years of separation.

You can apply out of time but you need to obtain special leave of the Court, which may not be given. You need a very good reason to obtain special leave to apply out of time.

You should only apply for Court orders as a last resort and only after you have already tried to negotiate the issues between yourselves. Before you can bring an application, you must show that you have attempted to resolve the matter between yourselves first and that you have attended mediation.

Read more about [applying for court orders](#).

TIME LIMITS FOR CONSENT ORDERS

The cut off time to lodge consent orders for property or financial orders for:-



Married couples - you must apply within one year of the divorce being granted.



De facto couples - within two years of separation.

You can seek special leave to file an application for consent orders out of time but you must have a good reason for your request to be granted.

[Read more about consent orders.](#)

TIME LIMITS FOR BINDING FINANCIAL AGREEMENTS

There are no time limits to make a financial agreement.

You can make a financial agreement at any time, regardless of whether it is before marriage or moving in together, during your relationship or after separation or divorce.

[Read more detailed information about making a binding financial agreement.](#)

TRANSFER OF PROPERTY AFTER SEPARATION OR DIVORCE



When a couple own a home or investment property / properties, they need to decide what will happen to those assets when they separate.

Sometimes the couple may decide to sell the property and divide the proceeds. This gives the parties funds to make a fresh start and move forward with their lives.

For others it is beneficial to keep the family home (or investment property). One advantage of doing this is to provide continuity and stability for their children, in what is otherwise a tumultuous time full of changes and uncertainty.

To do this, the property is generally transferred from joint names into the name of the party who will be retaining the property. Sometimes it is agreed that a cash payment will be made to “buy out” the other parties share.

The party retaining the home usually takes over all of the financial obligations and maintenance responsibilities. They may also need to get a new loan and mortgage in order to pay out the original mortgage and possibly the other party. If this is the case, the bank will require that either court orders or a financial agreement be in place to protect the bank’s interest from further claim by the ex-spouse.

If a bank is involved, they may attend to the transfer for you as part of the re-mortgage process, so you should speak to your financial institution first about the process and their requirements.

You can undertake the transfer process yourself, by completing and submitting the necessary forms to the Land Titles Office in your state.

Read more about [how to transfer your property](#).

CAPITAL GAINS TAX EXEMPTIONS



Often when finalising a property settlement after separation or divorce, property may need to be transferred from one party to the other. Usually the party receiving the property will make a payment to the other to “buy out” his or her share.

Normally when investment property is transferred in Australia, Capitals Gains Tax (CGT) will apply to the transaction.

Relief from Capital Gains Tax is available on transactions that are the result of relationship breakdown. The CGT that would otherwise be payable in regards to a transaction made as part of a property settlement is, in effect, deferred or rolled over. This means that CGT liability will not arise unless and until the property is sold or dealt with at a later date by the party receiving that property.

The CGT liability will be calculated from the rise in value of the property from the original purchase date (not the date it was transferred following relationship breakdown).

For Capital Gains Tax relief to apply to the transfer of investment property which takes place as part of a property settlement, the transfer of the property must be specified in one of the following:-



Court orders.



Consent orders.



Binding financial agreement (this avenue only available since 2006).



Any other approved document.

Some parties may wish to make an adjustment to allow a Capital Gains Tax component when finalising a property settlement, to take into account the eventual CGT that will be payable on the property.

Others may wish to disregard any potential CGT implications, for example, if the parties intend that the property will be eventually passed on to children as part of their inheritance (rather than sold).

Read more about [Capital Gains Tax relief following relationship breakdown](#).

STAMP DUTY EXEMPTIONS



If your property settlement involves transferring property from one party to the other, the Family Law Act offers exemptions on the payment of stamp duty which would normally apply.

Stamp duty exemptions relate to investment properties being transferred pursuant to:-



the terms of a binding financial agreement (for de facto or married couple);



consent orders; or



Court orders.

Your binding financial agreement or orders must be submitted to the Office of State Revenue, to support your application for an exemption. The transfer must be explicitly stated in the terms of the agreement or orders and the property in question must be clearly identified for the exemption to apply.

Any other property which is transferred pursuant to a financial agreement or order, is also exempt from transfer duty, such as motor vehicles or boats.

Read more detailed information relating to [stamp duty exemptions](#) following relationship breakdown.

REVIEWING YOUR WILL AND ESTATE PLANNING ARRANGEMENTS



As part of the legal housekeeping after separation, you will need to review your Will.

Most married couples leave their estate to their spouse and appoint their spouse as the executor and trustee under their Will. Understandably you will want to revise these arrangements following separation.

In most states, your whole Will or the parts of your Will that confer specific benefits or powers on an ex-husband / ex-wife, will be automatically void on divorce. If you want to leave a valid Will that accurately reflects your testamentary intentions, you should take immediate steps to review and update your Will as soon as possible after separation.



Make immediate plans to review and update your Will and estate planning arrangements;



Review and update the beneficiaries nominated to receive your life insurance and superannuation benefits.

A [Will Kit](#) is included in the binding financial agreement kit as an added bonus.

Read more about [Wills](#) and [estate planning after separation](#).

APPLYING FOR A DIVORCE



You can apply for a divorce after you have been separated for at least 12 months, with no reasonable likelihood of resuming married life. This includes being “separated under the one roof”.

The Family Court supplies a free [online Divorce Kit](#). It contains an Application for Divorce, which will need to be completed and lodged at the Family Court. A filing fee applies at the time you lodge your application. It can be lodged online, in person or by post.

Application may be made solely or jointly. If you make a sole application, you will need to serve a copy of the Divorce Application on your spouse, to inform them that the divorce process has begun.

You will be notified by the Court of a hearing date. You do not need to attend the hearing in person, unless there are children or other complicating factors.

Download a [Divorce Kit](#) from the Family Court.

Read more about [Applying for a Divorce](#).

LOOKING TO THE FUTURE - PROTECTING YOUR CHILDREN'S INHERITANCE



After your divorce or separation is behind you, it is possible that you will enter into a new relationship at some point in the future.

This is a decision that should not be made without consideration of the financial implications.

If you decide to enter into another relationship, whether it be de facto or marriage, any property you have accumulated from your previous relationship, may be considered to be part of the property pool of your new relationship after a minimum time period has elapsed. This means it could become subject to a property settlement claim should your new relationship come to a natural end after a time.

You can address your concerns about protecting existing assets from a future property claim, by making a financial agreement before you move in together or get married.

A financial agreement made with your new partner, will allow you to quarantine your existing assets. This ensures that they will be kept out of any future property settlement proceedings and ultimately, be passed down to your existing children.

For younger couples, this may not be an issue. However, older couples who have had the time to build an asset pool may wish to protect their assets by implementing a financial agreement before taking the step of beginning a new de facto relationship or marriage.

In this case, Financial Agreements dealing with the coming together of partners can address many issues including:-



quarantining assets accumulated prior to the relationship to provide for existing children;



how the assets accumulated by the parties prior to the relationship are to be dealt with;



how debts accumulated individually are to be dealt with;



how future assets that are acquired together will be dealt with and managed; and



how individual and jointly owned property will be divided should the relationship break down.

Think of financial agreements as a type of business plan for your relationship or marriage, allowing you to take a proactive approach to managing and protecting your assets.

The *Family Law Act* makes Financial Agreements accessible to all couples. It enables you to come to a private agreement in a non-combative way and offers certainty for your future.

For more information on using a financial agreement before starting a new relationship, call us on Freecall 1800 068 088.

SUMMARY

This guide is intended to be a short summary of issues you may face after separation.

Please call us on 02 6672 5904 if we can be of any further assistance. We are always happy to chat about how our legal kits can save you time and money when finalising your property settlement affairs.

We offer a range of [binding financial agreement kits](#), family and relationship documents and can also assist you to obtain consent orders.

You can find more information in relation to us (RP Emery and Associates) and our products and services at our main website:-

www.rpemery.com.au

Or you can go directly to our dedicated family law website here:-

www.peacefulpath.com.au

Thank you for using this RP Emery quality product. We take this opportunity to wish you every happiness and success for the future.

WHO WE ARE

RP Emery & Associates are an internet based legal publishing service.



Since 1990, we have provided the business community and individuals with professionally drafted, ready-made single contract templates and contract template kits.

Our mission is to demystify and simplify the law, empower the individual and revolutionise the way people access legal products and services. Using technology, we make legal solutions simpler, more affordable and user friendly.

DISCLAIMER

RP Emery & Associates is an online legal publishing service, we are not a legal practice. The information and resources found on this website are for educational purposes only and are not intended as a substitute for proper legal counsel. Anyone using this website does so at their own risk and readers are advised to seek the advice of a qualified legal practitioner before acting on any information or materials found here.

Copyright © R.P.Emery & Associates 2014 All Rights Reserved. No portion of this publication may be reproduced in any way or without prior written permission from the publisher.