A helpful guide to successfully navigating separation and divorce

Accredited Family Law Specialists
Legal advice and guidance you can rely on.
www.tonkinlaw.com

Contents

3 Introduction

PART 1:

4 Separating from your partner
What to do first

6 Agreeing what happens with the children
- Living Arrangements
- Moving away and travelling overseas

10 Separation and family violence
- Family Violence Intervention Order
- Family Violence Safety Notice

12 Agreeing on financial arrangements
- Child Support
- Spousal Maintenance

16 Agreeing what happens with the assets
- Property
- Inheritances
- Superannuation
- Binding Financial Agreements

17 Formalising agreements
- Court Orders
- Financial Agreements

18 What happens if we can't agree
- Mediation
- Collaborative Law
- Going to Court

PART 2:

19 Getting Divorced
- Divorce applications

PART 3:

20 Social Media and Family Law

21 Contact Information

Introduction

"They say that breaking up
is hard to do...now I know
- I know that it's true" [Neil Sedaka]

Yes, Mr Sedaka was right – breaking up is hard to do. Psychologists rate relationship breakdown as one of the great stressors of life – up there with the death of a family member. People often believe that once they end a relationship, or their partner ends it, life will, after a bit of disruption, be better than it was before. That may well be true, but you need to prepare for a lot of emotional ups and downs, financial worries and problems with children before it's all over.

This Guide is designed to help you to navigate a pathway through the forest of uncertainty that inevitably arises when a relationship ends. The first part of the Guide deals with separation and explains the issues you need to agree with your partner when separating – including what happens to the children, financial arrangements moving forward and what to do with your joint assets. It also discusses what to do if you can't reach agreement on these issues.

The second part of the Guide explains the formal process of getting divorced and legally ending your marriage. Finally, we discuss Family Law and social media.

As you read this Guide, please keep in mind that every relationship and family situation is unique, and that we can only offer general advice, albeit based on our many years of experience in guiding couples and families through the process of separation and out the other side.

It is always worthwhile discussing your individual situation with our supportive Family Law team, so we can help you achieve the best outcome possible for you and your children.

When we use the words 'husband' and 'wife' in this guide, that refers to both married and defacto couples.

PART 1:
Separating from your partner

What should I do first?

Relationships can end in a number of different ways and for many different reasons. Separation is usually marked by one person taking some decisive action, such as moving into a separate bedroom or leaving the home. It can also happen when one party announces to the other that the relationship is over, yet they continue to share the same bedroom for practical reasons, such as there are no alternative sleeping arrangements in the home. Whichever way the separation happens, here are some suggestions about what to do and what not to do when first separating.

- **Don't leave without the children.** If you are going to leave the relationship and the family home and you want the children to live mainly with you in the future, it's very important that you take them with you when you move out and that you find a place to live that is suitable for the children. Otherwise, if their future living arrangements become a dispute, it may be many weeks or months before you can get to Court, during which time the children will have established a pattern of living with the parent who stays in the home, which may be difficult to change. If possible, you should discuss the children's arrangements with your partner before you leave. If there has been domestic violence, or a threat of it, and you are unable to talk to your partner, then take the children with you when it is safe to do so. However, don't try to "snatch" the children back if they are with your partner, nor take them out of school, nor keep them after they spend agreed time with you.

- **The home:** you can leave without worrying about it. There is generally no financial penalty if you leave the family home and you later want to negotiate a property settlement with your partner. If you do leave, take what you need with you, without stripping the place bare. It's always more difficult to go back a second or third time to try to get furniture and household goods out of the property.

- **Can I change the locks if I'm staying?** The answer is generally yes, although that usually upsets the partner who has left the home. However, if you want to ensure that your partner does not keep coming back to the home, get the local locksmith to change the locks, but tell your partner that you have done so.

- **I can't live with my partner any longer - can I get them out of the home?** If there has been domestic violence, or the threat of it, whether or not it involves the children, you may be able to get an Intervention Order from the local Magistrates Court to have your partner removed from the home. That can have serious consequences – the children are usually included in the orders, which may make it difficult for your partner to spend time with them, and that can lead to stressful and expensive visits to Court. Please read the section in this Guide on separating due to family violence for more information on what to do in this situation.

- **If there isn't domestic violence, can we separate and live under the same roof?** Yes. You are usually considered to be separated under the same roof if you or your partner move into another bedroom at the home, apart for reasons such as illness (or snoring!). The separation date is important in a Divorce Application, a split of superannuation or for Centrelink payments, so it is good idea to make a diary note of the date of the separation.

- **Financial arrangements.** It's a good idea to provide yourself with some short term financial security if there is to be a separation. For example, if there is a joint bank account, you can take as much as you want out of the account and put that into a separate account in your name, but, generally don't take more than about half as, if the matter later goes to Court, you may be criticised for doing so. You should make copies of important financial records before discussing separation with your partner or moving out. These should include superannuation statements, tax returns, bank and credit card statements.

- **Should you see a lawyer?** If you are considering separation, or your partner has announced that they want to separate, it's a good idea to seek legal advice from an experienced Family Lawyer. There are a myriad of issues that will arise on separation, many of which you may not have thought about, but which your lawyer has experience of and can advise you.
  It is always best to get some advice on your specific situation before you take any major steps. If there has been domestic violence or the threat of it, or you are concerned that your partner may try to move assets, including bank accounts, around, it's best to see a Family Lawyer sooner rather than later.

Make sure that you make a note of the date of separation and keep it in a safe place for reference later.

PART 1:
Separating from your partner

Reaching agreement about what happens with the children

In most cases, the parents of children whose relationship has broken down are able to sort out amongst themselves who will care for the children, when and where. Here is a list of things to make sure you cover when discussing this critical issue:

- **Who has been the primary care-giver of the children?** The children will usually spend more time with that parent post separation as this helps ensure continuity for them.

- **Who will have the children on what days?** After separation, arrangements for the care of the children are usually worked out in fortnightly blocks. Typically, the primary care-giver will take care of the children during the working week and every second weekend. They may be with the other parent from after school on Friday until Sunday evening or to the start of school on Monday morning. They might also be with the other parent for a meal or overnight during the week. Young children, up to the age of around 3, do best when the other parent sees them for reasonably short, but frequent visits. Children, particularly the older ones, may spend one week with one parent, and the next week with the other. There is no fixed rule about how much time the children spend with each parent – it depends entirely on your individual situation.

- **How will the change-over of the children take place?** It can often be useful to organise the change-over for children at a neutral location (e.g. at school (before or after), at child care or at a family-friendly restaurant). Typically, one parent drops the children off and the other parent picks them up. Where there has been family violence, or threats of it, the change-over may take place at a police station, although that is usually a last resort as the children may associate the police with their spending time with their other parent.

- **How will you communicate any issues regarding the child to the other parent?**

  Some separations are amicable, others are not. If you can't talk to your partner without getting into an argument, it may be best to agree to communicate via email or by using a diary as a communications book. Be careful about using social media – make sure you read the section at the end of this Guide which offers advice on using social media and the potential legal implications.

- **Can changes be made to the agreed arrangements if necessary?** While it is best for both of you and the children that you agree on care arrangements for your children and stick to them, sometimes things crop up that mean one parent might want to make a change to the agreed arrangements for child care. It will be helpful to discuss the rules about making changes well in advance so that both parents are clear about this. For example, how much notice is required to the other parent to change the arrangement? How will you communicate these requests? What happens if the other parent doesn't agree to the change? What situations are reasonable to request a change in arrangements, which are not?

Make sure that you write down what you have agreed in an email or letter to the other parent and keep a copy of this for future reference.

What about living arrangements for very young children?

We find that mothers of very young children, say up to about 3 years of age are, understandably sensitive and concerned about the welfare of their offspring when spending time with the father. Often these parents are relatively young, it may be their first child and sometimes the mother may have little confidence in the father's ability to properly care for the child. That can be especially so if the parents are not married or if the separation took place prior to the child's birth.

Child psychologists have found that the child's time with the father, where the child is up to 3 or 4 years of age, should be relatively short, so that the child does not suffer anxiety by being separated from the mother, but fairly frequent, so that the child is able to bond successfully with the father, the child's memory being short at those ages. Unless the parents can agree between themselves, the Courts do not usually make orders that the child spends overnight with the father until they are at least around 2 years of age. Fathers tend to get impatient in those situations and want to have the child overnight, but the best advice for them is to take it slowly and to gradually increase the time that the child spends with them, leading up to overnight time. As with older children, the father needs to have proper accommodation for the child to spend overnight.

The above equally applies to the mother if the father has the primary care of the child.

What if I want to move away with the children – to the next suburb, to the country, overseas?

People often think that, if the children are living mainly with them, they can move across town, interstate or overseas without consulting the other parent. That is not so and, in fact, it's a very dangerous area of the law.

The court will always have the best interests of the child as its paramount concern. There has to be a very good reason for "relocating", such as the parent's new partner lives and works interstate, there is family support for the parent in a new location or the parent has a job they can't refuse in Darwin. The criteria for allowing a parent to relocate with children to another country is much stricter.

A case in point

We had a client from Eltham recently, a father whose former partner moved to Sydney with their children aged 8 and 6, without his permission or consulting him.

The mother had a sister in Sydney and the prospect of obtaining employment. Following their separation some months previously, the children had been spending time with the father for 5 nights a fortnight and they had an excellent relationship with him. Most of a his family, including his parents and siblings, lived in Melbourne.

We issued an urgent Application in the Federal Circuit Court in Melbourne and the Judge was satisfied that the mother should be required to return to Melbourne with the children while the matter was sorted out, which she did. A Family Report was prepared by a psychologist who recommended that the children continue to live in Melbourne because of the father's close relationship with them and the mother's fairly tenuous connection with Sydney.

If the mother had been allowed to remain in Sydney with the children, the father would have had to travel there regularly, with the expense of airfares and nowhere to stay apart from a motel, while the children spent time with him on a few weekends during school terms. The mother was on a pension and she would have been unable to contribute to the costs of travelling or to bring the children to Melbourne so that they could spend time with the father. The mother could, of course, have returned to Sydney by herself and left the children in Melbourne with the father.

The moral of this story is – don't move any distance with the children unless you have the written consent of the other parent or a Court Order. The same principles apply to moving the children across town and changing their schools.

PART 1:
Separating from your partner

What if we can't reach agreement on living arrangements for the children?

If you cannot reach agreement on the living arrangements for your children, then counsellors, mediators, lawyers and, if necessary, the Courts are there to make a decision for the parents and for the children. It is mostly, but not always in Australian society for the mother to be the primary carer of the children. It is usually she who cares for them in the years before they commence school. Mothers often work part time so that they can be available for the children before and after school. That is not to say that fathers do not perform those roles, it's just that more often than not it is the mothers who carry out those tasks. The Courts take the view that such arrangements should not be upset, so that, usually, the children continue to spend most time with the mother.

When can children have their say on whom they live with?

People often ask us at what age a child can decide which parent they want to live with. For the first few years of the operation of the Family Law Act, there was provision in the Act that the views of children aged 14 and upwards had to be taken into account by the Court. However, that was regarded as being too inflexible, as children mature at quite different ages. These days, if a child aged around 12 or upwards has strong views about which parent they want to live with, provided those views are well founded and the child is emotionally mature enough to have thought the matter through, the Courts will listen to them, not directly, but through a Family Report or an Independent Children's Lawyer who is appointed by the Court to represent the children's interests.

What if I want to travel overseas with the children for a holiday?

Our general advice is that you try to discuss any move overseas with the other parent and, if possible, obtain their written consent. To obtain an Australian passport for an Australian child it is necessary for both parents to sign the Passport Application – unless a Court orders otherwise.

If a parent refuses to sign the Passport Application, the Courts will generally order that they do so if the overseas trip is for a holiday, there are no security concerns such as those set out below, and the parent taking the children provides the other parent with a copy of the itinerary and contact details while the children are away. The parent who is travelling may also be required to give the other parent make-up time with the children when they return.

A case in point

In a recent case in which we were involved, a mother wanted to take the parties' 10 year old daughter to visit her parents, brothers, sisters and other family members in Indonesia. She had no family in Australia, she owned no real estate in Australia and she did not have a job here. She had previously run a business in Bali. Our client, the children's father, objected, saying that there was no guarantee that she would return to Australia, as she had no ties here. In addition, Indonesia has not signed The Hague Convention on International Child Abduction which meant that, if the mother was allowed to travel to Indonesia with the children and did not return, the Indonesian authorities may not require the mother to go back to Australia with the children. Whilst most countries have signed The Hague Convention, which makes the return of children in those circumstances relatively easy, there are still many that have not. In this case, the mother was restrained from taking the children out of Australia.

The Australian Federal Police maintain a Watch List at air and sea ports and, if a Court makes an Order that a child is not to be removed from Australia, the child is put on this Watch List so that, if the parent tries to leave the country with the child, the Court Order is picked up at Passport Control and the child is prevented from departing. Sometimes that procedure is used early in separations, when one parent wants to return to their country of birth or where they have family members and, in those cases, the Courts will not normally allow the person to leave with the children, pending the matter being further investigated.

The role of the Independent Children's Lawyer ("ICL")

The ICL is a lawyer appointed through the Courts to represent the interests of the children. They are lawyers with extensive experience in Family Law and who have additional training for that work.

The role of the ICL is to uphold the best interests of the children, looking at all the relevant issues before the Court and promoting the right of children to have a meaningful and positive relationship with both parents, subject to the children's right to be protected from any risk of harm or abuse. ICLs have the responsibility to assist the Courts in making sure that all relevant evidence is placed before the Judge who hears the case. The parties in a case before the Court where an ICL has been appointed should take on board what the ICL is putting forward and work to assist the ICL in performing their role, as co-operation with the ICL may well assist the parties in achieving a positive outcome.

The ICL usually talks to the children, if they are old enough to comprehend the ICL's role, but the ICL does not normally speak to the parents. The ICL is able to obtain information from a wide variety of sources to assist them, including school reports. They may also interview teachers, read medical records and the like.

The ICL's role is not to simply tell the Court what the children say about where they want to live or how much time they want to spend with each parent. Rather, the ICL gathers together all of the relevant information, including what the child tells them, and makes recommendations to the Courts.

When will the Courts prevent the children from seeing one of the parents?

One of the principles that runs through the Family Law Act is that children have the right to know and be brought up by both of their parents. The Courts will try to ensure that the children are able to spend time with both parents following separation.

However, in cases where a parent cannot properly care for the children, such as, where they are using non-prescription drugs, where they have anger management problems which impact on the children, or where they have no proper place for the children to sleep at night, the Court will not allow the children to spend time with that parent, or they will restrict the time spent with them.

For example, if a parent has a history of drug taking, the Court may order that they undergo regular drug screening or, if there has been domestic violence, undertake an anger management course. In those situations, the Court sometimes orders that the children's time with that parent be supervised, perhaps by a grandparent, or that it take place at a Children's Contact Centre, of which there are a number located around the Melbourne area.

What about changing Parenting Orders made by the Court?

It is possible to have Parenting Orders made by the Court altered if there is a change in family circumstance. It's best to consult a lawyer if you are in this situation.

A case in point

A leading case on this subject is Rice & Asplund, which was decided back in 1979, but is still good law. The parents separated when the only child of the marriage, a girl, was aged 3. In October 1975, after a contested hearing, the New South Wales Supreme Court (the Family Law Act had not come into operation at that time), ordered that the father, Mr Rice, have custody of the child and that the mother have access. In May 1976 Mr Rice applied for Orders to reduce the amount of time that the child spent with the mother. About a month later, the mother applied for custody of the girl. In September 1976, the mother married a Mr Asplund. The parties' competing custody claims went to trial in May 1978 and the Court ordered that the mother have custody of the child and the father have reasonable access. The father appealed the decision to the Full Court of the Family Court in Sydney. The Appeal Court decided that the mother's changed circumstances (her remarriage) were such as to justify a change in the Orders. The Appeal was dismissed and the child remained in the mother's custody.

PART 1:
Separating from your partner

Separation and family violence

What is family violence?

People often assume that "violence" means physical violence only. That is not correct. The Victorian Family Violence Protection Act 2008 defines "family violence" as 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; or
- behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effect of, behaviour referred to above.

The Act provides a list of definitions and examples for each of the above behaviours that constitutes family violence. Family violence is taken very seriously by the Courts, both the Family Court and the Federal Circuit Court and, at state level, the Magistrates and Childrens Courts.

If you are considering separating due to family violence there are a number of things you need to consider to ensure the safety of you and your children. From a legal perspective, you need to decide if you need to apply for a Family Violence Intervention Order ("IVO").

An IVO can provide that your partner does not commit family violence against you, including while you are both living in the home. The Court can also order that your partner leaves the home and does not return during the time that the order operates.

That is a fairly brutal order, as it requires that the police attend at the house and escort the partner from the property, usually giving them only a few minutes notice to collect their belongings.

An order requiring a partner to leave the house will, almost certainly, cause them significant distress and it may make it more difficult for the children to spend time with them in the future (as the children can be included on the order) and/or to negotiate a settlement. That is not to say that you should hesitate in obtaining an IVO if there has been family violence or you are genuinely concerned that it may occur.

Family Violence Intervention Order

If you have concerns about your safety and/or the safety of your children due to family violence, you can apply for an IVO in the local state Magistrates Court. You can do this yourself, or seek the support of a solicitor.

What does an IVO do? What protection does it offer?

An IVO protects the person who has obtained it from domestic violence (as defined above) by the perpetrator. A standard order requires the perpetrator not to commit further violence, stay away from the victim, including at their place of work and, if the parties are not living together, to not contact them, except to engage in the arrangements for the care of the children.

Who can an IVO protect you from?

- a person who is or has been your spouse or domestic partner; or
- a person who has or has had an intimate personal relationship with you ("intimate" means "close" and does not refer to a person who you have only had sexual relations with); or
- a person who is or has been your relative; or
- a child who normally or regularly resides with you or has previously resided with you on a normal or regular basis; or
- a child of a person who has or has had an intimate personal relationship with you.

What is the difference between an Interim IVO and a Final IVO?

An Interim IVO is a temporary order that remains in place until a Final IVO is made. The local Magistrates Court will usually make an interim IVO without the other partner being aware that it has been applied for. A Final IVO usually lasts for 12 months. At the expiry of the Final IVO, it is not usually extended unless there have been breaches of the IVO.

What is a Family Violence Safety Notice?

The police can apply for an IVO on your behalf if they think it necessary for your safety and they can issue a Family Violence Safety Notice ("Safety Notice"), which acts as a temporary order with similar conditions that apply to an IVO. Safety Notices are usually issued by the police following an incident which occurs when the Courts are not open, such as at night, weekends or public holidays. The police can issue a Safety Notice if they consider it necessary even if the affected family member does not want them to.

If a Safety Notice is issued against you, you must attend Court on the date stated on the Notice. You may be arrested if you do not. A Safety Notice comes into operation when it is served on the other party and it ends when an IVO is served or until the Magistrate decides not to make an IVO.

What are your options if served with an IVO?

- you can agree to the IVO being made and you can do so without admitting guilt. However a Court under the Family Law Act can make adverse findings against the domestic violence perpetrator, even if there is no admission of guilt;
- you can contest all or some of the conditions of the IVO; or
- you can offer to give an Undertaking, which is a written legal promise, instead of having an IVO made. The other party has to agree to accept an Undertaking. An Undertaking is not a Court Order, but there are consequences for breaching it.

Is an IVO a criminal matter?

No, it's a civil matter. This means that, while the police keep a record of the IVO, it is not recorded as a crime. However, if you breach the conditions of an IVO, it then becomes a criminal matter. A conviction for the breach of an IVO can lead to imprisonment and will be recorded as a crime. This can have significant implications for employment.

How is an IVO enforced?

If you obtain an IVO, or one is made against you, you should keep it with you at all times and be familiar with its conditions and exceptions. Typically, if there are children, the other party may be allowed to contact you to make arrangements for the children to spend time with them or to attend mediation.

If you believe that the other party has breached the IVO, you should notify the police immediately. The police need to be able to convince the Court that the IVO has been breached, so any evidence you can provide will be useful, including text messages, voice messages, emails, photographs and the like. Keep a diary of any breaches, including the date, time and location of where they occurred. The police should investigate the alleged breaches and take statements from you and any witnesses. They should also interview the other party and then make a decision as to whether to press charges. If your child is listed on the IVO, you should provide a copy to the school or childcare centre. If the IVO prevents the other party from approaching your place of work, you should give a copy to your employer.

PART 1:
Separating from your partner

Agreeing on financial arrangements

Child Support

As well as agreeing to living arrangements for the children, separating parents need to agree who will pay for what expenses associated with the cost of supporting children. This is the area of child support.

Child support falls into two categories – for children under 18 and for those over 18 who are going on to further education or who have a physical or mental disability.

Child support for children under 18

The payment of child support is regulated by the Child Support Agency, a government authority closely allied to the Australian Taxation Office.

Assessing child support

The assessment of the amount of child support payable by the paying parent (usually, but not always, the father), is based on the incomes of both parents, the ages of the children and the amount of time that the children spend with each parent. If the paying parent has another child/ren, that will affect the amount of child support payable.

There is a helpful calculator for working out the amount of child support payable in a particular case on the Child Support Agency website.

https://processing.csa.gov.au/estimator/About.aspx

Private arrangements

You and your partner can make your own informal arrangements for paying these costs. Here is a list of things to make sure you cover when discussing this issue:

- School fees, books, uniforms, excursions, camps, school sports and private tuition
- Private health insurance and the payment of the gap between the cost of the service and the refund from the private health insurer
- Dental expenses including orthodontic
- Sports expenses outside those organised by the school, such as football, soccer, cricket, swimming, tennis
- Any other expenses that may be incurred on behalf of the child that were being paid for prior to separation, or which you agree should now be covered

However, if you wish to enrol your child in, say, swimming lessons that were not being taken prior to the separation, you need to get your partner's agreement to that if you want them to contribute to the costs.

Once you agree on the child support arrangements, you can enter into a Child Support Agreement which is then registered with the Child Support Agency.

https://www.humanservices.gov.au/customer/enablers/notifying-us-binding-agreement-child-support

The Agreement can be for a fixed period of time or until the children turn 18.

As long as the terms of the Agreement are at, or more than, the amount that the Agency would have assessed, then the Agency will normally approve the Agreement.

Such Agreements can include matters like school fees, private health insurance and the other items set out above, which are not part of assessments made by the Agency. If the children were attending a private school at the time of the separation or were enrolled to do so, application can be made to the Agency to vary the assessment to provide that the paying parent pays all, or part of, the school fees and/or related expenses such as books and uniforms.

The Child Support Agreement should also be registered with the Family Court in case enforcement proceedings need to be issued.

Applying for child support

If you and your partner cannot agree on child support, then either can make an application, online or in writing, to the Child Support Agency for an assessment. **https://www.humanservices.gov.au/customer/services/child-support/child-support-assessment.**

That application is often made at the same time as applying for Centrelink benefits. Once the Agency makes the assessment, child support becomes payable.

Reviews of assessment

Problems often arise with paying parents who are self-employed, such as tradesmen. Their accountants usually prepare income tax returns to legally minimise the tax payable. As the Child Support Agency relies on tax returns to work out how much is to be paid, the taxable income may be less than the paying parent is really receiving from their business, both in actual income and in benefits, such as the use of a motor vehicle, mortgage payments and the like.

In that case, the receiving parent can apply to the Agency to review the assessment. If they can show that the paying parent is actually receiving a higher real income than the tax returns show, then the assessment can be adjusted. That process takes place internally within the Agency but there is a right of review to the Social Security Appeals Tribunal and, ultimately, to the Federal Circuit Court, but only if it is claimed that the assessment was legally, not factually, wrong.

Enforcement

If the paying parent is not making regular payments, the receiving parent can apply to the Agency to have the child support taken out of the paying parent's salary. The Agency has other powers to enforce child support, including taking arrears of payments out of the paying parent's tax refunds and preventing a paying parent from leaving the country if they have significant child support arrears.

Child support for children over 18

The obligation to pay child support usually stops upon a child turning 18, or the end of the school year when they turn 18. It is possible for a child who is over 18, or a parent of that child, to apply to the Court for what is called adult child maintenance.

Adult child maintenance is dealt with under Section 66L of the Family Law Act, which can be summarised as follows:

The Court can only make a child maintenance order in relation to a child who is over 18 if the Court is satisfied that the provision of maintenance is necessary:

(a) To enable the child to complete his or her education (being tertiary education, which includes TAFE and non-university tertiary education); or

(b) Because of a mental or physical disability of the child.

PART 1:
Separating from your partner

A case in point

In the 2006 adult child maintenance case of AM, an unmarried 28 year old woman succeeded in her application for adult child maintenance from her parents. She suffered from Urticarial Vasculitis Arthritis, a degenerative disease, and other ailments which prevented her from working. She also required significant and ongoing care. She said that her disability made the provision of maintenance necessary and that her claim was therefore covered by Section 66L of the Family Law Act. An order for adult child maintenance was made for a period of five years. Her father was ordered to pay her $520.00 per week and her mother to pay $975.00 per week.

Most of the adult child maintenance cases that we deal with relate more to children attending university and requiring financial assistance to do so. In assessing the payment of adult child maintenance, the Court is not allowed to take into account any Centrelink benefits which the child is receiving. They will, however, look at any income that the child is earning by way of part or full time employment.

Usually it does not matter to the Court if the parent who is asked to pay adult child maintenance does not spend regular time with the child.

Spousal maintenance

The Family Law Act provides that the Courts can order that one party to a marriage or domestic relationship pay maintenance to the other party where the paying party has the capacity to pay maintenance and the receiving party is in need of it. This is quite separate from child support.

Typically, if one party is not working because of child care responsibilities or ill health, and the other party is working and has a sufficient income to pay spousal maintenance, after payment of their reasonable living expenses and child support, then the Court can order that spousal maintenance is paid.

What the Court looks at

In hearing an application for spousal maintenance, the Court will carefully go through Financial Statements filed by each party to see whether those two criteria are met – that is, that one party has a need for maintenance and the other party has the ability to pay it.

In a situation where the paying party is an employee whose employer provides proper salary records, determining whether that party can pay for maintenance is relatively easy. It is more difficult where the paying party is self-employed and their accountant lists, for taxation purposes, all their expenses involved in earning that income, in order to minimise their tax – in other words, much the same as with child support. When it comes to the question of whether that party can pay spousal maintenance, the taxation returns often do not reflect the true income of the party. An investigation by the lawyer and/or independent accountant may then be needed to find out whether that party does, in fact, have sufficient income to pay maintenance.

Unless the Court otherwise orders, there is usually no time limit for the payment of spousal maintenance and it does not automatically end once the parties are divorced. However, if the receiving party becomes employed or, if employed, receives a pay rise or re-partners, then it may no longer be appropriate for the paying party to continue with spousal maintenance.

Spousal maintenance is a separate payment to child support, where one party is not working due to child care, unemployment or ill health and the other party has the ability to pay. It can also apply if both parties are working, but one has a much higher income than the other.

Spousal maintenance and property settlements

Frequently, an allowance for spousal maintenance is included in property settlements. For example, a party may receive an extra 5 to 10% of the assets, on top of the property settlement, to make allowance for the fact that they would otherwise be entitled to spousal maintenance. People often prefer that type of settlement, as it provides a larger lump sum at the time of the settlement and is not dependent on the paying party continuing with their employment. If the paying party is in another relationship and are supporting their new partner and, possibly, a child of that relationship, that may affect their ability to pay spousal maintenance.

Binding Financial Agreements

The safest way to avoid having a spousal maintenance order made is to include a provision in a Financial Agreement (a document which settles property issues between the parties) that neither will pay any spousal maintenance to the other in future. A Court ordered property settlement does not provide the same security against a spousal maintenance order as a Financial Agreement. There is no "water tight" guarantee against a party claiming spousal maintenance, even if they enter into a Financial Agreement, but such Agreements provide the best insurance against a claim being made.

PART 1:
Separating from your partner

Agreeing what happens to the assets

Property

Property settlements occupy most of our Family Lawyers' time. While disputes over the parenting of children are, of course, most important, very often parents manage to resolve those themselves, leaving it to the lawyers to assist them in dividing up the assets. These typically include the family home and perhaps an investment property, cars, superannuation, shares and money in the bank.

Australian couples in a relationship, whether they have been married or de-facto, are frequently home owners rather than renters. When the relationship ends one party will often try to buy the other's interest in the family home; it is how much each party should get which frequently leads to disagreement.

To give you an idea of what to expect, as a rule of thumb, the Courts (and therefore the lawyers, as the advice we give to clients is based on what the Courts do as much as what is written in the Family Law Act) adjust the interests of the parties in the home and other assets based on the following factors, amongst others:

- the age and state of health of the parties;
- whether there are any children, their ages, their health and who they are living with;
- the income earning capacity of each of the parties;
- whether there have been any special contributions to buying or improving the home or other assets, such as a gift or inheritance.

As it is often the female in the relationship who is mainly caring for the children, the Courts may make an adjustment in her favour for that reason. It is said that, as a "rule of thumb", the party that the children are mainly living with gets an adjustment of 5% for each child. That is a very rough and ready way of working out a settlement, and it assumes that the parties otherwise have approximately equal incomes, that there are no health issues for the parties or the children and no other factors, such as an inheritance, which may alter the percentage adjustment.

Although it is not possible to accurately generalise, as each case has its own particular set of facts, it can be broadly said that the Courts usually adjust property, being the family home, shares, money in the bank and investment properties, within the range of 60% to 70% to the parent who has the children living with them most of the time.

Can I stay in the home until the children finish school?

In the early days of the Family Law Act, the Courts sometimes made orders that the mother (if the children were living with her), could stay in the family home until, say, the youngest child started school or even sometimes the youngest finished secondary education. In the meantime, the father got no money out of the home, he may have continued to contribute to a mortgage but, at the agreed time, he would receive a larger proportion of the ownership in the home than he might otherwise if the settlement had taken place reasonably soon after the separation. However, those arrangements gradually fell into disfavour, mainly because the male partner was seriously disadvantaged, having their equity in the property tied up for many years without being able to obtain a settlement which would let them buy a home of their own. The practice also died out with the end of low interest, government-sponsored loans to enable the female partner to refinance a mortgage at lower than the commercial interest rate.

TONKIN
LEGAL GROUP

Inheritances

An inheritance received by one party early in a long relationship will carry less weight than one which comes late in the piece or, indeed, after the separation. The Courts take the view that the contribution represented by an inheritance early in a relationship is matched by the contributions of both parties, by way of income earning, child care and homemaking during the rest of the relationship. At the other end of the scale, an inheritance which comes very late in the relationship, or after separation, is more likely to be adjusted back in favour of the person receiving the inheritance, although not necessarily on a dollar for dollar basis.

Superannuation

Usually, there is a "split" from one party's superannuation fund to the other's in order to give each party the same amount of super.

For example, if Jack has $300,000 and Jill has $75,000 in super, those are added together to get $375,000. That is then divided in half, which equals $187,500. Jill's $75,000 is then taken off, as she already has that in her fund, so there is a split from Jack's $300,000 fund to Jill's of $112,500, and they each end up with $187,500, being half of $375,000.

The Courts do not have to divide super in that way, but that is frequently the practice adopted. Sometimes there can be some "horse trading" during negotiations so that, for example, a husband who has a large superannuation fund and may wish to hold on to it, can offer the wife a larger non-super settlement in order to keep his superannuation.

Formalising your agreements

Consent Orders

Consent Orders are orders obtained by agreement between the parties. If agreement is reached between both parties regarding children and/or property, Consent Orders can be prepared by your lawyer and filed with the Court to formalise those arrangements. Nobody has to go to Court for that process and the Orders are made by a Registrar in their office.

The only restriction in relation to property Orders made by consent is that the Registrar must be satisfied that they are "just and equitable" – in other words, that they are within the range of what a Court would order if the case went to a hearing. If the parties agree on a settlement which is outside what the Court would order – in other words, if one party is to receive more or less than the normal range of Court Orders, then a Court may refuse to make the orders. In this case, a Financial Agreement can be prepared instead of Consent Orders.

Financial Agreements

Financial Agreements are often a cheaper and more convenient way of settling property matters between parties rather than having Consent Orders made. They have the same force and effect as a Court Order.

This process involves both parties obtaining independent legal advice about the proposed settlement, the Financial Agreement is signed by the parties and their solicitors and it then becomes enforceable – the same as a Court Order.

There are strict requirements for the preparation and signing of Financial Agreements, but they can be an effective way of formalising a settlement. The Agreements are not scrutinised by the Courts, so they can contain anything that the parties agreed to for a property settlement. Financial Agreements cannot be used for parenting matters.

What if we can't reach agreement?

If you can't reach agreement, there are a number of options available to you:

Mediation

Mediation is an excellent way to reach an agreement about both children and property without having to go through the expensive and traumatic experience of a Court case. Mediation involves both parties being prepared to go to a mediator and make a genuine attempt to reach an agreement.

The mediator, who is not usually a lawyer, tries to get the parties to reach their own agreement, with the help of the mediator.

Typically, mediation takes some two or three sessions. It is best if the parties are in the same room with the mediator, although that is not essential. If there is an Intervention Order in force, mediation can still take place if the parties and the mediator agree.

Lawyers are not usually present at the mediation, although the mediator will encourage the parties to go back to their lawyers between mediation sessions for a "check up" to see how the mediation is going and whether the proposed outcome is fair and reasonable.

Mediators are cheaper than lawyers and the success rate of mediation in Australia is around 75%, so it is very worthwhile considering as an alternative to going to Court. If agreement is reached, Orders by Consent can be drawn up by the lawyers in parenting cases and a Financial Agreement or Consent Orders in the case of a property settlement.

Collaborative Law

Collaborative Law is a non-Court based method of resolving these issues. The process works as follows:

a. Each party engages a Collaborative Lawyer. Tonkin Legal Group has trained Collaborative Lawyers who can assist.

b. The parties and their separate lawyers have joint meetings with a view to trying to resolve the Family Law issues. Each party signs a contract stating that they will work together to reach an outcome that is suitable for both parties and, most importantly, the children, and that they will be courteous to each other during the process.

c. The process allows the parties to isolate what is important to them and their family. If the need arises, the collaborative support group can include a financial planner, an accountant, a valuer or a psychologist. These other professionals can be brought into the process to deal with conflict, the valuation of property or how best to structure a settlement.

In summary, Collaborative Law is a process which enables separating couples to work with their lawyers and, as necessary, other professionals, to avoid the uncertain outcome of Court and to achieve a settlement that best meets the specific needs of both parties and their children - without the underlying threat of litigation. This voluntary process is initiated when the couple sign a contract binding each other to the process and disqualifying their respective lawyers from representing either one of them if the collaborative process fails.

Going to Court

Going to court should be the last resort for resolving disputes relating to parenting and property settlements. There are two Courts that deal with parenting and property disputes – the Federal Circuit Court and the Family Court. Both are located in the same building in Melbourne, the Commonwealth Law Courts on the corner of William and La Trobe Streets, and in the Federal Court building in Robinson Street, Dandenong.

PART 2:
Getting divorced

TONKIN
LEGAL GROUP

"Divorce" is the legal ending of a marriage. The only ground for divorce in Australia is the irreconcilable breakdown of the marriage which is proved by 12 months separation. The separation can be an actual physical separation where one party leaves the home and lives elsewhere, or where the couple continue to live under the same roof but lead separate lives.

People commence this formal process either because they want to signal that their relationship is finally over and/or they wish to remarry.

Procedure for getting divorced

(a) An Application is made to the Federal Circuit Court in Melbourne or Dandenong. The Court will list the case for hearing several weeks later. The Application is made by one of the parties involved and can also be made jointly.

(b) If the application is only being made by one party, it is necessary to "serve" the Divorce Application on the other party.

(c) The Court then conducts the Divorce hearing on the listed date.

If there are children under 18, either the applicant or, if they are legally represented, their solicitor, has to attend the Divorce hearing to satisfy the Court that proper arrangements have been made for the care, welfare and development of the children, which basically means confirming the arrangements set out in the Divorce Application. It is not necessary for the other party to attend the Divorce hearing or to be legally represented.

(d) A month and a day after the Divorce is pronounced, the Court issues a "Divorce Order" which finalises the procedure. It is not permissible to remarry before the issuing of the Divorce Order.

Separation under the same roof

If all or part of the separation period took place under the same roof, then affidavit evidence is required from a third party to demonstrate that the parties were living separately and apart under the same roof.

Objection to Divorce

Occasionally, one party will object to the Divorce Application – for example, by claiming that the separation period was for less than 12 months. If that happens, the case may not proceed on the original Court date and it may be set down for a defended hearing when both parties can give evidence.

The 12 month rule

There is one other matter to keep in mind about Divorces – a party's right to make an application for property settlement or spousal maintenance ceases 12 months after the Divorce Order is issued.

Divorce filing fee

And finally, there is a hefty fee for the filing of a Divorce Application – currently $900 in the Federal Circuit Court. It does, however, come with a lifetime guarantee!

Divorce is the legal ending of a marriage. You must be separated for 12 months to commence this process.

PART 3:
Social media and family law

We live in a society entrenched in technology and social media. Recently, a survey found that 1 billion people logged onto Facebook over the course of one day. That's 1 in 7 people in the world!

Interestingly, social media plays an important role in Family Law matters. On the one hand, it can help parents to stay connected with their children through instant messages, photos, status updates and the like. Parenting Orders often include a provision for allowing children to communicate with their parents through Facebook, Instagram, Twitter and other social media platforms when they are not spending time with them.

A dangerous tool

On the other hand, social media can be a dangerous tool. During Family Law cases, things can get particularly stressful and parties sometimes turn to social media to vent their frustration by posting nasty and offensive comments. These posts are usually accompanied by a barrage of replies from family and friends supporting the party and cheering them on. While some people may do this without giving it a second thought, it can have very serious legal consequences. Very often, Family Lawyers will trawl through the other party's social media feed to find damaging material to include in their client's Affidavit. This also extends to emails, text messages, letters and any other material the party has sent to their former partner over the years, which may be negative or derogatory in nature.

More importantly, what a party may think is harmless on Facebook (like going on about their ex-partner's Affidavit material or an expert witness' recommendations) can actually be an offence punishable by up to 1 year's imprisonment. Section 121 of the Family Law Act 1975 makes it an offence to "publish" any account of proceedings or images which identifies a party and/or children involved in Family Law proceedings. Suddenly, a Facebook status that was written in a 20 second bout of frustration and anger could lead to jail time!

A case in point

In the 2013 case of Lackey and Mae, the father in Family Law proceedings posted negative and derogatory comments about the Court, the Independent Children's Lawyer, expert witnesses and the mother on his Facebook account. The Court accepted that these posts were a form of cyber bullying and in breach of Section 121 of the Family Law Act. The Court ordered that the father immediately remove all offending material and that he and his family be restrained from publishing or otherwise distributing any material, by electronic means or otherwise, relating to the Family Law proceedings, the children, the mother or any member of the mother's immediate family including, but not limited to, publication on Facebook or other social media sites.

The Judge also noted that any further breach of the order would incur a penalty of a bond, or other "more severe penalty". The Marshal of the Court and the Australian Federal Police were provided with copies of all material filed in the proceedings. They were requested by the Judge to monitor the father and the paternal family's social media accounts for a period of two years for any breaches of the order and, if necessary, to refer the matter to the Australian Federal Police for possible prosecution.

It is clear that the Family Courts are increasingly willing to impose their jurisdiction across all social media platforms and hold parties accountable for their bad "netiquette". Once a status is posted or a picture is uploaded, it is considered public and cannot be withdrawn. It is therefore very important for parties in Family Law proceedings to be mindful of what they post and to think twice before they turn to social media to blow off steam – "if you have a problem – face it, don't Facebook it".

Contact us

TONKIN
LEGAL GROUP

We hope this has been useful in helping you understand how to navigate the murky waters of separation and divorce.

As we said at the beginning of this Guide, while this information is based on the extensive experience of our supportive Family Law team, it can only be of a general nature. As with any important decision, it is best to get professional advice based on your individual circumstances.

Our Family Law team are ready to help you.

We offer a range of legal services including:

- Estate Planning
- Conveyancing
- Divorce
- Family Law
- Property Law
- Wills/Probate

For more information:

Tel: 03 9534 9044
Email: mail@tonkinlaw.com
Website: www.tonkinlaw.com

Our Family Law team

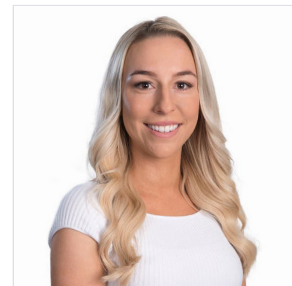
St.John Heath | Partner
Accredited Family Law Specialist, Registered Family Dispute Resolution Practitioner, Collaborative Lawyer
(sheath@tonkinlaw.com)

Shane Williams | Partner
Family Lawyer and Estate Planning Lawyer
(swilliams@tonkinlaw.com)

Richard Tonkin
Consultant Partner
Accredited Family Law Specialist
(rtonkin@tonkinlaw.com)

Cassandra Selvaggio
Associate
Accredited Family Law Specialist
(cselvaggio@tonkinlaw.com)

Charlie Robinson | Lawyer
Family Lawyer
(crobinson@tonkinlaw.com)



Ruby Heath | Lawyer
Family Lawyer
(rheath@tonkinlaw.com)

TONKIN
LEGAL GROUP

8-10 Flintoff Street
Greensborough Vic 3088
(03) 9435 9044
mail@tonkinlaw.com
www.tonkinlaw.com

The Guide is accurate as at October 2020