

11th
Edition

Women and Family Law

Women's Legal Service NSW



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LEGAL SERVICE NSW



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Disclaimer

Information about the law is summarised or expressed in general statements in this publication. The information should not be relied upon as a substitute for professional legal advice or reference to the actual legislation.

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1. General information

1.1 About this booklet

This is the eleventh edition of *Women and Family Law*. It states the law as at November 2019 that applies to all married and de facto couples after relationship breakdown.

This booklet provides a starting point for finding out information about the law. It provides some answers to common questions and also sets out where you can go for further help.

You should not use this booklet as a substitute for speaking to a solicitor and getting legal advice.

When reading this booklet, please note:

- ▶ The terms 'partner' or 'ex-partner' are used to describe a person's husband or wife or de facto partner, including a same sex de facto partner.
- ▶ Since amendments to the law in December 2017, the *Marriage Act* now defines marriage as between two people, regardless of gender. As a result, when discussing "Divorce" in Chapter 2 and "Property" in Chapter 7, this booklet sometimes uses the term 'spouse' to describe a husband, wife, heterosexual and same sex de facto partners.

- ▶ Words and phrases are printed in bold for a number of reasons:
 - A term that is defined in Chapter 8 (definition section) is printed in bold the first time that it appears in each chapter.
 - The first time a term is abbreviated in each chapter, it is printed in bold.
 - Time limits are printed in bold.
 - Cross references to other sections of the booklet are printed in bold.

1.2 The legal framework

What laws apply?

The *Family Law Act 1975* (**Family Law Act**) is a federal law that covers:

- ▶ divorce;
- ▶ financial matters (**property** and **maintenance**) of separated couples. *The Family Law Act* covers de facto couples (including same sex de facto relationships) and married couples; and
- ▶ issues about children after the **separation** of their parents (except child welfare or child protection issues which are dealt with by the **Children's Court**, under the *Children and Young Persons (Care and Protection) Act 1998* (NSW)). *The Family Law Act* covers children whose parents were married or in a **de facto relationship** (including a same sex de facto relationship) and children whose parents have never lived together.

The *Child Support (Registration and Collection) Act 1988* and *Child Support Assessment Act 1989* (**Child support legislation**) are federal laws that set up Child Support. These laws cover **child support** in most circumstances. Child maintenance is covered by the *Family Law Act* in rare cases that fall outside the child support legislation.

The NSW *Crimes (Domestic and Personal Violence) Act 2007* (**Domestic Violence Act**) is a state law. It enables **Local Courts** to make **Apprehended Domestic Violence Orders (ADVOs)** to prevent violence, abuse and harassment in domestic relationships. It also gives the police power to arrest anyone who breaches an ADVO and to take away firearms. The *Domestic Violence Act* includes provisions that specifically make stalking and some other forms of intimidation a crime.



Which courts deal with family law matters?

There are three courts that deal with family law matters:

- ▶ the Family Court;
- ▶ the **Federal Circuit Court**; and
- ▶ the Local Court.

The Family Court and Federal Circuit Court are referred to throughout this book as the **Family Law Courts**.

For further information about how to find the Family Law Courts nearest to you see ▶ *Chapter 9: Referrals and Resources*.

2. Getting help

2.1 Counselling and emotional support

Why do I need advice and support?

Separation or divorce can create upheaval in people's lives. It can be difficult to make decisions about money or **property** in a time of emotional turmoil. Often a woman must not only deal with her own emotional needs but also help her children adjust to their changed circumstances after separation.

It is essential that you have good legal advice to help you make the best decisions about yourself and your children. It may also be important to find emotional support. It is sensible to keep the two areas separate. Do not rely on a **lawyer** for emotional support. Do not take legal advice from a counsellor; you should only take legal advice from a lawyer.

Is there anyone I can talk to?

You may need help with the many decisions and feelings you face when your relationship is in trouble. Counsellors can help you get things clear in your mind and give you advice and information about your relationship. Most women's health centres have counsellors that offer services either for free or for a reduced fee depending on your income.

Family Relationship Centres provide information and advice about parenting, relationship and separation issues. These centres also provide **family dispute resolution** services, which can help you and your partner

reach agreement about parenting arrangements for your children without going to court.

A family relationships website and telephone service for parenting advice is also available. See ► *Chapter 9: Referrals and Resources*.

The **Family Law Courts** have information on many topics including helping your children cope with the end of a relationship and handling parental visits.

Usually going to counselling is your own choice, but the Family Law Courts will usually require at least one visit to a family counsellor or **family dispute resolution practitioner** if:

- ▶ you want a divorce and you have been married for less than 2 years;
- ▶ an **application** is made for court orders about children; or
- ▶ the Court orders a **Family Report** about the children's welfare.

Usually what is discussed in counselling is confidential, but in family law there are some exceptions. Most counsellors must report a risk of child abuse to **NSW Community Services**. The work of **family consultants**, employed by the Family Court to assist the Court in cases involving children, is not confidential because they have to make a report about your family to the judge. There may be other exceptions as well. If you have concerns about confidentiality get some legal advice.

2.2 Lawyers

Do I need to get legal advice?

No matter how well you and your partner get on, it is important to get *independent* legal advice. You can then make informed decisions and possibly work out an agreement between yourselves that is fair. Any agreements you make should be checked by your own lawyer.

If you and your partner cannot agree on important issues like the care of the children or dividing the property, it is important to get legal advice quickly before something is changed that may affect your rights or entitlements.

Legal Aid NSW, LawAccess NSW and community legal centres can give free legal advice.

Do I need a solicitor or a barrister?

In NSW, lawyers work as either **solicitors** or **barristers**. Solicitors can:

- ▶ tell you about your legal rights and options;
- ▶ help you reach an agreement with your partner or the other parent of your children; and
- ▶ prepare documents to confirm that agreement and file them in court – i.e. apply to the Court for **consent orders**.

Important Information

You can apply for consent orders without a lawyer but it is better to have a lawyer prepare the actual orders to make sure that your rights are protected and that you have considered all your options. By formalising your agreement through consent orders, a court can enforce the agreement if it is breached. Consent orders are enforceable against both you and the other parent. You can file a completed Application for Consent Orders form through Family Law Courts or the Local Court. There is a filing fee for this form. For current filing fees and for the Family Law Courts website refer to ▶ *Chapter 9: Referrals and Resources*.

Solicitors generally prepare any paper work for a court case and many solicitors will also appear in court to present a case.

Often, a solicitor will want to hire a barrister to represent you in court. Barristers specialise in court work and are usually contacted through and hired by your solicitor on your behalf. If your solicitor recommends a barrister, your solicitor must tell you how much the barrister charges and get your agreement in writing to her or his fees. You will then have the advantages of having two lawyers on your side, but you will also have extra expenses.

It may be cheaper to find a solicitor who will go to court for you without a barrister. However, if your case is complex it may be better to have the experience of a good barrister on your side. It is possible for barristers to take a case on directly without having to go through a solicitor, however it may be difficult to find one prepared to do this.

How can I find a solicitor?

To find a solicitor, ask LawAccess NSW or a community legal centre or the Law Society Solicitor Referral Service for names of solicitors experienced in family law. The NSW Law Society has a specialist accreditation program for family law solicitors. You can ask for the names of solicitors with specialist accreditation. See ► *Chapter 9: Referrals and Resources* for more details.

Many solicitors have a free first appointment so that you can meet them and decide if you feel comfortable working with them.

You can also access free or low cost legal services by applying for a grant of Legal Aid. For further information about applying for Legal Aid, see ► 2.3 in this chapter.

What can I expect from a lawyer?

Your lawyer should clearly explain your legal position to you, tell you what your choices are and what she or he thinks is the best option for you to take. But *you* are the one who should make the decisions about your case, based on advice from your lawyer.

It is important to understand what your lawyer says so you can make informed decisions. If you have difficulty understanding your lawyer's advice, ask your lawyer to explain things to you clearly and in plain English. If you still do not understand, ask them to put it in writing and you can then read it at a quieter moment or ask someone for help to understand.

Your lawyer should not agree to anything with your partner or the other **party's** legal adviser unless you have agreed to it first.

Your lawyer should also keep you informed of the progress of your case and your ongoing costs. A private lawyer will charge you for all time spent doing work for you, including talking to you on the phone and writing letters to you.

Handy Tip

Many women can feel intimidated when talking to their lawyer so it can be useful to write down all the things you want to say and all the questions you want to ask before you go to an appointment with your lawyer.

What will my legal costs be?

Before you choose a lawyer it is important to ask what their fees will be. All lawyers are required to tell their **clients** about their fees.

There are rules setting out exactly how much a lawyer, whether a barrister or solicitor, can charge for work done under the *Family Law Act 1975* (**Family Law Act**). There is a fixed hourly rate for work such as talking to you, either in person or on the phone and going to court. There is a fixed fee for preparing a divorce. There are also set charges for most other work like preparing documents, reading letters and other documents, and photocopying.

Many lawyers charge more than the fee set by the *Family Law Act*. This is permitted but they must first:

- ▶ make a written agreement with you setting out how much they charge for different kinds of work;
- ▶ let you know you can get independent legal advice about legal fees; and
- ▶ give you a Family Court brochure about legal costs, which sets out the scale of fees and your rights to challenge a legal bill.

As well as solicitor's fees, you will pay for disbursements. Disbursements are costs the solicitor pays on your behalf such as fees for your barrister, court filing fees, photocopying, or the cost of **serving documents** on someone.

Barristers charge between \$1,500 and \$6,000 a day, depending on the experience of the barrister and the complexity of the case.

It is impossible to say what your legal fees may be, but here is an example. If you need a full court hearing about children or property lasting two days, it could cost you and the other party about \$25,000 each (from the beginning of the matter to the end). There are more costs if interim hearings are needed or if the value of a family business is involved. A complex case with a hearing lasting two weeks could cost over \$100,000 for each party.

Handy Tip

Every time you talk to your lawyer you pay for their time. You can save money by taking any important documents (e.g. marriage certificate, bank account statements, receipts, superannuation details and details

of any property you own) to your lawyer on the first visit. You can also prepare notes for your lawyer about yourself, your family and your property. ➤ See the **Information Sheet** at the end of this chapter.

What if I don't like what my lawyer is doing?

If you are unhappy with your lawyer you can go to a new one, but you will have to pay the first lawyer's bill before she or he will send your papers on to you or your new lawyer.

If you have a lawyer paid for by Legal Aid, and you are unhappy with the lawyer you have been allocated, you can talk with Legal Aid about changing your lawyer.

You can make a complaint to the NSW Office of the Legal Services Commissioner about your solicitor or barrister. Complaints should be made **within 3 years**.

What if I think my lawyer has charged me too much money?

If you:

- ▶ made a costs agreement with your lawyer about costs; or
- ▶ started a court case in the Family Law Courts,

you can challenge your lawyer's bill.

In NSW you can start by asking for an itemised bill (if your lawyer has not already given this to you). This is a bill that sets out each item of work and the amount charged for the work. If you think that the bill is too high, contact your lawyer to discuss your concerns. Your lawyer may agree to review the bill.

If you cannot reach an agreement you may want to consider costs mediation. If after mediation you are still unable to reach an agreement, you can apply to the Supreme Court of NSW for a costs assessment. This is when the Court appoints an independent costs assessor to consider the bill and your concerns with it. You have **12 months** from when your lawyer gives you the bill to apply for a costs assessment.

Contact the Office of the Legal Services Commissioner or the Law Society of New South Wales for further information about costs mediation and costs assessment. See ➤ *Chapter 9: Referrals and Resources*.

Can anyone else help us to agree about important decisions?

The federal government encourages people to settle their own disputes and it has a number of ways of helping people to do this including through counselling, family dispute resolution (mediation) and arbitration.

There are many benefits of using family dispute resolution:

- ▶ it costs a lot less than going to court;
- ▶ it may be more satisfying to be in control of the process and to come up with your own agreed resolution; and
- ▶ when there are children, parents may have to continue to relate to each other as parents long after their intimate relationship is over. Taking a matter to court can make this adjustment to a working relationship as parents more difficult.

For a discussion about whether family dispute resolution is suitable for you, see ▶ *Chapter 4: Family Dispute Resolution*.

What if I have trouble understanding or speaking English?

Interpreters can be arranged for counselling, mediation, arbitration and discussions with your lawyer and court hearings. You have a right to a free interpreter in court. If a legal aid lawyer is assisting you, ensure that the lawyer knows you need an interpreter – this will also be free.

2.3 Legal aid

Can I get legal aid?

Legal aid is available in family law matters. In order to receive legal aid, you must satisfy:

- ▶ a means test to assess your income and assets;
- ▶ a merit test to assess your likelihood of getting the orders you want; and
- ▶ an 'availability of funds' test to see if there is enough legal aid funds to assist you with your case.

Legal aid is not free and generally you will pay a small contribution to the cost of the legal work, depending on your income. The minimum contribution is \$75.

Legal Aid NSW may require that you participate in a mediation called a Legal Aid Conference to try to resolve the dispute before a grant of aid is given to go to court. Legal Aid NSW should make an exception to this requirement if you have experienced domestic violence, there are concerns for the safety of a child, or a recovery order for the return of a child is needed. A Legal Aid Conference is very beneficial because you can have your lawyer with you.

► **Contact LawAccess NSW on 1300 888 529.**

How do I apply for legal aid?

You can apply for legal aid directly to Legal Aid NSW, or get a private lawyer to apply for you. If your application is successful, Legal Aid NSW will either provide you with a solicitor, or pay the private solicitor's fees at Legal Aid NSW rates. Legal Aid NSW may ask you to pay a contribution towards your legal fees.

Legal Aid NSW may say that they cannot represent you because in the past they have represented the other parent and have a **conflict of interest**. If this is the case and you qualify for legal aid, the grant of legal aid can be made to a private solicitor who does legal aid work and they will represent you.

Legal Aid NSW can prioritise urgent matters if they fit within their Policy and Guidelines. If you think you should be getting help urgently, contact Legal Aid NSW, LawAccess NSW or a community legal centre to ask for assistance.

If your application for legal aid is refused you can appeal to the Legal Aid Review Committee **within 28 days** of being informed of the decision.

What if I'm not eligible for legal aid?

Legal Aid NSW and some community legal centres will give you free consultations with a lawyer to give you advice and possibly assist you with the paperwork to help you represent yourself in court.

Some solicitors and barristers do work for free or for a reduced fee. This is called *pro bono work*. Contact the NSW Law Society or the NSW Bar Association for a *pro bono* referral if you cannot get a grant of legal aid. However, it is very difficult to get a *pro bono* referral for family law matters.

There are also many resources available for people who represent themselves.

See the Federal Circuit Court website: www.federalcircuitcourt.gov.au
or the Family Court of Australia website: www.familycourt.gov.au
and Find Legal Answers: www.legalanswers.sl.nsw.gov.au

2.4 Information Sheet

This information sheet can help you to make the most of the time you spend with your lawyer. Fill out this information sheet and take it to your first appointment with your lawyer together with the documents listed in the checklist below.

1. **You**

Name:

Date of birth:

Address:

Telephone:

2. **Other party**

Name:

Date of birth:

Address:

Telephone:

Name and contact details for lawyer (if relevant):.....

.....

.....

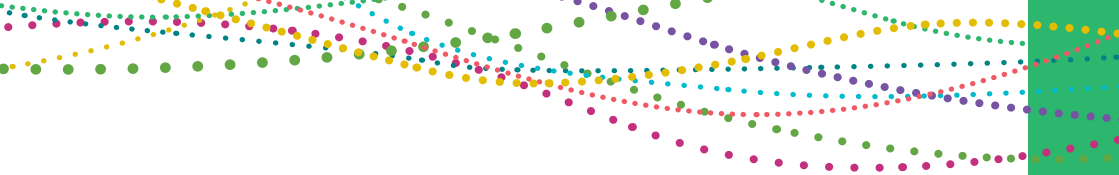
3. **Family history and details**

Date you and your partner started living together:

Date of marriage:

Date of separation:

Children (names, gender, date of birth):.....



Name	Male/Female	Date of Birth	Name of other parent

Current care arrangements for the children:

.....

.....

.....

4. Property

Current assets	Details	Estimated value
House		
Car		
Furniture		
Shares		
Insurance		
Superannuation		
Other		

Current debts	Details	Estimated value
Credit cards		
Personal loans		
Mortgage		
Other		

List the assets you brought to the relationship:

.....

.....

.....

List the assets the other party brought to the relationship:

.....

.....

.....

List your non-financial contributions to the relationship, e.g. homemaker contributions:

.....

.....

List the other party's non-financial contributions to the relationship, e.g. homemaker contributions:

.....

.....

5. Checklist of documents to take to your lawyer

- marriage certificate (if married)
- bank account statements
- credit card statements
- superannuation statements
- insurance statements for you and your partner
- mortgage documents
- title deeds of any property you own (or where they are held)
- receipts for major items you bought before the relationship
- receipts for major items you bought during the relationship
- tax returns and Notices of Assessment

3. Divorce

3.1 Ending the marriage

How can I get a divorce?

To legally end a marriage you need to apply to the **Federal Circuit Court** for a divorce. Orders about property and children are not dealt with as part of a divorce application. You have to make separate **applications** for these orders if you need them.

To get a divorce, you need to prove to the Court that:

- ▶ you have a valid marriage (e.g. by providing your marriage certificate or equivalent documentation); and
- ▶ your marriage has broken down and there is no chance that you will get back together. This is called an **irretrievable breakdown** of your relationship; and
- ▶ you have been separated for 12 months before you applied for divorce; and
- ▶ you are an Australian citizen, a permanent resident or have been living in Australia for at least 12 months before applying for the divorce; and
- ▶ if you have children under the age of 18, there are proper arrangements in place for their care or there are circumstances that warrant making the divorce order, even though the Court is not satisfied that such arrangements have been made.

What does 'separated' mean?

You are considered to be separated from the day either you or your **spouse** decide the marriage is over and communicate this to the other person.

You can get back together for up to three months without re-starting the 12-month **separation** period. However, the time you spend back together does not count as part of the separation. For example: If you separate for two months, get back together for one month and then separate again, the Court will consider that you have been separated for two months not three months.

You may be able to get a divorce if you and your spouse have separated but still live in the same house for financial or other reasons. This is called *separation under one roof*. When you apply for a divorce you will need to prove that your marriage has ended and you and your spouse live separate lives. You do this by providing the Court with two **affidavits**, one from you and one from a friend or family member, telling the Court about your separate lives. For example, you sleep in separate rooms, do not cook each other dinner or do each other's laundry, do not go out as a family, or eat and entertain together. Children over 18 can make this affidavit.

What if I was married for less than two years?

If you have been married for less than 2 years, you need to see a family counsellor to discuss the possibility of reconciliation before you can apply for a divorce. If your spouse is violent and you are afraid to see him or her, discuss this with the counsellor when you make an appointment. The counsellor should arrange separate appointments. If your spouse will not attend counselling, you may still get your divorce by applying for permission (called special leave) from the Court. Unless you urgently need a divorce, it is easier to wait for two years from the date of marriage to apply for divorce.

3.2 Legal process and procedures

What are the steps involved in getting a divorce?

Doing your own divorce application is not too difficult and there are many ways to find help with it if you have any problems or questions.

The *Application for Divorce Kit* on the Federal Circuit Court website (federalcircuitcourt.gov.au) provides a step-by-step guide to doing your own divorce. Most people will need to eFile (file documents over the

internet) their divorce application via the Commonwealth Courts Portal (**the Portal**) (comcourts.gov.au). The Portal is not currently available to same-sex couples wanting to divorce. They will need to contact the National Enquiry Centre (**1300 352 000**) for information about applying for divorce.

A summary of the steps involved in getting a divorce is set out below:

1 Complete an application for divorce online

You will need an email address to register to use the Portal. You will also need access to a printer, scanner and a Visa or a Mastercard to pay for the filing fee. See ► *Chapter 9: Family Law Fees* for more details. A reduced fee may apply in some circumstances. You can apply on your own (this is known as a sole application) or together with your spouse (this is known as a joint application).

You need to complete and print your application. You need to sign the *Affidavit for eFiling Application (Divorce)* in front of a solicitor or **Justice of the Peace**. Once signed and witnessed, you need to upload:

- ▶ the signed *Affidavit for eFiling Application (Divorce)*;
- ▶ your marriage certificate;
- ▶ any affidavits and any other documents for example, evidence of your citizenship, such as your Medicare card;

onto the Portal.

After you pay the filing fee, you will need to choose the location of the court and the date you would like your divorce application to be heard.

The Portal will stamp the documents you uploaded with a court seal. If you have made a sole application, you will need to print the sealed documents and **serve** them on your spouse.

If you have made a joint application, you do not have to serve your spouse with any documents.

2 Serve the application on your spouse

It is very important that you follow the strict rules for serving (formally giving) your spouse with a divorce application. Further information on how to serve is below.

The following documents need to be served on your spouse:

- ▶ the application for divorce;

- ▶ *Affidavit for eFiling Application (Divorce)*;
- ▶ a copy of the *Marriage, Families and Separation* brochure (available on familycourt.gov.au); and
- ▶ any other documents you eFiled on the Portal, except the copy of your marriage certificate.

Your spouse must be served **at least 28 days** before the hearing date if they are in Australia or **42 days** before the hearing date if they are overseas.

You can serve the documents on your spouse in two ways:

▶ **service by post**

If you are confident that your spouse will sign and return an Acknowledgement of Service form, you can try service by post. Without a signed Acknowledgement of Service form, the Court cannot be sure that your spouse received the documents.

▶ **service in person**

You cannot serve the documents on your spouse yourself. You can get a friend or relative aged over 18 to deliver the documents, or use a professional process server.

3 File the service documents

You must prove to the Court that your spouse has been served. You do this by eFiling:

- ▶ if you served your spouse in person, an *Affidavit of Service by Hand (Divorce)*, made by the person who served your spouse with the divorce; and
- ▶ if you served your spouse by post, the *Acknowledgement of Service (Divorce)* form signed by your spouse.

This proves to the Court that your spouse received a copy of your application and the date they received it.

If your spouse was served in person, your spouse can, but does not need to, sign the *Acknowledgement of Service (Divorce)*.

4 The court hearing

If you have made a joint application or there are no children aged under 18 then you do not have to go to court, unless you are asking the court to make other orders about service (see below), or you have been living

separately under the same roof or have been married for less than two years.

If you are asking for the divorce and you have children aged under 18, you need to go to court for the hearing. When you arrive, there will be a list of cases displayed in the court building and a court attendant to direct you to the right courtroom. A court officer will call your name when the Court is ready for your case. Tell the Court you are the **applicant** and that you want the Court to grant your application for divorce. If you have a solicitor, she or he will talk for you.

5 The Court makes its decision

The Court can:

- ▶ grant your divorce;
- ▶ grant your divorce but refuse to make it final until proper arrangements are made about your children;
- ▶ adjourn your case. This means the hearing is postponed to another day so you can give the Court better evidence that your spouse was served or for another reason; or
- ▶ refuse or dismiss your application.

If the Court is satisfied there are grounds for divorce and proper arrangements have been made for your children, it will make a divorce order. The divorce order usually becomes final one calendar month later and is called a final divorce order. The Court can decide to shorten the time after which the divorce order becomes final. A sealed (stamped) copy of the final divorce order will be available on the Portal, which is proof that you are divorced.

What if I cannot find my spouse?

The Court will require proof that your spouse has been served with (formally given) the divorce application. If it is impossible to send a copy of the divorce application to your spouse, the Court can agree to **dispense with service** (i.e. the Court can say that you do not need to serve your spouse). Before doing this, the Court will need to see proof of the ways you have tried to find them by, for example, checking with their family or friends or their last place of work. You will need to eFile an affidavit setting out the attempts you have made to find them.

If you know where one of your spouse's relatives is, the Court can order that you serve that person instead of your spouse. This is called **substituted service**.

What if my spouse is overseas?

You can serve your spouse by post or in person with the assistance of a process server. The Court can order some other type of service, for example, substituted service (service on someone else, such as a relative, or by email).

If I was married overseas, can I still apply for a divorce in Australia?

If you were married overseas you can apply for a divorce in Australia. The test for a divorce is the same as the test applied to marriages made within Australia. That is, you can apply for a divorce as long as you can show the Court that you have a valid marriage, that your marriage has irretrievably broken down, you have been separated for 12 months and that you or your spouse is an Australian citizen, a permanent resident or have been living in Australia for at least 12 months before applying for a divorce.

You will need to provide evidence of your overseas marriage by way of a certificate or official document from the registry of marriages in the country where you got married. If this document is not in English, you also need to provide an English translation of the document. If you can not produce an official document proving your marriage, you can file an affidavit describing your marriage and the reason why you can't produce an official document.

What if I do not want to divorce my spouse?

You cannot legally stop a person applying for a divorce as long as the requirements for a divorce have been met. See ► *section 3.1* above for the legal requirements.

However, the law provides for fair **property settlement, maintenance** and **child support** so you should get advice about these matters if they have not already been sorted out.

What if my spouse files for divorce and makes untruthful statements in their application?

You can eFile a Response, putting your version of events in a statement. If you eFile a Response you must then go to court for the hearing. It is best

to have the record set straight, as the divorce application will remain in the court file.

How much will it cost me to get a divorce?

When you apply for a divorce you need to pay for:

- ▶ court filing fee
- ▶ a certified copy of your marriage certificate if you do not have the original
- ▶ translation of marriage certificate (if not in English – see ▶ *What if I need my marriage certificate translated?* in section 3.3 below)
- ▶ a process server to serve your divorce application on your spouse – on average costs between \$70–\$140 (depending on location of spouse)
- ▶ your lawyer's fees if you have used a lawyer to help with your divorce application.

See ▶ *Chapter 9: Family Law Fees* for current fees.

If you and your spouse have a child under 18 years old, you will also need to attend a hearing at court. This could mean taking a day off work.

If your spouse starts the divorce proceedings then you will not have to pay for the divorce.

Lawyers' costs are set by the Family Law Rules and Federal Circuit Court Rules and change each year. Your lawyer can choose to charge more than the set amount as long as they tell you up front, and you sign a costs agreement.

What if I need to apply for a divorce but can't afford the court filing fee?

You may be eligible for a reduced filing fee for divorce applications if you are:

- ▶ entitled to Commonwealth health concessions (see below);
- ▶ receiving Legal Aid, Youth Allowance, Austudy payments or Abstudy or are represented by an approved legal aid scheme or service, including an approved community legal centre;
- ▶ under 18 years old; and/or
- ▶ an inmate of a prison or detained by law in a public institution.

Reduced filing fees for divorce are granted to primary cardholders (but not dependants of the primary cardholder) of a Health Care Card, Health

Benefit Card, Pensioner Concession Card, Commonwealth Seniors Health Card, or any other card issued by Centrelink or the Department of Veterans' Affairs that entitles you to Commonwealth health concessions.

If you do not fall within the categories above but cannot afford court fees, you can still apply for a reduced fee by filing a Reduction of Fees (Financial Hardship) application. The court will consider whether a reduced fee is appropriate, based on your personal circumstances.

3.3 Marriage certificates

What if I can't find my marriage certificate?

If you do not have your marriage certificate, you can order a certified copy from the Registry of Births, Deaths & Marriages. There is a standard fee for a marriage certificate. A certificate can be provided urgently for an extra charge. See ► *Chapter 9: Family Law Fees* for current fees or contact the Registry of Births, Deaths & Marriages: www.bdm.nsw.gov.au

If your foreign marriage certificate is not available, you must eFile an affidavit with your divorce application explaining why the certificate is not available.

What if I need my marriage certificate translated?

If your marriage certificate is not in English, you will need to have your marriage certificate translated into English by a certified translator. The translated version of your marriage certificate must be eFiled, with an affidavit by the translator stating they are competent to make official translations.

You may be able to get your marriage certificate translated for free. Visit translating.dss.gov.au for more information. Otherwise, you can attend your local Service NSW Centre and pay to have your marriage certificate translated into English.

3.4 Life after the divorce

When can I get married again?

One month after your divorce hearing, your divorce order becomes final. Once your divorce order becomes final, your marriage is legally ended and you can remarry. The Court can shorten the one-month period.

What about my will?

It is a good idea to make a new will when something big changes in your life like marriage, divorce or the birth of a child. When you get married, your will is automatically revoked unless it was stated in your will that it was made in contemplation of the marriage. A divorce does not automatically revoke a will. However, if you have a will leaving anything to your spouse, when your divorce becomes final, that gift to your former spouse will be revoked unless your spouse can prove that it was not your intention to revoke their gift.

Most couples own their family home as *joint tenants* (each person owns 100% of the property) rather than *tenants in common* (each person owns a share e.g. 50% of the property). If you own property as joint tenants with your spouse, that property will go directly to your spouse as the surviving tenant and will not become part of your estate when you die (the reverse is also true). Marriage or divorce or a will does not have any effect on a joint tenancy. If you do not want your share of the property to go to your spouse should something happen to you, it is important to pursue a property settlement as soon as possible. You may also want to get legal advice on ending the joint tenancy and then owning the property as tenants in common.

When can I get a property settlement?

You can make a property settlement any time after you separate. Once a divorce becomes final, you must apply to court **within 12 months** if you need a property settlement or **spousal maintenance**. Generally, it is better to do a property settlement first or at the same time as applying for a divorce. If your spouse applies for divorce, seek legal advice to get a property settlement if you have not already done so.

4. Children

4.1 When parents can agree

Do we have to go to court about the children?

The *Family Law Act 1975* (**Family Law Act**) encourages separating parents to agree on parenting arrangements without going to court. If you and the other parent can agree about arrangements for your children, then you do not have to go to court at all.

An application for a parenting order can be made by anyone who has a genuine interest in the child and does not have to be a parent (see ► 4.4 of this chapter), however this chapter focuses on how the law applies to parents.

We agree about arrangements for the children – what now?

There are three options:

- ▶ You can have an *informal agreement* about the care and living arrangements of your children. Your agreement can be verbal or in writing. There are some benefits to having informal arrangements, for example, they can be much more flexible than court orders. However, they are not enforceable and if they are not detailed enough, this can lead to misunderstandings about what the agreement means.
- ▶ You can write a *parenting plan* about the arrangements for your children. You can do this yourselves or get the assistance of a **Family Dispute Resolution Practitioner (FDRP)**. If you are eligible for

legal aid, you can attend a type of family dispute resolution called a **Family Law Conference**. For more information about family dispute resolution see ➤ *section 4.2* below.

- ▶ You can have your agreement or parenting plan made into **consent orders** by an *Application for Consent Orders* with the Court. See ➤ *Chapter 2: Do I need a solicitor or barrister?* for more detail about consent orders.

You can also combine the certainty of court orders with the flexibility of parenting plans to cover different aspects of the arrangements.

What is a parenting plan?

A parenting plan is a written agreement, signed and dated by you and the other parent. It sets out the future care arrangements for your children. It can cover who has **parental responsibility** for the child, who the child lives with, spends time with and communicates with, **child support** payments and other issues.

Parenting plans are not legally binding and cannot be enforced if one parent does not follow the agreement. However, the Court will take into account the agreement made in a parenting plan if your case later goes to court and the court believes it is in your children's best interests to do so.

What is a Family Relationship Centre?

Family Relationship Centres (FRCs) are government-funded services that provide information to people about relationship issues including parenting, financial help and pre-marriage counselling.

FRCs also provide family dispute resolution (mediation) services to help separating parents work out arrangements for their children. FRCs provide assessment, preparation and three hours of family dispute resolution for free or a low fee.

There are FRCs across NSW. See ➤ *Chapter 9: Referrals and Resources*.

4.2 Family Dispute Resolution

What is Family Dispute Resolution?

Family Dispute Resolution (FDR) is a way of sorting out legal problems without going to court. This method of dealing with legal problems is

generally known as mediation but in family law it is called FDR and the mediator is called a **FDR practitioner (FDRP)**.

A FDRP is a trained, neutral person who helps people discuss their legal problems and reach an agreement that is acceptable to both parties. FDRPs do not tell you what to do or give legal advice. They try to help you to explore options you may not have thought of and to reach an agreement that reflects what is important to both people involved.

Do I have to participate in FDR?

In most circumstances you must participate in FDR with the other parent before you can make an **application** to the Court for **parenting orders**. However, there are important exceptions to this requirement (see below).

If you cannot reach an agreement at FDR or an exception applies, you can apply to the Court for parenting orders.

How does the Court know I have attended FDR?

You can make an application to court for parenting orders if:

- ▶ you have a **section 60I certificate** from the FDRP that assisted you; or
- ▶ an exception applies to you and you include this information in your application.

A section 60I certificate from a FDRP will state one of the following:

- ▶ the other **party** did not attend for FDR;
- ▶ all parties attended and a genuine effort was made to resolve the dispute;
- ▶ one party did not make a genuine effort to resolve the dispute; or
- ▶ the FDRP decided that FDR was not appropriate.

If a genuine effort to resolve the dispute is not made, it may affect future court decisions about legal costs.

What are the exceptions to FDR?

You will *not* need to get a certificate from a FDRP if:

- ▶ you and the other parent are applying for consent orders;
- ▶ your application is in response to the other party's application;

- ▶ the Court is satisfied there are reasonable grounds to believe there has been or is a risk of abuse or family violence;
- ▶ your application is about a **contravention** of parenting orders that were made in the last 12 months, and the person who breached the court order showed serious disregard for their obligations under the order;
- ▶ your application is urgent; or
- ▶ one of the parties is unable to participate in FDR for a reason such as having a disability or living in a remote location.

It is important to remember that even if you do not attend FDR prior to filing in Court because you are eligible for one of the exceptions, the Court can still order the parties to attend counselling or FDR. Safety measures can be put in place to make sure you can participate.

Should I try FDR if I have experienced family or domestic violence?

It can be difficult to decide whether or not to try FDR if you have experienced domestic violence. FDR works best when there is equal bargaining power between the two parties. Where one party has significant power over the other, it is usually difficult to achieve a fair resolution. A woman who feels less powerful or intimidated may make concessions or agree to decisions that are not necessarily in her best interests, that are not what she really wants, or may not be in the best interests of the children.

FDR is not normally recommended when there is domestic violence. However, a woman may still be able to achieve a fair **settlement** if she has good legal advice and feels safe to assert her rights with mediators' present. FDR can be part of a healing and empowering process but should be entered into with caution and good support.

If I have experienced domestic violence how can I try and make FDR work for me?

The following suggestions might help you to make FDR work for you if you have experienced family violence:

- ▶ Tell the FDRP about your experience of domestic violence and discuss what she or he can do to provide a safe process;
- ▶ If you will feel intimidated or afraid to be in the same room as your ex-partner ask about a telephone FDR or a shuttle FDR (see ▶ "What is shuttle FDR?" on page 36) so that you will be in separate rooms;

- ▶ Make arrangements for separate times to arrive and leave the waiting rooms;
- ▶ If you are eligible for legal aid, it may be possible to organise a Family Law Conference which is a type of FDR where you can have a **lawyer** present. This provides an important safeguard if there is a history of domestic violence;
- ▶ Ask your local Family Relationship Centre if they have Lawyer Assisted FDR available. If your case is suitable and the other party consents to also being legally represented then legal representation may be possible for the FDR process;
- ▶ Get legal advice about your options before and after attending FDR to make sure your agreement is fair and safe. Don't sign an agreement if you are unsure about what you are agreeing to or if you are unsure about whether it is in your best interests or the best interests of your children.

What is shuttle FDR?

Shuttle FDR is where the parties are in different rooms. The FDRP moves between rooms to listen and pass information about the issues and possible solutions between the parties. Shuttle FDR is one way of attempting to provide a safe environment where there is a history of domestic violence. FDR can also be done by telephone in appropriate circumstances.

What happens in FDR?

FDR will usually go for three hours, but it may finish earlier or go for longer. FDR could also run over a number of sessions. It is important to have breaks and for the session not to go too long, otherwise it's too exhausting.

Different FDRPs may use different processes but usually an FDR session will include the stages described below.

1 Opening statement by the FDR Practitioner

- ▶ The FDRP explains their role (a neutral person there to assist communication and negotiation) and outlines the expected process.

2 An opening statement by each party

- ▶ Each party is asked to give a short statement outlining how they see the situation and how they and/or the children have been affected. No interruptions are allowed. It does not matter who goes first.

3 The FDRP summarises both opening statements

- ▶ Listen carefully and let the FDRP know if they have got anything wrong.

4 Setting the agenda (list of issues or topics to discuss)

- ▶ The FDRP identifies issues and works with the parties to set an agenda for the session. It might include issues like where the children live, when and how they spend time with the other parent, schooling, how the parties will communicate with each other about the children and so on.

5 Exploration

- ▶ The FDRP works with both parties to explore the issues on the agenda one at a time. There is usually lots of talking and sometimes allegations are made about past behaviour. The purpose of FDR is not to decide the truth of an allegation; it is about making decisions about future arrangements for the children.

6 Private sessions

- ▶ The FDRP may stop the session one or more times to talk privately with each party. Private sessions are confidential. The FDRP explores options with each party, discusses underlying issues or hidden agendas and asks the parties to think about whether options are practical. She or he may also explore alternatives to those each party may have proposed.

7 Negotiation

- ▶ Some FDRPs enter into a negotiation stage towards the end. At this stage, the FDRP might become more involved in problem solving, assessing options, identifying common interests and focusing on the best interests of the children.

8 Agreement

- ▶ Agreement in FDR is by consensus, that is, both parties agree on the outcome. Sometimes you may reach agreement about some but not all issues. The FDRP may want to put your agreement in writing. Before signing any written agreement, get legal advice.

9. Termination

- ▶ Termination of FDR occurs where there is no agreement. This may be because a party walks out or does not show up, where the parties cannot reach an agreement or where safety issues cause the FDRP to decide to end the FDR. If this happens the parties will be given a section 60I certificate that states that FDR was unsuccessful. This certificate allows either party to file an application in court within 12 months of the date on the certificate.

Important Information

The following suggestions may help you prepare for FDR.

- ▶ Get legal advice before going to FDR. Consider your best and worst alternatives to a negotiated agreement. You might hear this called a 'BATNA' and 'WATNA'. They may be the range of orders a court may make. Knowing the best and worst alternatives will help you in the negotiations.
- ▶ Prepare a short opening statement to make at the beginning of the FDR meeting. Give your view of the situation and how you and/or the children have been affected.
- ▶ Prepare for the rest of the FDR meeting by writing notes to take with you and help you remember what to talk about. Write notes about:
 - your main concerns—the issues that you need to have resolved. Focus on what is in the best interests of your children and explain why;
 - what you want and why it is best for your children; and
 - what you might agree to in the short term and what would need to happen or change for you to move beyond this short-term arrangement.
- ▶ If your ex-partner gives their opening statement first, do not respond to what is said—stick to the opening statement you prepared. The FDRP's job is to identify the issues and give you a chance to respond to them later.

- ▶ Be prepared to let the FDRP know if you need a break or if you feel the session needs to end. It's important the FDRP knows any difficulties you are having with the session. Otherwise, there is a risk that she or he may decide that a genuine effort wasn't made to resolve the dispute and this may affect future court decisions about legal costs.
- ▶ Stick to the agreed ground rules during the session.
- ▶ Try not to interrupt when others are speaking. Write down your concerns and raise them when it's your turn.
- ▶ Don't feel pressured to sign a parenting agreement at the FDR session—get legal advice first.

4.3 Decisions of the Family Law Courts about children

What if we cannot agree about what happens to the children?

If you cannot agree about arrangements for the children, it is important to get legal advice quickly to decide whether or not you need court orders.

When parents cannot agree on the arrangements for their children, then either parent may apply to the Court for a decision about what is best for the children. If the Court makes orders about children they are called parenting orders. Generally, the Family Law Act requires parents to try FDR before applying to court. See ▶ *section 4.2*.

Parenting orders deal with who has parental responsibility; where the children live; who the children spend time with; how parents should communicate with each other about the children; the communication children are to have with another person (including by phone, Skype or email) and any other aspect of each child's care, welfare and development.

What is parental responsibility?

Both parents automatically have parental responsibility for a child until that child turns 18. Parental responsibility means 'all the duties, powers, responsibilities and authority that, by law, parents have in relation to children'. If you separate from the other parent your parental responsibility

does not automatically change. Both parents can make important decisions about the child's life.

What is equal shared parental responsibility?

The *Family Law Act* presumes that it is in the best interests of the child to make an order that provides for **equal shared parental responsibility**.

When an order is made for equal shared parental responsibility, parents are obliged to consult each other and agree on major long-term decisions about the child. These issues include:

- ▶ the child's education (both current and future);
- ▶ the child's religious and cultural upbringing;
- ▶ the child's health;
- ▶ the child's name; and
- ▶ changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent. (This does not include a parent's decision to form a relationship with a new partner, but does include moving to another area.)

The presumption for equal shared parental responsibility does not apply in cases of child abuse or family violence. In these circumstances, the Court must look at whether there should be equal shared parental responsibility or sole parental responsibility. While the Court can make orders for sole parental responsibility, it is usually very reluctant to make this order.

Equal shared parental responsibility does **not** mean the amount of time the child spends with each parent is the same. The decision about equal shared parental responsibility is made separately to any decisions about how much time a child may spend with each parent.

How are the best interests of the child decided?

The 'best interests of the child' is the most important consideration when the Court makes orders about children. The best interests of the child are made up of primary and additional considerations.

The primary considerations are the:

- ▶ benefit to the child of having a meaningful relationship with both parents; and

- ▶ need to protect the child from physical or psychological harm, from being subjected to, or exposed to abuse, neglect or family violence.

The need to protect children from harm is given greater weight in cases where there is family violence, child abuse or risk of exposure to either.

The additional considerations are:

- ▶ the views of the child;
- ▶ the nature of the relationship of the child with parents and others, including grandparents;
- ▶ the extent each parent has participated in:
 - making long term decisions about the child;
 - spending time with the child; and
 - communicating with the child;
- ▶ the extent each parent has met their obligations to maintain the child (non-payment of child support can be considered);
- ▶ the effect of change to the current arrangements for the child (**status quo**);
- ▶ the practical difficulties and expense of 'spending time with' and 'communicating with' a parent and the impact on the child of maintaining personal relationships and direct contact regularly with both parents;
- ▶ the capacity of the parent and others to provide for the needs of the child;
- ▶ the maturity, sex, lifestyle and background of the child and parents;
- ▶ if the child is an Aboriginal or Torres Strait Islander child, the right to enjoy Aboriginal or Torres Strait Islander culture;
- ▶ the parent's attitude to the child and to parenting;
- ▶ any family violence involving the child or a member of the child's family;
- ▶ an order that is least likely to lead to further proceedings; and
- ▶ any other fact or circumstance the Court thinks relevant.

The Court can consider any family violence orders and reach their own conclusions about whether that family violence order is relevant.

Is it likely that the Court will order equal time living arrangements?

If the Court orders equal shared parental responsibility for the child, the Court must consider making an order for the child to live with each parent on an *equal basis* or to provide for the other parent to have **substantial and significant time** arrangements with their child. Substantial and significant time should include weekend, weekdays and holidays and allow for parents to be involved in daily routines and special occasions. The Court can only order these care arrangements if it is in the best interests of the child and reasonably practical. The Court considers:

- ▶ how far apart the parents live from each other;
- ▶ the parents' current and future capacity to have an arrangement where the child can spend **equal time**, or substantial and significant time, with each of the parents;
- ▶ the parents' current and future capacity to communicate with each other and resolve any difficulties that might arise in making an arrangement work;
- ▶ the impact that an arrangement would have on the child; and
- ▶ other matters the Court considers relevant.

Why have orders for children to spend time and communicate with someone?

The main aim of making parenting orders about children spending time or communicating with the other parent is to foster an ongoing relationship between a child and both parents. As long as there are no risks of harm to a child, it helps children if you encourage them to spend time with their other parent, so they do not feel torn between the two of you.

Does the Court always make orders for children to spend time and communicate with the other parent?

Parents do not have an automatic right to spend time with or to communicate with a child. The child on the other hand, has a right to know and be cared for by both parents. Unless you can show that there is an unacceptable risk of abuse or neglect or family violence directed towards the child or the child's family members, the courts usually make orders for a child to spend time and communicate with the parent the child does not live with. If you have serious concerns about your children's safety during parental visits you should contact your local office of **NSW Community Services** immediately and also get some legal advice.

Parents have obligations to help make 'time' and 'communication with' orders happen. Interfering with the time your child spends with or communicates with the other parent can be seen unfavourably by the court. If it is an unacceptable risk situation, get legal advice.

4.4 Who can apply for court orders?

Who can apply for a parenting order?

An application for a parenting order can be made by anyone who has a genuine interest in the child. This means it does not have to be made by a parent. It enables people such as a grandparent to apply to the court for orders about children.

I co-parent a child with my same-sex partner. What are my rights if we separate or divorce?

If you were in a **de facto relationship** with the birth mother or you were married to the birth mother and you consented to the assisted/artificial conception procedures when the child was conceived through donor insemination, then you are the child's legal parent. As a parent, you have parental responsibility for the child. If you cannot agree with the other parent about arrangements for the child then you can apply to the Court for the child to live with you, spend time or communicate with you.

If the child was born as a result of sexual intercourse, then you are not the child's legal parent (even if you were in a de facto relationship or married at the time) but you can apply to the Court as someone concerned with the child's care, welfare or development.

Do I have any rights to see my grandchildren if I'm a grandmother?

If you are a grandparent, you can apply to the Court to see your grandchild. The *Family Law Act* says that children have a right to spend time with their relatives and other significant people if it is in their best interests. The relationship of a child with others, including grandparents, is specifically included in the list of considerations about the best interests of the child. If you want an order to spend time or communicate with your grandchild, then you must first attempt FDR and if that does not work you can apply to the Court for orders. You will need to tell the Court why it is in the best interests of your grandchild to make the orders you want. It is possible to apply for court orders even if the child's parents are still together. Legal Aid NSW has

a brochure about legal options for grandparents. See ► *Chapter 9: Referrals and Resources*.

4.5 Going to court

Do I need a lawyer?

It is possible for you to go through the entire court proceedings without having a lawyer at all and many people have no other choice. You will need to be prepared to 'represent' yourself in court by finding out about the Court rules and the law, writing **affidavits** yourself and making arguments to the Court about why it should make the orders you are asking for. This can be particularly hard if the other parent has a lawyer.

If you are on a low income, you should see if you are eligible for legal aid. You can also get free legal advice from some community legal centres and many family lawyers will give you a free first appointment.

The **Family Law Courts** have tried to simplify procedures so it is easier for you to apply for orders without the assistance of a lawyer. Check the court rules and case management directions. These are available from the court registries or on the Family Law Courts website: www.familylawcourts.gov.au

While it is possible to represent yourself, it is in your interests to get advice from a lawyer and have your paperwork reviewed by a lawyer before you file paperwork in Court.

For more information see ► *Chapter 2: Getting Help*.

How long will it take to get a parenting order?

Generally, you can assume it will take a lot longer than you want. Some cases could take up to two years because of limited court resources or because of **interim applications** in your case. Urgent matters can be decided very quickly if necessary. Your **Local Court** may decide matters much more quickly, depending on how busy it is and if it is prepared to hear family law cases.

What is a less adversarial trial?

The less adversarial trial (**LAT**) process means that the same judge is involved early in the case and takes an active role. Parties talk directly to

the judge, rather than through their lawyers, and everything said in court is treated as evidence in the case. At the beginning of a case, you will be asked to complete a LAT questionnaire. You should complete this very carefully since it will become part of the evidence in the case. Note that a LAT only takes place in the Family Court.

What is the Magellan Program?

The Magellan Program was developed to deal with Family Court cases involving serious allegations of physical and sexual child abuse. An individual judge closely manages each Magellan matter and the court aims to deal with these matters as quickly and efficiently as possible. The Magellan Program is only available in the Family Court.

Can a lawyer be appointed for the children?

The Court may decide to appoint an **independent children's lawyer** to represent your child's interests. An independent children's lawyer should be appointed in any case where there is so much hostility that the best interests of the child may not be presented to the Court by either parent, or where there are serious allegations of abuse or neglect of the child or where there is some other complicating feature like differences of religion or culture between the parents, or mental health issues.

If you believe that an independent children's lawyer should be appointed you can ask the Court to make this order.

In most cases the independent children's lawyer is paid by Legal Aid but parents may have to contribute to or cover the costs of the independent children's lawyer. This depends on the financial situation of the parents.

What if the children are in danger?

If you or your children are at risk of family or domestic violence or sexual assault, you should call the police on 000.

You should get legal advice as quickly as possible if your children are in danger. You can apply to the Court for an urgent order for your children to live with you. In a genuine emergency a court can make orders without the usual requirement that notice be given to the other parent. An order made without the other parent being present is called an **ex parte order**.

The Court can also make a temporary order about the children, called an **interim order**. Generally, they are made to last until all the evidence can

be heard at a final hearing. If there is any risk to the child's safety then an interim order should be made to protect the child from this risk.

If you fear for the safety of your children, you can contact the police or apply at a Local Court for an **apprehended domestic violence order (ADVO)**. The Family Law Courts can also give you a protection order (called an injunction in family law) for you and the children, where there is a clear threat to you or your children's safety or welfare.

Notice of Risk in the Federal Circuit Court

All Initiating Applications or Responses seeking parenting orders in the Federal Circuit Court must be accompanied by a Notice of Risk. The *Notice of Risk* must be filled out in accordance with the prescribed form and can be filed electronically through the Commonwealth Courts Portal (www.comcourts.gov.au). The Notice seeks information about child abuse and family violence; mental ill-health; drug and alcohol abuse; parental incapacity; or any other risk posed to the child. The information provided in response must relate to how they pose a risk to the child.

Notice of Child Abuse, Family Violence or Risk of Family Violence in the Family Court

If filing in the Family Court, a *Notice of Child Abuse, Family Violence or Risk of Family Violence* will be required where there are allegations to be made. The Notice of Child Abuse requires a concise summary of the allegations and details of each of them including dates they occurred, and any other particulars, which reflect the contents of the **affidavit evidence**. The *Notice of Child Abuse* does not specifically seek additional information about the risk to a child from mental ill-health, drug and alcohol abuse or parental incapacity. In other respects, the substance of the information to be provided is the same as required for a *Notice of Risk*.

What if the other parent has sexually or physically abused our child?

If your child has been sexually or physically abused, you can be exempted from having to participate in FDR and can go straight to Court. Depending

on the Court in which your matter is being heard, you must lodge either a *Notice of Risk* or *Notice of Child Abuse, Family Violence or Risk of Family Violence* when you file your Application or Response in Court (see above). After the Notice is filed, the Court will assess whether your case should be put in the **Magellan program** (see ➤ page 45).

4.6 Contravention of parenting orders

What happens if the children do not spend time with the other parent as required by a family law orders?

Family law orders must be taken seriously. If there is an order for the child to spend time with the other parent or any other person, and you do not allow this to happen, you risk being taken to court for contravention (breach) of the court order.

Depending on the circumstances, the Court may refer you to a parenting program, order make-up time with the other parent, or in serious or persistent cases issue a fine or even gaol you. If the parenting orders are no longer workable, the Court may consider changing the orders.

If you are taken to court for breaching a parenting order, you may avoid being punished if you show that you had a reasonable excuse. A reasonable excuse may be that you needed to protect someone's health or safety, or you believed that you had not contravened the order at the time.

The Court can order costs against an unsuccessful **applicant** if they lodged the contravention application to harass the other parent.

If there are parenting orders in place and you are concerned that the children are in danger when spending time with the other parent, you need to immediately apply to the Court to change the parenting orders. See ➤ "What if the children are in danger?" on page 45.

The Court might order you to attend a post separation parenting program. The aim of these programs is to help families who are having difficulty making court orders about children work, particularly where there have been breaches of the orders.

What can I do if the other parent does not want to see the children?

Even if there are parenting orders for the children to spend time with the other parent, the courts have not been willing to force a parent to see their

child. The courts have yet to consider this to be in the child's best interest. A practical option may be to ask for help from a family counsellor or parenting program to assist the other parent to acknowledge parental responsibility.

4.7 Taking children without consent of a parent

What if the other parent takes the children?

You should first try to contact the other parent and see if you can get an agreement about returning the child. If you do not have a parenting order and the children are taken and/or not returned, you can apply to the court for a *parenting order* for the child to live with you and a **recovery order** for the child to be returned. If you already have a parenting order, you still need to go back to court and apply for a recovery order. A recovery order is like a warrant for the return of the child and empowers the state, territory and federal police to find and return your child to you.

You will need to prove that the Court should deal with your case urgently. If your case is not urgent you will have to try FDR before you can file an application to the Court (unless one of the other exceptions to attending FDR applies to you).

Normally you need to serve (formally notify by giving a copy of the court documents) the other parent when you make a court application, but if you cannot find the other parent or if the situation is very urgent, you may be able to get the Court to hear your application *ex parte* (without the other parent present in court).

What if I do not know where my children have been taken?

You can get a *location order* or a *commonwealth information order* to get information from individuals or government departments like the Australian Taxation Office, Centrelink or Housing NSW about where the other parent is and where the children may be.

Can I stop the children being taken overseas?

Your children could be taken overseas without your knowledge if they have current passports and your partner can access these passports. If you are afraid your partner will take the children out of Australia, get legal advice straight away.

Important Information

There are some steps you can take to prevent your children from being taken overseas without your consent.

- ▶ If the children already have passports, keep the passports in a safe place.
- ▶ If the other parent already has the children's passports, ask the Court to order the other parent to give the Court their passport and the children's passports and get a restraining order so that the children cannot be taken out of the country without the Court's permission.
- ▶ If the children do not have passports, ask the Australian Passport Office to stop passports being issued for your children. You can also make a Child Alert Request so that if an application for a passport is lodged, the Passport Office is warned that there may be circumstances to consider and is more likely to notify you about this application. This Alert Request will remain valid for 12 months. If you have a court order for a Child Alert Request, it will remain valid until the child is 18 years of age.
- ▶ If it is possible that your children could get foreign passports or be added to the other parent's foreign passport, you must contact the embassy or consulate about that country's policy to protect children from being abducted overseas.
- ▶ If you have real concerns about your children being taken out of Australia without your consent, you can ask for a specific court order to place the children on the Airport Watchlist (also known as the Family Law Watchlist). You then need to provide a sealed/stamped copy of the court order to the Australian Federal Police (AFP), which directs them to place the children on the Watchlist. Any child on the Watchlist will be stopped before boarding a plane or ship that is leaving Australia. The child's name will remain on the Watchlist until they are 18 years of age or until a future court order directs the AFP to remove the child's name from the Watchlist.

What if the children are taken out of Australia?

Unless there is clear written consent for a child to travel or the court has made an order for overseas travel, section 65Y of the FLA makes it an offence to take or send a child overseas from Australia if that child is subject to a parenting order dealing with:

- ▶ Where a child lives
- ▶ When a child spends time with a person
- ▶ With whom a child communicates with, or
- ▶ When a person has parental responsibility for a child.

Similarly, unless there is clear written consent for a child to travel or the court has made an order for overseas travel, section 65Z of the FLA makes it an offence to take or send a child overseas from Australia if there is an application filed in court seeking orders of the type set out above.

If the children are taken out of Australia without your consent or kept overseas longer than you allowed, get legal advice straight away.

Australia has signed an agreement (the Hague Convention on the Civil Aspects of International Child Abduction) with more than 70 other countries to prevent child abduction. If the country the children have been taken to has signed this agreement you can ask that country to assist in returning your children to Australia. To do this, you will need to contact the Commonwealth Attorney-General's Department and NSW Community Services.

To have your children returned to Australia, you must show that your children are aged 16 or under; the children usually live in Australia and that you have a legal right under Australian law to decide where they live.

If the country is not part of the Hague Convention it is more difficult to get the children back. You can either try to enforce an Australian parenting order in the other country or you can try to get a parenting order in the country where the children are located.

If you are concerned that your children may be taken illegally out of Australia, contact the Australian branch of **International Social Service** that provides telephone referral and social work support. If there is a risk that your children may be taken out of the country before the next working day, the Family Law Courts have an out-of-hours service for emergencies. See ▶ *Chapter 9: 'Referrals and Resources'*.

If the children live with me can I move?

If moving house will make it more difficult for the other parent to spend time with a child or will make the existing arrangements unworkable, the other parent will need to agree to you moving house. If they won't agree you will need to apply for parenting orders allowing you to move. These cases are called relocation cases. You will have to show the Court why it is in the best interests of the child to allow the relocation and how the other parent will be able to maintain a meaningful relationship with the child.

You should get legal advice before you move. If you move with the child without the consent of the other parent or a court order, the Court can make orders for the child to live with the other parent or force you to return if the child is to live with you.

4.8 Appeals

What can I do if I am not happy with the court decision in my case?

If you think a **registrar** has made an incorrect decision you can ask for a 'review' by a judge. You need to lodge an Application for Review. You need to check with the court staff about the time limits.

If you think the judge made an incorrect decision based on the law, you can appeal the decision. An appeal is not a rehearing of the whole case. The appeal is only to look at whether the judge made an **error of law**. A Notice of Appeal must be filed **within 28 days** of the order being made and you will have to pay the filing fee or apply for a waiver or exemption of the fee.

You must apply for a **stay of execution** from the Court that made the orders you do not like. The stay will stop those orders from having effect while you wait for the appeal.

If you have applied for your parenting orders in the Local Court and you do not agree with the decision of the magistrate, you can appeal to the Family Law Courts. The matter will be heard by a judge of the Family Law Courts and the case is reheard from the start. You need to lodge a Notice of Appeal **within 28 days** of the orders being made by the Local Court and pay the filing fee.

4.9 Other common questions

How can I change my child's name?

A child's name cannot be changed without the consent of both parents or a court order.

You first need to try FDR and attempt to reach agreement with the other parent. For further information about FDR, including exemptions from the requirement to attend FDR, see ► *section 4.2*.

If you cannot reach agreement through FDR, or if you cannot find the other parent, you can apply to the Court to change the child's name. You will need to persuade the Court that the name change is in the best interests of the child.

Alternatively, you can apply to the District Court to change the child's name. The District Court will not consider other parenting issues and there are no FDR requirements.

If you have concerns for your safety or the safety of your child, you can ask the court to make an **ex parte** and non-publication application. This means the other parent will not be notified of your application. Instead, a decision will be made in Chambers (outside of the open courtroom) and the application will be given a pseudonym rather than using names.

What happens to the children if I die?

If there is an order that your children live with you, the other parent does not automatically have the right to have the children live with them if you die.

You can decide who you would like your children to live with and name them as a 'testamentary guardian' in your will. This may help that person to get a parenting order that the children live with them. Naming a guardian in your will does not guarantee that the Court will order what you want. The Court will still decide the case based on the best interests of the child. However, your wishes are important and will be considered by the Court.

5. Protection against violence and harassment

5.1 Domestic violence

What is domestic violence?

Domestic violence occurs when one person tries to coerce or control another person in a family-like or **domestic relationship**. See ► *Chapter 8* for definition of domestic relationship.

Domestic violence involves an abuse of power and can take the form of physical violence, sexual abuse or sexual violence, emotional or psychological abuse, verbal abuse, **stalking** and intimidation, social and geographic isolation, financial abuse, cruelty to pets, or damage to **property** or threats to be violent in these ways. In the majority of cases, domestic violence is perpetrated by men against women. However, women can be perpetrators of violence in both heterosexual and same sex relationships.

What is the difference between domestic violence and family violence?

The terms 'domestic violence' and '**family violence**' are often interchanged. They both generally refer to violence between two or more people who are connected by a domestic relationship.

In NSW, the terms 'domestic violence' and violence in a 'domestic relationship' are used in the **Domestic Violence Act**. This legislation deals with personal protection orders called Apprehended Violence Orders (**AVOs**).

However, the federal *Family Law Act 1975* (**Family Law Act**) refers to 'family violence'. The definition of family violence in the *Family Law Act* changed in 2012 and acknowledges more types of abuse. See ► *Chapter 8* for the definition of 'domestic relationship' and 'family violence'.

The laws about domestic violence protection orders are different in each state or territory.

Is domestic violence a crime?

Domestic violence is a crime and should be reported to the police.

The police may charge the violent person with assault and/or apply for an **Apprehended Domestic Violence Order (ADVO)** for your protection. Many police stations also have **Domestic Violence Liaison Officers (DVLOs)** who should be helpful and understanding if you report domestic violence. Police can get a temporary ADVO quickly by email to protect you until you can go to court. This type of ADVO is called a **Provisional Order**.

If the victim would like to remain in the house with the children, Police have the power to exclude the violent person from the house.

Police should also remove any firearms from the violent person. If the violent person is on bail for assault or some other crime, you can ask that the person be ordered to report to a police station further away from where you and the children live.

Where do I go if I need to leave my house?

If you need to leave your home in order to be safe from violence, there are organisations that can support you. Women's refuges provide a safe place to stay and some time to work out future plans. Counselling services can help you emotionally and give you a chance to talk over your options. They can also give you referrals for financial help. The Domestic Violence Line can also provide information and referrals to women's refuges in your area. See ► *Chapter 9: Referrals and Resources* for details.

Renting

If you are renting and experiencing domestic violence, it is important that you seek advice from a lawyer or from your local Tenants Advice and Advocacy Service to understand your options.

Removing a perpetrator of violence from the house

If you are a victim of domestic violence, you may want the perpetrator removed from the home. You or a Police officer can make an application for an ADVO and ask for an exclusion order preventing the defendant from entering the property. If the defendant is named on the lease, and you have a final ADVO with an exclusion order that prevents the defendant from entering the property the defendant's tenancy will end automatically.

An interim ADVO, with an exclusion order preventing the perpetrator of violence from having access to your rental property will mean that you can continue to live safely in the property while the interim ADVO is in place. However, an interim ADVO will not end the defendant's tenancy.

Alternatively, if you do not have an ADVO, or you have an ADVO but the ADVO does not contain an exclusion order, you can apply to the NSW Civil and Administrative Tribunal for an order ending the perpetrator's tenancy in the 'special circumstances' of the case (s 102 *Residential Tenancies Act*).

Changing the locks

You can change the locks of your rental property, without the landlord's consent, if you have an ADVO with exclusion order (interim, provisional or final). You can also withhold copies of the new keys from the excluded person. If you do not have an ADVO with an exclusion order, you should seek the landlord's permission before changing the locks.

You want to end your tenancy and leave the property

If you are experiencing domestic violence by someone you have, or have had, domestic relationship with, you can end your tenancy immediately, without penalty, by giving the landlord and any co-tenants a Domestic Violence Termination Notice. A sample Domestic Violence Termination Notice is available from the Tenant's Union or Fair Trading NSW website. The notice you give the landlord **must** include one of the following:

- ▶ a domestic violence order (ADVO), or
- ▶ a **personal protection injunction** under the *Family Law Act*, or
- ▶ a copy of a **certificate of conviction** in proceedings against the relevant domestic violence offender for the domestic violence offence, or
- ▶ a **declaration by a medical practitioner** (an expanded list of professionals who can sign a declaration are due to come into effect in 2020).

The declaration form is available on the Fair Trading NSW website.

Tenant databases

It is common for victims of domestic violence to be listed on tenant databases due to debts they have incurred as a result of abandoning the property or due to damage caused to the property by the perpetrator. If you terminate your tenancy by providing a Domestic Violence Termination Notice you cannot be listed on a residential tenancy data list.

Damage to property

You will not be liable for damage to a rental property, if you can show that the damage was caused by a perpetrator of violence during a domestic violence offence.


5.2 Apprehended Domestic Violence Orders

What is an ADVO and how can it protect me?

An ADVO is a court order that places restrictions on the person who is violent or abusive towards you. In ADVO matters, this person is referred to as the **defendant**. An ADVO can be tailored to your own circumstances so it provides the best possible protection. An ADVO can only stop a person from doing something like, for example, assaulting, coming to the house or destroying property. It cannot order a person to do something, for example, attend counselling or an anger management course.

What is the difference between a domestic violence and personal violence order?

There are two types of AVOs, Apprehended Domestic Violence Orders (ADVOs) and Apprehended *Personal* Violence orders (APVOs). You can apply for an **ADVO** if you are involved or were previously involved in a “**domestic relationship**” with that person. Section 5 of the **Domestic Violence Act** sets out the definition of “domestic relationship”. The definition is broad and includes the relationship between two people living in the same residential facility. A woman’s ex-partner and current partner are also considered to be in a domestic relationship with each other, even if they have never met.



You should apply for an **APVO** if you are not related to or have never been in a domestic relationship with the person, for example, you are neighbours or co-workers.

The information in this booklet is about ADVOs.

Is it a criminal offence if an ADVO is made against me or someone else?

The purpose of an ADVO is to protect you from the future behaviour of the violent person. Having an ADVO against you is not a criminal offence and is not listed on the defendant's criminal record.

If the defendant breaches (disobeys) the ADVO issued against them it can lead to a criminal offence, because it is a breach of a court order. If a breach occurs, the police will investigate the incident and where there is sufficient evidence, charge the violent person. If that person is found guilty of the charge, a criminal conviction can be recorded.

If I have an ADVO, does it mean my partner has to leave the house?

An ADVO does not automatically mean that the defendant has to leave your home. You can still be in a relationship and have an ADVO that orders your partner not to assault, threaten, stalk, harass, intimidate or destroy or damage property, and other orders to suit your circumstances.

How do I get an ADVO?

You can report the violence to the police who can then make an application on your behalf, or you can make a private **application** for an ADVO at your **Local Court**.

If you make a private application, you must explain to the court the reasons why you want an ADVO. You should also tell the court what has happened recently and in the past and why you are fearful. You need to know the address of the violent person. The court will prepare the application, which will be **served on** the violent person and order them to come to court.

What if I need immediate protection?

If you are asking the police to apply for an ADVO for your protection, the police can apply for a **provisional** or **interim** ADVO for your protection. The police will apply for a provisional ADVO when they believe that someone needs immediate protection. A provisional ADVO lasts until it is revoked,

or when an interim or final order is made at court, or the application for a final ADVO is withdrawn or dismissed. The provisional ADVO will not be enforceable until it is served on (formally given to) the defendant by the police.

If you are making a private application for an ADVO, you can ask the Registrar to apply for an interim ADVO.

An interim ADVO application can be considered by the Court even if the defendant is not in Court or aware of the application. However, it will not be enforceable until it is served on (formally given to) the defendant by the police. The interim ADVO will last until the case next comes to court where it can be extended, varied or made into a final order.

Will a lawyer help me at court?

If the police made the application on your behalf, the police prosecutor will represent you in court. You will not need to organise your own lawyer. You will still need to go to court to support the police application for an ADVO for your protection.

If you made the application privately, you can represent yourself or have a lawyer represent you. Legal aid is available in some cases to people who meet the legal aid means test and availability of funds test. There may be a duty solicitor to represent you for free as part of the **Women's Domestic Violence Court Advocacy Service (WDVCAS)**.

What support can I get at court?

Many Local Courts have a **WDVCAS** where you can get help from a court support worker. At a number of courthouses, there are 'safe rooms'. These are women only rooms where you can speak to a court support worker and/ or lawyer. Call your Local Court to find out whether it has a WDVCAS and a free lawyer. If not, you should tell the court staff about your safety fears so the Court can make arrangements to protect you from threats of violence and intimidation. See ► *Chapter 9: Referrals and Resources* for more details.

What happens on the first day the application for an ADVO is at court?

On the first day the application for an ADVO comes to court, there are a few possible outcomes:

- ▶ The defendant may come to court and agree to the orders in your application. The violent person can consent to (agree to) an ADVO

without admitting what is in the application is true. This is called 'consenting without admission.' If the defendant consents to the orders you are seeking, a final ADVO will be made that day.

- ▶ If the defendant does not attend court but there is proof that he or she has been served with (received) the application to come to court, the Magistrate can order an ADVO in his or her absence. This is called an *ex parte* ADVO. The Magistrate can also make an interim ADVO if the defendant has not been served with the application. An *ex parte* or interim ADVO is not enforceable until it is served on the defendant.
- ▶ If the defendant has not been served and did not attend Court, the matter will be **adjourned** (postponed) to a later date so the defendant can be served. The ADVO is not enforceable until the order is formally served on (given to) the defendant. The Court can make an interim ADVO for your protection which will be enforceable as soon as it is served on the defendant.
- ▶ If the defendant comes to court but disagrees with the application for an ADVO, the Court will tell the parties to come back on a later date for a hearing. The Court can make an interim ADVO for your protection which will protect you until the hearing. The defendant can agree to this interim order without admitting to any of the allegations or behaviour. If the defendant does not agree to an interim order for your protection, you may need to tell the Magistrate why you need the order. The Magistrate will then decide if you need an interim ADVO for your protection. The Magistrate will also make a date to exchange statements before the hearing date. If the police are applying for an ADVO for your protection, police will draft your statement. If you are the defendant or if you are applying privately for your ADVO, you should get legal advice about drafting your statement. The WDVCS can help refer you for advice. See ▶ *What support can I get at court?* on page 58, and *Chapter 9: Referrals and Resources*.

What happens if my ADVO application goes to a hearing?

At the hearing, the Magistrate will listen to the evidence you give about the violence and/or threats of violence that make you afraid. The Magistrate will also hear the defendant's version of events and then decide on 'the balance of probabilities' whether or not you fear the defendant and if these fears are reasonable. If the Magistrate finds you have fears, an ADVO will be ordered for your protection.

What orders can be made?

Every ADVO includes the order that the defendant must not:

- ▶ assault or threaten;
- ▶ stalk, harass or intimidate;
- ▶ intentionally or recklessly destroy or damage property of;

you or anyone in a domestic relationship with you. This means anyone living with you or in a relationship with you but also includes other family members such as your parents.

These orders are called mandatory orders.

In addition to these mandatory orders the Magistrate can make orders depending on your circumstances. For example, these could be that the defendant must not:

- ▶ go to your home or workplace; and/or
- ▶ approach you (by telephone, text, email, social media or in person); and/or
- ▶ live at your place; and /or
- ▶ contact you except as agreed in writing between you and the defendant about contact with children.

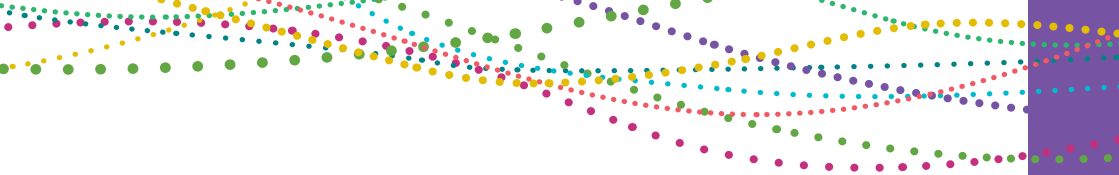
When an ADVO is made the Magistrate can also make an order for you or the defendant to collect personal property. This is called an *ancillary property recovery order*. It can order that the police or another person must also go with the person collecting the property.

The orders in an ADVO stay in place for the time period set by the Court. ADVOs are usually made for two years but could be for more or less time.

What happens after the ADVO is made?

You will be given a copy of the order or interim order by the court staff or a copy will be mailed to you, and the police will keep a copy of it on their central computer. You should keep a copy of the order with you at all times. This will make it easier to tell the police about the ADVO if the order is breached.

The ADVO is not enforceable unless the defendant was in court when the order was made or until the police serve the order on the defendant. If the defendant disobeys the order, the police can arrest and charge the person



with breaching the order. If you think the defendant has breached the order, you should report it to the police.

Important Information

If the violent person breaches the ADVO there are a number of things that you can do:

- ▶ Keep a record of all breaches of the ADVO, no matter how small they may seem to you. This may help to establish a pattern of abusive behaviour over a period of time. Every time the violent person breaches the ADVO write details about:
 - the date and time of the incident;
 - what happened including what the violent person did or said and how you responded;
 - any witnesses who saw or heard what happened; and
 - what you did afterwards.
- ▶ Ask any witnesses to keep a record of the incident and write down what they saw or heard.
- ▶ Collect evidence of the breach:
 - A message from the violent person may be a breach of the ADVO. Save any emails, text messages, messages on social media, voicemail messages or messages on your answering machine. You can then show or play these messages to the police;
 - If you are physically injured, go to the doctor or hospital for medical care and ask the doctor to note your injuries and the cause;
 - Take photographs of any injuries (e.g. bruises or scratches).
- ▶ Report the breach to the police. You can telephone the police or go in person to the police station to make a statement. Use the notes you made to help you make a statement to the police. You should report all breaches of the ADVO to police no matter how small or insignificant they seem to you. By consistently making the reports, you can establish a pattern of abusive behaviour over a period of time.

- ▶ Keep a record of any reports you make to police. Write down:
 - the date(s) you made the report to the police;
 - how you made the report (by telephone or in person);
 - the name of the police station where you made the report;
 - the name of the police officer you spoke to; and
 - the police event number. This is a special number that records the incident on the police computer system.

What if I am still afraid when the ADVO period is up?

If you still fear violence when the ADVO is about to expire, you can apply for an extension of the ADVO. You must apply for an extension of the order before it expires. You should get legal advice about an extension 6–8 weeks before the ADVO expires.

If things change during the period of the ADVO, you can apply to the Court to have the ADVO varied.

If the order has expired and you still have fears, you can apply for a new ADVO.

Can my children and new partner be protected too?

The mandatory orders in an ADVO protect you and any person with whom you have a domestic relationship (such as children and a new partner).

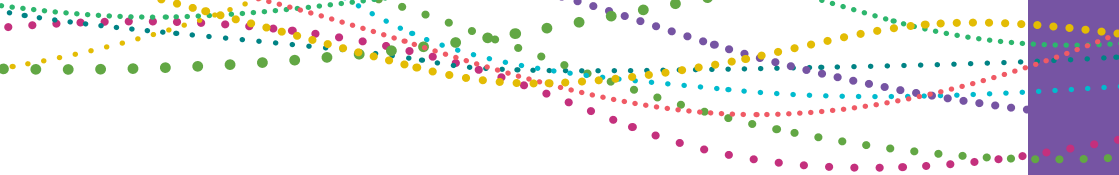
You can also ask that your new partner be named separately as a protected person on your ADVO so that they are protected by any other orders on the ADVO.

If the Court issues an ADVO for your protection, the orders should include any child with whom you have a 'domestic relationship' (unless the Court thinks there are good reasons for not doing this).

Only the police can make an application for an ADVO for children aged under 16.

National Domestic Violence Order Recognition Scheme

AVOs (provisional, interim and final) made in any state or territory on or after 25 November 2017 will automatically be recognised in every other state and territory in Australia and therefore enforceable. For AVOs made



prior to 25 November 2017, an application for registration can be made to a court in the state or territory in which the person is living.

5.3 ADVOs and family law

What if my ADVO was made *before* my family law parenting orders?

If you have an ADVO, any later **parenting orders** that are inconsistent with your ADVO will override those sections of your ADVO. If this happens the Family Courts must state in the parenting order that it is inconsistent with your ADVO, give a detailed explanation in the order about how the children's time with the other parent is to take place, explain the order to all people affected by the order, and serve a copy of the order on other parties and on the police and Local Court.

Where there is an inconsistency the ADVO will be invalid to the extent of the inconsistency. For example:

- ▮ The ADVO states the father is to stay away from the mother's home.
- ▮ The parenting order states the father is to collect their child from the mother's home on Friday at 4pm.
- ▮ The father will not be in breach of the ADVO on Fridays at 4pm but he will be in breach if he goes to the home at any other time.

What if my ADVO is made *after* my family law parenting orders?

If you need to apply for an ADVO and parenting orders are already in place, the Local Court has the power to vary, suspend or discharge the parenting orders to suit the conditions in your ADVO, see ► s 68R of the *Family Law Act*. For example, if you hand the children over at your home or the violent person's home, you might ask to vary the parenting orders so you can hand the children over at a public place. The Local Court can only use this power if it has new material or fresh evidence that the Court that made the parenting order did not have when it made the order.

It is important to tell the Local Court if there are parenting orders in place and provide a copy. You should also take a copy of your family law orders to your local police if you are asking for an AVO for your protection and want orders that are inconsistent with the existing parenting orders.

You can ask the court to vary the parenting orders however in practice, Local Courts are reluctant to use this power to vary parenting orders.

In Family Law proceedings, family violence is a relevant factor for the court in deciding arrangements for children. This means that an ADVO naming the child or a member of the child's family is taken into account when the Court is deciding about the best interests of a child. This includes past and present ADVOs including interim ADVOs.

Can I get protection under the Family Law Act?

If you apply for parenting orders and your partner is violent, you can ask for an **injunction** under the *Family Law Act* to protect yourself and/or your children. An injunction is an order made by the Court to stop or restrain your partner from being violent towards you.

However, applying for an ADVO from the Local Court offers better protection. Breach of an ADVO is a crime and the police can make an immediate arrest.

Can I get counselling or other support after experiencing domestic violence?

The NSW government through **Victims Services** provides free counselling and may provide financial support and a recognition payment for people who have experienced physical or psychological injuries because of domestic violence which occurred in NSW. Victims of domestic violence have up to **2 years to claim** for financial support and up to **10 years to claim** for a recognition payment. See ► *Chapter 9: Referrals and Resources*. There is no time limit for applying for counselling.

6. Child support and maintenance

The Department of Human Services (DHS) delivers all the services and payments for Medicare, Centrelink and Child Support. Previously, the Child Support Agency delivered child support services. DHS Child Support is referred to as **Child Support**.

There are generally two types of financial support that you can receive for children after you separate from your partner (you can also receive financial support from the other parent even if you have never lived together):

- ▶ Centrelink family assistance payments from the federal government; and
- ▶ **child support** from the other parent.

You may also be eligible for **spousal maintenance** after you separate from your partner.

Child support, spousal maintenance and Centrelink family assistance payments apply to couples who were married or in a **de facto relationship**, including a same sex relationship.

6.1 Centrelink family assistance payments

What types of Centrelink family assistance payments can I get if I separate from my partner?

You may be eligible for financial assistance from the federal government to help you with the costs of caring for your children. This financial assistance is generally referred to as 'Centrelink family assistance payments' and may include **Family Tax Benefit Part A**, **Family Tax Benefit Part B** and rental assistance. You may also be able to get other benefits such as a health care card and money to move into rental accommodation (e.g. payment of the bond).

The type of Centrelink family assistance payments and rates vary for every parent. This depends on your circumstances including your income, the income of any new partner you live with, the number of children who live with you, the time the children spend with the other parent and other factors.

There may be other types of financial assistance from the government that you may be eligible for, depending on your circumstances.

To ask about and apply for Centrelink family assistance payments and other benefits from the government:

- ▶ visit humanservices.gov.au/paymentfinder to explore payments based on your circumstances;
- ▶ apply for payments online;
- ▶ contact Centrelink on **136 150**; or
- ▶ visit your local Centrelink Service Centre.

If you were already receiving Centrelink family assistance payments or other payments from the government before you separated, you should advise of this change because the type of benefits you receive and the amounts paid will probably change.

If I am receiving Centrelink family assistance payments, do I have to try to get child support from the other parent?

Generally, yes.

Centrelink family assistance and child support payments are closely linked. You must apply for child support from the other parent by contacting Child Support to be eligible to receive more than the base rate of Family

Tax Benefit Part A. How to apply for child support is explained below in [▶ section 6.3](#).

You have **13 weeks** from the date you separate from your partner to apply for child support. If you do not apply for child support within that time, you can only receive the base rate for Family Tax Benefit Part A.

There are some exemptions to this rule, including where:

- ▶ you fear that the other parent may be violent to you;
- ▶ you do not know where the other parent is; or
- ▶ you do not know the identity or whereabouts of the other parent.

You can ask to speak to the social worker over the phone or at a Centrelink Service Centre if you believe you should not need to register for child support from the other parent.

If you and the other parent are able to negotiate a child support agreement within the first 13 weeks of separation, you can register that agreement by contacting Child Support (see [▶ section 6.7](#)). However, these agreements often take some time to negotiate and it is unlikely you will be able to register an agreement within 13 weeks from your separation. It is usually quicker and easier to apply for child support immediately when you first apply for Centrelink family assistance payments.

If you do not receive any family assistance payments or only receive the base rate of Family Tax Benefit Part A you can make a private arrangement about financial support of the children without applying to Child Support. However, you should get legal advice before entering into a private agreement. See [▶ section 6.7](#) for more details about private arrangements.

6.2 Child support

What does the law say about child support?

Child support laws provide for the assessment, collection and enforcement of child support payments. The child support laws are administered by the Department of Human Services. Generally, they apply to all children in Australia.

In some limited circumstances financial support can be provided in the form of child maintenance (see [▶ section 6.10](#)).

Do both parents have to pay child support?

All parents must contribute to the financial support of their children whether they were married, living in a de facto relationship or never lived together.

I was in a same-sex relationship when I had my children. Can I get child support from my ex-partner?

The Federal Government has removed discrimination against same-sex couples in family, child support and social security law (as well as other laws).

Since 1 July 2009 you are able to apply for child support from your former same-sex partner if you and your former partner are recognised as 'parents' under the *Family Law Act*. If you separated from your same-sex partner before 1 July 2009, you can still apply for child support now. Payments cannot be paid for the period before 1 July 2009 and may only start from the date of your application for child support.

If you were married or in a de facto relationship with your same sex partner and the child was born through donor insemination, both you and your partner are the child's legal parents under the *Family Law Act*.

➤ See *Chapter 4, section 4.4* for more information about same-sex parents under the *Family Law Act*.

Do I have to apply for child support?

As a parent, you have responsibilities and rights. Many parents arrange child support independently without any assistance from government departments, the courts or other government agencies. If you are separated and receive only the base rate of Family Tax Benefit Part A (or you don't receive family assistance payments at all) you and the other parent can arrange your child support to suit you. However, making a private arrangement to receive less child support than your children are entitled to may negatively affect the amount of Family Tax Benefits you receive. See ➤ *section 6.1* for more information about family assistance and *section 6.7* for more details about private arrangements.

6.3 Applying for child support

Who can apply for an assessment of child support?

A parent of a child can apply for an assessment of child support.

A person who is not a parent of the child can also apply for an assessment of child support if the non-parent carer is:

- ▶ an 'eligible carer' of the child; and
- ▶ is not living with either parent on a genuine domestic basis; and
- ▶ does not have care jointly with a parent of the child.

An 'eligible carer' is a person who has at least 'shared care' of the child i.e. they have care of the child for between 5 and 9 nights per fortnight.

How do I apply for a child support assessment?

You can:

- ▶ visit humanservices.gov.au/separatedparents and complete and lodge an 'Application for Child Support Assessment' form online; or
- ▶ telephone Child Support on **131 272** and ask to apply for child support over the phone.

What happens to my child support assessment application?

Before Child Support accepts an application for child support assessment, it must be satisfied that the people claiming to be the parents of the child are in fact the parents.

Once the assessment is made, Child Support notifies both parents of the assessment and lets both parents know about their right to apply for:

- ▶ a review of the decision; or
- ▶ a declaration that a person should not be assessed because they are not the parent of the child.

What can I do if I need proof that another person is a parent or proof that I am not a parent?

If you think that you are not the parent of a child, or if you do not have proof that the other person who you say is the parent of the child is the parent of the child, you can apply to the **Family Law Courts** for a declaration of parentage.

There are different time limits to file applications in the Family Law Courts about parentage in child support matters. When you receive the written notice from Child Support you must file your application in the Family Court, Federal Circuit Court or Local Court for a declaration *within 56 days* of receiving the notice.

DNA testing may be ordered by the Court to determine if a person is a parent.

Where you are both women and where the Court has to decide if you or the other person is a parent, the Court will need other evidence about your relationship, how the child was conceived and what you and the other person intended when the child was conceived.

You can apply for legal aid to cover both the cost of DNA testing and representation.

6.4 Child support payments

How are child support payments calculated?

Child Support payments are calculated by using a formula based on:

- ▶ the costs of caring for children (based on Australian research);
- ▶ the income of both parents;
- ▶ the ratio of care which each parent (or carer) has for the children;
- ▶ whether the parents have any other dependent children living with them; and
- ▶ whether the parents have any other children for whom they must pay child support (i.e. any other children in child support cases).

There is a basic formula that can be varied to cover different family circumstances.

What if my circumstances do not 'fit' the formula?

If you think the child support assessment is unfair because it does not take into account the special circumstances of your case, you can apply to change the assessment. There are 10 reasons available under the law where you can apply to change the assessment. These reasons are listed on the form you need to use to apply to change the assessment.

You should also provide Child Support with any supporting documents that are relevant to your application to change the assessment. Child Support will send a copy of your application and supporting documents to the other parent. The other parent must fill in a response and provide any supporting documents to Child Support. Child Support must give you a copy of the response and supporting documents.

A senior case officer (**SCO**) will make a decision about whether to accept your application for a change of assessment. The SCO will usually have a conference with you and the other parent – either together, separately or by telephone. Sometimes the SCO will make a decision based on written submissions. Arrangements can also be made to use interpreters. You cannot have a representative appear on your behalf at the conference.

Usually, these conferences are done separately. If you are worried about your safety, or if you feel you cannot participate in a conference with the other parent because of domestic violence, let a Child Support officer know when you file your application to change the assessment and when you are contacted by the SCO about your application. Talk to a Child Support officer and SCO about removing all identifying information from your supporting documents before they are sent to the other party.

The process of applying for a change of assessment takes about 3 months.

An application for change of assessment may apply to a period going back 18 months from the date the application is made. If you apply for change of assessment beyond that 18-month period (and as far back as 7 years) you must apply to a court for leave (permission) to do this (s 112 of the Act). If the court grants leave, the matter may be referred back to Child Support to decide or the court itself may determine whether a change to assessment should be made.

What should I do if I am unhappy with the decision of the SCO?

If you are unhappy with the decision of the SCO, you can object in writing or by email **within 28 days** of receiving the decision. A different officer will conduct a review of the case and notify you in writing of the decision about your objection.

If you also disagree with that officer's objection decision, you can apply to the Administrative Appeals Tribunal (AAT) **within 28 days** of receiving the decision.

If at any point Child Support decides the issues are too complex, you will need to apply to the Family Law Courts to change the assessment. Child Support will tell you if this applies to your case.

The Child Support Registrar may also initiate a change of assessment application.

What if the other parent's or my circumstances change?

You can ask Child Support to vary your child support assessment if:

- ▶ your income or the other parent's income changes by 15% or more from the income used in the original assessment; or
- ▶ subject to certain requirements, you earn extra money (e.g. working overtime or second job) to re-establish yourself after separation. You can apply for the extra income to be excluded from the child support assessment for a maximum of 3 years.

Is there a minimum amount of child support payable?

Parents who are responsible for paying child support and who receive income support from Centrelink or Veteran's Affairs, will have a "minimum child support payment" they must pay each week.

Parents who are responsible for paying child support and who are on a low taxable income but are not receiving any Centrelink income support, may have to pay a set amount per child per week. This is known as a "fixed assessment." If you have more than 3 children, the amount you have to pay is capped. Parents who have good reasons about why their income is so low, can lodge an application with Human Services seeking that the fixed assessment not apply.

Interim Care Determinations

Ordinarily the amount of child support payable is determined by an assessment of the amount of time the child *actually* spends with each parent. The same care determination applies both for the child support assessment and the assessment of a carer parent's Family Tax Benefit.

However, since 23 May 2018, **Interim Care Determinations** may be made where there is a **Disputed Care Change**. Even though the amount of time the child *actually* spends with each parent is not in line with the care arrangements set out in the parenting order or parenting plan, the amount

of child support payable will continue to be assessed on the basis of the care arrangements in the parenting plan or parenting order.

A **Disputed Care Change** occurs when:

- ▶ There is a parenting order or parenting plan in place, and
- ▶ One parent reports a change in care that is not in line with the parenting order or parenting plan, and
- ▶ The other parent disagrees with the changed care, and is taking 'reasonable action to ensure compliance' with the parenting orders or parenting plan.

An Interim Care Determination period can last anywhere between 4 and 52 weeks. This means the amount of child support paid could continue to be in accordance with the care set out in a written care agreement instead of the actual care arrangements for up to 52 weeks. The Interim Care Determination period will depend on whether the person with reduced care takes continuous reasonable action. If the person with increased care takes reasonable action, the Interim Care Determination period will be reduced.

What is reasonable action to ensure compliance?

Reasonable action is not defined but is likely to mean starting court proceedings or Family Dispute Resolution, talking to a lawyer, or the other party about the disputed care change.

How long does an Interim Care Determination last?

This is complicated. Generally, the maximum interim period (that is where child support will continue to be paid in accordance with a court order despite the actual care) will be either:

- ▶ 52 weeks from the date the orders were made, or
- ▶ 26 weeks from the date of the change of the care date,

whichever is later.

There are special circumstances where an interim care determination will not apply. This is likely to be circumstances of violence or neglect and evidence is required to prove the special circumstances.

6.5 Disagreeing with child support decisions

What if I disagree with a decision made by Child Support about my case?

Child Support must tell you in writing about most decisions it makes about your case. If you think Child Support did not make the right decision, you can ask for a formal review of the decision. This is called an **objection**. You might want to object because you think Child Support did not consider all the facts, used wrong information, or did not apply the law correctly.

You must object to a Child Support decision **within 28 days** of the notice being delivered to your address (**90 days if you live overseas**). You must tell Child Support in writing or by email that you object to the decision. You should give Child Support any documents that support your objection.

You can also object to a child support decision after this time, but you need to explain why you are late. If Child Support does not accept your late objection, you can file an appeal about this decision at the Administrative Appeals Tribunal (AAT). You must do this **within 28 days** of receiving the decision.

Child Support will give the other parent a copy of your written objection and supporting documents. Talk to Child Support about removing all identifying information from your documents before they are sent to the other parent. Tell Child Support if there has been domestic violence or you are afraid of the other parent.

The other parent can respond and provide supporting documents. Child Support will consider the evidence and may talk to you and the other parent about the objection. Child Support has to make a decision about the objection **within 60 days (120 days if a parent lives overseas)** of receiving it.

Child Support must tell you in writing about the outcome of your objection and any changes made to the child support assessment. If you do not agree with this decision you can apply to the AAT to review Child Support's decision. You must do this **within 28 days** from the date the decision was delivered to your address.

Handy Tip

- ▶ Don't ignore letters from Child Support / Department Human Services.
- ▶ Tell Child Support in writing if you disagree with decisions it makes about your case.
- ▶ Check time limits.

6.6 Ending child support payments

Child support payments end if the child:

- ▶ dies;
- ▶ becomes a member of a couple (married or de facto relationship);
- ▶ is adopted; or
- ▶ no longer lives in Australia (except if they are in a reciprocating jurisdiction) or is no longer an Australian citizen.

Child support payments end when a child turns 18. In limited circumstances, child support can continue after a child turns 18. For example, a carer parent may apply to extend child support to the end of the school year of a child who turns 18 in that school year. The application needs to be made before the child turns 18, although it may be accepted later in exceptional circumstances.

6.7 Child support agreements

What type of child support agreements can I make?

There are two types of agreements:

- ▶ limited child support agreements; and
- ▶ binding child support agreements.

Both types of agreements must be signed by both parents and registered with Child Support to be binding.

Child support agreements can cover a range of financial matters about the costs of the children. For example, they might provide for how much money is to be paid on a periodic basis (e.g. weekly), non-periodic payments

(e.g. school fees, children's music and sporting activities) and binding agreements might include a lump sum payment of child support.

It is important to get legal advice if you are thinking about entering into a child support agreement. If you are considering a lump sum payment instead of weekly amounts, you must make sure you get advice about whether this will affect your entitlement to family assistance or other Centrelink benefits.

What is a limited agreement?

A limited agreement is a formal written agreement signed by both parents. You do not need legal advice before signing a limited agreement. However, you should get legal advice to make sure you understand what you are agreeing to and if it is right for you.

There must be a child support assessment already in place before Child Support can accept a limited agreement. The amount you agree to accept or pay in the limited agreement must be equal to or more than the child support amount assessed by Child Support.

Limited agreements are used when parents want some flexibility about child support and are not meant for long-term arrangements.

A limited child support agreement can be ended:

- ▶ by another limited or binding child support agreement;
- ▶ by a joint letter to Child Support ending the previous agreement;
- ▶ if the annual rate of child support payable changes by more than 15%, either parent may choose to end the limited agreement and go back to being assessed by a standard child support assessment. You must tell Child Support in writing about this change;
- ▶ by either parent writing to Child Support once 3 years have passed since the making the agreement; or
- ▶ by a court order.

What is a binding agreement?

A binding agreement is a written agreement signed by both parents. However, it is different from a limited agreement because:

- ▶ you do not need to have a child support assessment formula in place (unless the agreement makes provision for a lump sum payment);

- ▶ the agreed child support amount to be paid can be less than the child support amount assessed under the formula;
- ▶ you both must have independent legal advice before entering into or ending the binding agreement and you need a statement from your lawyers that legal advice has been given; and
- ▶ the binding agreement can only be ended by a new binding agreement registered with Child Support or a court order in very limited circumstances.
 - If an agreement was made before 1 September 2008 and at least one of the parties did not have legal advice, the agreement can be set aside if the court decides it is '**just and equitable**' to do so.
 - A binding agreement is no longer in force if the child leaves the care of the parent.

Handy Tip

The rate of Family Tax Benefit will not be tied to the terms of a child support agreement. 'Notional assessments' are made from time to time by Child Support, based on the taxable incomes of both parents. This is complicated and before you enter into a child support agreement get advice about the impact it will have on your Family Tax Benefit.

6.8 Collection of child support payments

How is child support collected?

If:

- ▶ Child Support issues a child support assessment; or
- ▶ you make a child support agreement and Child Support accepts the agreement; or
- ▶ a court order is registered with Child Support (see ► *section 6.10*),

you can choose to collect payments privately or you can request that Child Support collect child support payments.

Collecting child support payments privately may be an option for you if:

- ▶ the other parent has made child support payments regularly in the past; and
- ▶ you are satisfied the other parent will make future payments on time and in full.

If private collection arrangements break down, you can ask Child Support to collect payments. Child Support can only collect payments up to three months in arrears at the time you opt back in for Child Support to collect (in special circumstances this can be extended to 9 months).

You can ask Child Support to collect child support payments for you if you do not want to receive payments directly from your ex-partner. Child Support can deposit the child support payments directly into your bank account or you can discuss other payment methods with Child Support.

6.9 Enforcing child support payments

What can Child Support do to collect unpaid child support payments?

Child Support generally tries to negotiate with the parent who has not paid child support to collect unpaid child support payments. However, if unsuccessful, Child Support may try to enforce payment by:

- ▶ garnishing wages (take unpaid child support payments directly from a person's pay or bank account);
- ▶ enforcing tax return lodgements;
- ▶ intercepting tax refunds; or
- ▶ issuing overseas travel bans to stop parents who have failed to pay child support from leaving the country until they pay outstanding child support.

If these methods fail, Child Support may start legal proceedings to try and recover the 'debt' of child support payments. If you are unhappy that Child Support have not done this, you can do so yourself but only after giving Child Support 14 days written notice of your intention to do so.

Child Support will not enforce a child support debt which has accrued when registered for 'private collection'. You have to do this in either the Federal Circuit Court or Family Court.

It is also possible to enforce a child support debt under civil law in a Local Court, but the court is likely to transfer the matter to the Federal Circuit Court or Family Court.

Handy Tip

Get legal advice before starting any court enforcement of a child support debt.

What happens to child support payments if either parent is declared bankrupt?

Child support payments are not affected by bankruptcy. This means the child support debt can still be claimed against the non-paying parent, even if she or he declares bankruptcy.

6.10 Child maintenance

The *Family Law Act* provides for the Family Law Courts to issue child maintenance orders in limited circumstances:

- ▶ urgent child maintenance when there is a need for immediate assistance prior to Child Support making an assessment or providing payments;
- ▶ a departure is sought from an assessment given by Child Support;
- ▶ the child is over 18 and requires support to attend tertiary education; or
- ▶ the child is over 18 and has a disability and requires continued support.

6.11 Spousal maintenance

Can I get spousal maintenance from my former partner?

In some circumstances you may be able to receive maintenance from your partner to cover your living expenses.

In order to receive maintenance from your partner (married or de facto) under the *Family Law Act*, you must show that:

- ▶ you need the financial support; and
- ▶ your partner has the ability to pay for that support.

Maintenance may be ordered because:

- ▶ you have been in the relationship for a long time and have lost your work skills;
- ▶ you are caring for a child of the relationship;
- ▶ you cannot work because you have a disability or because of your age; or
- ▶ you have some other very good reason that stops you from supporting yourself.

The Court will usually make a maintenance order for a limited period of time. Sometimes the Court will order a lump sum be provided to you or transfer some property to you. Unless you will never be able to work, it is best to go to court with a plan about getting back into the paid workforce. For instance, apply for a course to retrain and apply to the Court for spousal maintenance for the period of time it would take to complete the course.

The Court looks at how much you need to support yourself. You should prepare a detailed budget taking into account all of your expenses. The Court will ignore any support you may receive from Centrelink when deciding whether you need maintenance. If you do get a pension or benefit, Centrelink may reduce your pension by some amount if you receive maintenance. The Court will also look at your partner's income and ability to pay for your support.

You can ask Child Support to collect your maintenance once an order is made.

You can apply for maintenance at any time. However, you must apply for maintenance **within 12 months** of your divorce becoming final for married couples or **within 2 years** from the date of separation for de facto couples. If you want to apply later, you will need to seek leave (permission) of the Court, which is only given in exceptional circumstances.

What are the steps involved in getting maintenance?

If you and your partner can agree, you can ask the Court to make your agreement legally binding by making '**consent orders**'. There is a Consent Orders Kit available from the Family Law Courts. You can enforce consent orders by going back to the Court if necessary. It is important to seek independent legal advice before making consent orders.

If you cannot agree, you can make an application yourself in the Local Court or the Family Law Courts.

What if I am still living with my spouse but they will not give me any money to live on?

You may be able to get maintenance for your own living expenses even though you are still married and living with your spouse. You apply in the same way as if you were separated. This is not available to de facto couples.

Can I get 'childbirth maintenance' if I am pregnant?

You may be able to claim childbirth maintenance (called 'child bearing expenses') from the father of your child if you are *not married*. Generally, you can ask for maintenance for the 2 months before and 3 months after the birth, plus reasonable medical expenses related to your pregnancy and childbirth and for set up costs for the baby such as prams etc.

You can apply to the Local Court or the Family Law Courts for such orders at any time during the pregnancy or **within 12 months** after the child's birth. The Court will consider the financial situation of each parent and any special circumstances.

The 'child bearing period' may extend outside of this period, if the mother was forced to cease work, or was unable to return to work, or incurs a medical cost, because of a pregnancy related issue.

Handy Tip

You can apply for legal aid for applications to court for spousal maintenance and child bearing expenses.

You can get free legal advice about child support and maintenance from the Child Support Service of Legal Aid NSW, LawAccess or some community legal centres. See ► *Chapter 9: Referrals and Resources.*

7. Property

7.1 What is considered property of a relationship?

When your marriage or **de facto relationship** ends, all the **property** that you and your former partner own needs to be divided in a way that is fair to both of you.

Property includes things such as a house, land, superannuation, a business or company, cash, trusts, cars, caravans and boats, bank accounts, gifts and inheritances, lottery wins, compensation payouts, insurance policies as well as furniture and household items. Personal things like clothing are unlikely to be included.

Loans and debts are also considered property.

Property includes property each of you brought into the relationship, property acquired during your relationship and property acquired after separation.

Property of a relationship includes property that is in your name, property in your former partner's name and property in both your names. It does not matter if all the property is only in one person's name because the title to property can be changed from one partner to the other to make sure that the property is divided fairly.

7.2 How long after we separate do I have to sort out our property issues?

If you need or want a court to help you sort out your property issues, time limits apply.

If you were *married* you must apply to court **within 12 months** of your divorce order becoming final. If you were in a *de facto relationship* you must apply to court **within 2 years** from the date you **separated**.

The same time limits apply to applications for spousal **maintenance** by married and de facto couples. See ► *Chapter 6* for more on spousal maintenance.

If your time limit has expired, you can make a special application to the Court for permission to apply out of time and this is only given in exceptional circumstances.

7.3 Which law applies to me?

The *Family Law Act 1975* covers all separating couples, whether they are married or in a de facto relationship. This includes same sex couples.

However there are different time limits for applying to a court for orders about how the property is to be divided for couples who are married and those who are in de facto relationships. See above for information on time limits.

When can the family law courts make a decision about our property?

The court needs to have 'jurisdiction,' that is, have the power to make a decision about your property.

If you are married the court needs to see proof that:

- ▶ there is a valid marriage (under Australian law or another country – shown by giving them copy of the marriage certificate and/or certified translation if not in English); and
- ▶ either you or your spouse is
 - an Australian citizen; or
 - living permanently in Australia; and

- in Australia at the time a court application is made for a property settlement.

If you are a de facto couple the court needs to see proof that:

- ▶ you and your partner were living permanently in a participating jurisdiction (all States and Territories of Australia except WA) when your relationship broke down; or
- ▶ you and your partner live in a participating jurisdiction on the day the court application is made; and either:
 - both of you lived there for at least one third of your relationship; or
 - the applicant made a substantial contribution to the property or the finances of the relationship or the welfare of the family in a participating jurisdiction.

This can be proved with some basic information in an Affidavit.

How do I know if I am in a de facto couple?

The Court will find that you have been in a de facto relationship, if, having regard to all the circumstances of your relationship, you were a couple living together on a genuine domestic basis. Those circumstances may include any or all of the following:

- ▶ the length of your relationship;
- ▶ your living arrangements;
- ▶ your sexual relationship;
- ▶ your financial arrangements;
- ▶ your commitment to a shared life;
- ▶ any children of your relationship or whom you cared for;
- ▶ whether other people knew you were in a relationship;
- ▶ if your relationship is or was registered under a prescribed law of a State or Territory.

Once the Court is satisfied you were in a de facto relationship, it can make decisions about how to divide your property.

7.4 What if we can agree on how to divide our property?

If you can agree on how to divide your property, you have three options:

1. You can have an *informal agreement*. You and your former partner do not have to go to Court or have a formal written agreement about how you are dividing your property. However, an informal agreement is not legally binding, which means it cannot be enforced if one of you fails to follow the agreement. Also, stamp duty is only waived on the transfer of property if there is a court order. For these reasons, an informal agreement is not recommended in most circumstances.
2. You can ask the Court to turn your agreement into **consent orders** by completing an Application for Consent Orders and filing it with the Court. If the Court thinks that the agreement is fair it will make the agreement into orders. When the Court makes the orders, they become binding. This usually means that neither you nor your former partner can make any further claim on the property. It is very important to get your own legal advice prior to signing consent orders. For more about consent orders see ► *Chapter 2: Do I need a solicitor or barrister?*
3. You can turn your agreement into a **binding financial agreement**. This agreement must comply with formal requirements in order for it to be legally binding. You must receive your own legal advice before signing a binding financial agreement. Binding financial agreements are discussed later in this chapter.

It is important to obtain legal advice about your circumstances and whether an informal agreement, consent orders or a binding financial agreement would suit you best.

7.5 What if we can't agree on how to divide our property?

Can I go straight to court?

In most cases, the *Family Law Act* requires you to try to reach an agreement by using dispute resolution such as mediation before you can apply to the Court for property orders.

In some cases you may not have to try to resolve your property dispute before going to court, such as when:

- ▶ you have experienced family violence;
- ▶ your partner refuses to negotiate;
- ▶ there has been fraud;
- ▶ there is a reason to make an urgent application, for example, if there is a risk that your partner may sell property without telling you; or
- ▶ you are almost out of time to make your application.

How will the Court divide our property under the Family Law Act?

There is no formula about how to divide your property. The Court will look at the facts of your case and use the following four steps to decide a fair way to divide your property. You and your former partner should use the same steps if you want to divide your property without asking the Court to decide for you.

1 Identify what property you have and how much it is worth

Identify and value the property of the relationship. Property includes such things as property owned by you or your partner at the start of the relationship, property purchased by either or both of you during the relationship, superannuation, gifts and inheritances received by either of you, goodwill in a business, compensation payments, lottery winnings, redundancy payouts, and loans. Property also includes any debts owed individually or jointly. The property is valued as at the date of settlement or court hearing.

If you do not know what property your partner owns you can ask the Court to issue a **subpoena**. A subpoena requires banks, employers or other organisations to send the information to the Court for you or your **lawyer** to look at. See ▶ *section 7.7* for information about how to find out about your partner's superannuation.

2 Work out what contributions you both made to the relationship

Consider what contributions you and your partner made to the relationship. Contributions made after your relationship ends and up to the time you finalise your property division may also be relevant.

Contributions can be non-financial and/or financial.

Financial contributions include any money provided by you or your parents or other family members, wages or a deposit paid on a house. They also include initial contributions (any property you had at the start of the relationship).

Non-financial contributions include any unpaid work you or others have done repairing, improving or maintaining property, or work done in a business owned by your partner.

Contributions made as a *homemaker or parent* are also considered as non-financial contributions.

In some cases the contributions may not be seen as equal, such as where the relationship was short or the contributions of one partner were particularly large.

Domestic violence, or behaviour such as gambling or drug and alcohol addiction may be taken into account in property cases. The violence or other behaviour must have significantly impacted on a person's ability to make contributions to the relationship. In these circumstances, it may be fair to increase the victim's contributions and reduce the violent person's contributions.

3 Work out your future needs

Future needs are worked out by looking at the following factors for you and your partner:

- ▶ age and health, including any disabilities;
- ▶ income;
- ▶ ability to earn an income and entitlements to any financial resources;
- ▶ responsibility to support children or others, including how many nights children live with each parent; and
- ▶ whether or not the relationship and your role in it (for example as the primary caregiver) has affected your ability to get a job.

For example, if the Court decided that your contributions were equal in the past and that you have two young children who live with you most of the time and your partner makes more money than you do or can, then the Court may order a distribution of the property to you which is more in your favour than it is to your partner.

4 Think about whether it is a fair division of the property in the circumstances

Work out if the way you have divided the property between you and your partner is fair. The Court assesses this by looking at the overall financial position after the first three steps have been considered. The Court should only make an order if 'it is satisfied that, in all the circumstances, it is just and equitable to make the order'.

Important Information

To start most property cases under the Family Law Act, you need to eFile the following documents on the Commonwealth Courts Portal (www.comcourts.gov.au):

- ▶ an Initiating Application form), which must state the orders that you want the Court to make (you can change the orders you are asking for later on if you get new information about your property);
- ▶ a Financial Statement; and
- ▶ an Affidavit in support.

If you are or were married, give the Court a copy of your marriage certificate and if relevant, divorce certificate.

If you want the Court to make interim or urgent orders you must file an Affidavit saying why it is an urgent matter and ask for leave (permission) to have your case heard more quickly.

There will be a filing fee unless you are eligible for an exemption or a waiver of court fees. See ▶ *Chapter 9: Family Law Fees for current fees.*

You can also apply for orders about your children at the same time. See ▶ *Chapter 4: Children.*

It is a good idea to go to the **Family Law Courts** website or call the Court first to check the current court rules and to get copies of the right forms.

What happens after I have eFiled my Initiating Application form?

You must arrange for a copy of all documents eFiled to be served on (formally given to) your partner by hand by anyone over 18 (except you).

Your partner should then file and serve you with a Response to Initiating Application, Financial Statement and Affidavit (if required) **within 14 days** of your documents being served on him or her. Your partner can oppose all or part of your application and ask for different orders to be made.

What will happen at court?

There are a range of events which may happen at court including:

- ▶ directions hearings – where orders about court process can be made such as a list of documents to file and by what date; and
- ▶ conferences – where a Registrar will meet with you and your partner and your lawyers to try to settle your dispute.

If you cannot reach an agreement with your partner, your matter will eventually be listed for a trial (this is also called a final hearing). In most cases both you and your partner will need to give oral evidence at the trial. This means you may be asked to answer questions after taking an **oath** to tell the truth.

What if we reach an agreement after our court case has started?

If you reach an agreement after your court case has started you can ask the Court to make consent orders, sometimes called 'Terms of Settlement'. Once the Court approves the orders they will be just as binding and enforceable as orders made by a judge.

For more about **consent orders**, see ▶ *Chapter 2: Do I need a solicitor or barrister?*

Can I appeal a court order?

If you think the Court has made an error in deciding your case, you can file an appeal **within 28 days** of the judgment and ask for the decision to be set aside. This is not a rehearing of your case, but an appeal based on an **error of law**.

If your time limit has expired you have to make a special application to the Court for permission to appeal out of time and this is only granted in exceptional circumstances.

You should get legal advice about the appeal process as it is very complex and can be very expensive.

7.6 Can we make an agreement about our property before we separate?

Yes, you and your partner can make a binding financial agreement (**BFA**) before, during or after your relationship.

A BFA can deal with how your property and financial resources are to be divided on the breakdown of your relationship and the payment of spousal maintenance in some situations.

The Court is not required to approve a BFA but can enforce the agreement if the necessary requirements are followed, which include:

- ▶ you and your partner must obtain independent legal advice before entering into a BFA and produce a certificate stating that you received this advice; and
- ▶ at least one of you must sign a separation declaration.

You will need a solicitor to prepare your BFA as they are complex and must satisfy many legal requirements. BFAs are expensive to enter into and they can only be set aside by the Court in limited circumstances.

If you are in a de facto relationship and have a BFA you will need to make a new BFA if you later marry your partner.

7.7 Superannuation

How is superannuation dealt with under the Family Law Act?

The *Family Law Act* allows superannuation to be split at the end of your relationship. Usually superannuation can be taken from your partner's fund and put into a superannuation fund in your name (or the other way around). Sometimes the superannuation will be put in your name into the same fund as your partner because of the legal requirements of the fund.

How do I find out about my partner's superannuation?

You can ask your partner's superannuation fund to tell you the value of their superannuation.

The Family Law Courts website has a Superannuation Information Kit which contains the forms that you must send to the trustee of the fund, which are:

- ▶ Form 6 Declaration; and
- ▶ Superannuation Information Request Form (accompanied by the appropriate Superannuation Information Form).

The fund may charge a fee to provide you with this information.

Handy Tip

Keep a record of the name of your and your partner's superannuation funds and membership numbers.

How do I divide superannuation?

If you ask for some of your partner's superannuation, the following options are available:

- ▶ reach an agreement with your partner to split the superannuation and enter into a Superannuation Agreement, which is a Financial Agreement that includes superannuation. You must provide a certificate stating that you have received independent legal advice regarding this split. You do not have to register this agreement in court, so you must keep a copy of the agreement. The *Family Law Act* does not require that the fund be given notice of the terms of a superannuation agreement, but it is wise to do so to ensure the terms can be carried out by the fund; or
- ▶ register an agreement with the Court so it becomes consent orders (see earlier in this chapter for more details about consent orders). You must notify the superannuation fund which must approve the orders. This must be done at least **28 days** before filing the Application for Consent Orders; or
- ▶ apply to the Court to make an order regarding your partner's superannuation. You must tell the superannuation fund about the orders you are asking the Court to make about superannuation. You must provide the fund with an opportunity to attend the court hearing and object to the orders.

If you and your partner split your superannuation, you will not receive any cash payments from the superannuation fund until retirement. However, in

some cases of severe financial hardship it may be possible to apply to the fund to have the superannuation released to you before retirement age.

Sometimes you can ask the Court to order the superannuation fund to flag when a superannuation payment is due. This can be done to make sure that the benefit is not paid out to your partner before the property division is resolved. Flagging a superannuation interest can be useful when your partner is close to retirement age.

You should get legal advice about how to deal with superannuation in your property settlement. It is a complex area of law.

7.8 What else should I think about?

Can I get an urgent court order to protect our property?

Yes, if you are worried that your partner may sell or give away property or get a new loan without telling you, the Court can make an urgent order (**injunction**) to stop this happening until a final decision is made about your property. This includes property which is owned in the sole name of your partner.

Can I get an order for my partner to give me money to pay for a lawyer?

In some cases you can ask the Court to make an order for your partner to pay you some money for your legal fees or other expenses. However, before the Court will do this they must be satisfied that you will get at least that amount of money at the end of your property dispute and that your partner has enough money left for themselves.

Any money you get in advance may be taken off the amount you get at the end of your property dispute. This will depend on things like how much money your partner has spent on their legal fees and other expenses during the court case.

The Court does not make these orders very often – usually only where your partner has a very high income compared to you, or valuable property in his or her name that can be used as security for borrowing money from a bank.

Can I live in the house after separation?

If you are both named on the title or the lease, you and your partner are entitled to live in the family home unless there is a court order that says either you or your partner must leave. If only one of you is named on the title or the lease, the person named can exclude the person not named. In limited circumstances, you can get a family law order giving you the right to stay in the house, to the exclusion of the other person, until the property settlement is finalised. The Court looks at the needs of both parties and the needs of the children. This is called a sole occupation order or an exclusion order.

If you are living in a rental property there are different options if you want to stay or leave the property. See ► *Chapter 5: Protection against violence and harassment* for further information.

If you have experienced domestic violence you can also apply for an exclusion order as part of an application for an apprehended domestic violence order (**ADVO**). See ► *Chapter 5: Protection against violence and harassment* for further information.

What if my partner is bankrupt?

If your partner is bankrupt at the time of your property settlement, you are still entitled to make a claim on the property remaining after the bankruptcy. Your financial and non-financial contributions will be recognised equally with the rights of any other creditors making a claim to the property. If your partner is bankrupt or looks like they might go bankrupt, you should get urgent legal advice.

What about stamp duty and capital gains tax?

Stamp duty and/or capital gains tax usually needs to be paid when property is sold or transferred. However, in most cases you will not have to pay stamp duty or capital gains tax if you transfer the title of your property from one partner to the other under a court order. This includes consent orders and orders made by a judge.

You should get legal and accounting advice about any capital gains tax you might have to pay on property you keep after the property is divided and then later sell.

What happens to our debts?

The only debts that you must pay are debts that are in your name, joint debts or debts guaranteed by you. Just because you are married or in a relationship does not mean that you take on all your partner's debts.

Under the *Family Law Act* the Court can order that the responsibility for a debt be altered. The debt can be transferred into your name or your partner's name or altered so that both of you pay part of the debt. To do this, the Court can order third parties (e.g. banks) connected to the debt to alter it accordingly.

This means that any third parties involved with your debt must be told about the court application so they can tell the Court what they think about the proposed change.

What if we have a large amount of debt / multiple debts and can't afford to pay them now we are separated?

It can be complicated where you and your former partner both have a large amount of debt and no ability to pay. It is good to see a financial counsellor to discuss your debts and your options for dealing with those debts. You need to be realistic about what you can afford. Legal Aid might be available in some very limited cases to make an application to the Court for orders about your property and/or debts.

Can I get spousal maintenance from my partner?

In some circumstances, a Court might order that your former partner pay you spousal maintenance. For more information on this, see ► *Chapter 6: Spousal Maintenance*.

What if my partner forced me to take on debt in my name?

If your partner has forced you to sign loan documents, credit card applications, cheques, withdraw money or put your name on debts you need to seek legal advice as soon as possible.

You will usually be responsible for any debts in your name or joint names even if the debt really isn't yours.

See ► *Chapter 9: Referrals and Resources*.

Will a property agreement affect my Centrelink payments?

If you are getting a pension or benefit from Centrelink, or if you are likely to apply in the future, any agreement you make to take a larger share of the property instead of maintenance for you or the children may affect your payments. Get advice from Centrelink or a **solicitor** to find out how you may be affected before you sign any agreement or apply for court orders.

Can I get legal aid?

It is difficult to get legal aid in property matters, particularly if you have a house. However, in some situations legal aid may be available. This may include where you are trying to keep the family home for the children and will not receive any other money in the property settlement or when the only property of any value is superannuation. Sometimes you will get legal aid but may have to pay back some or all of the legal costs from your property settlement after the case is finished. Contact Legal Aid NSW to find out if you might be eligible. See ► *Chapter 9: Referrals and Resources*.

If you feel that you have exceptional circumstances and have been refused legal aid for your property matter then you should lodge an **appeal with legal aid within 28 days** of receiving that refusal.

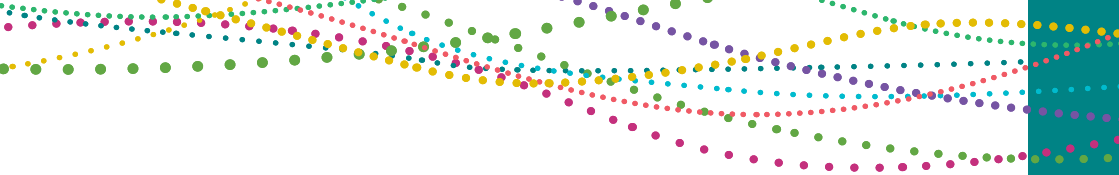
Handy Tip

Make lists of as much of the following information that you can. You will need this information if you are negotiating a property settlement with your partner or if you are going to see a lawyer. You can use the 'Information Sheet' in Chapter 2 to record this information:

- ▶ dates – when your relationship began and/or when you married, when it ended, the dates of birth of yourself, your partner and of any children;
- ▶ valuations of assets – current valuations for your home, cars, furniture, shares, life insurance and superannuation policies and any other assets. Estimates are good enough at this stage. If you must go to a full hearing you will need to get proper valuations. Real estate agents will often give you a 'market assessment' or appraisal which is an estimate of the value of your home for free;

- ▶ liabilities – outstanding mortgages, personal loans, credit card statements and any other debts;
- ▶ family business – any family business liabilities and current trading statements;
- ▶ financial contributions – any money or other assets brought into the relationship at the beginning and during the relationship, and any money or other assets, such as cash savings, investments, gifts from parents, compensation payments or any other source;
- ▶ non-financial contributions – if you have mainly been a homemaker it is essential that you document your contribution to the relationship in terms of home decoration, renovation or maintenance, attendance at school functions, supervising homework, entertaining business clients, etc;
- ▶ salaries – for both you and your partner; and
- ▶ superannuation entitlements – current statements for both your funds.

If you are planning on leaving your home, it will make things easier later on if you take the original or photocopies of all documents relating to your property, such as title deeds, bank statements, superannuation fund statements and receipts.



8. Legal language: what does it all mean?

These terms are highlighted in bold the first time they appear in each chapter of this booklet.

Action

A dispute that is taken to court. Also called 'proceedings', a 'case', a 'matter' or a 'suit'.

Adjournment

Putting off a court case until a later date.

Affidavit

A written statement of facts and circumstances, sworn or affirmed to be the truth and signed in front of a solicitor or Justice of the Peace. Affidavits are used as evidence in court cases.

Affirmation

A promise to tell the truth when giving evidence in court either in person or by signing an affidavit.

Applicant

A person who starts a court case.

Application

The document filed by the applicant to start a court case.

Apprehended domestic violence order (ADVO)

A violence protection order against a person with whom you have domestic relationship (eg a spouse or family member).

Apprehended personal violence order (APVO)

A violence protection order against a person with whom you do not have a domestic relationship (eg a neighbour).

Barrister

A lawyer who specialises in court work.

Binding financial agreement

An enforceable agreement dealing with the division of property, and/or payment of maintenance. It can be entered into before, during or after marriage.

Child support

Payments that are made by a parent for the benefit of a child.

NSW Community Services

The government agency in NSW responsible for child protection.

Conflict of interest

A clash between the different duties that a lawyer has to clients, the Courts, other lawyers or the public. For example, a lawyer has a duty to keep client information confidential and to put the interests of the client before others. A lawyer cannot fulfil these duties by representing two people on opposing sides of a case or in some cases acting against a past client.

Contravention

When a party does not follow (breaches) the family law orders made by the Court.

Client

A person who employs a lawyer.

Consent order

A court order based on agreed terms between parties to a dispute.

It is just as enforceable as any other court order. It can be about property or children or both.

Contested or defended action

A dispute in court where the respondent will not agree with all or part of an application.

De facto relationship

A relationship between two adults who live together as a couple on a genuine domestic basis and who are not married or related by family.

De facto partner

A partner in a de facto relationship (formerly de facto spouse).

Defendant

In the context of AVO proceedings, the defendant is the person against whom an application is made or who has an AVO against them.

Deponent

A person who swears or affirms an affidavit.

Dispense with service

A court order which means that you do not have to give your application or other court documents to the other party.

Dissolution of marriage

Divorce, the legal end of marriage.

Divorce Kit

A kit produced by the Family Law Courts which provides the steps in applying for and obtaining a divorce and the application for divorce form.

Domestic Relationship

You have a domestic relationship (as used in NSW Domestic Violence law) with another person if you:

- Are/were married
- Are/were in a de facto relationship
- Have/have had an intimate personal relationship eg. Boyfriend/girlfriend – doesn't need to include sexual relationship
- Live/lived with each other
- Live/lived in same residential facility at the same time
- Are/were cared for by the other person (paid or unpaid carers included)
- Are/were a **relative** of the other person
- Are part of the same extended family or kinship group (Aboriginal/Torres Strait Islander person)
- Are/were in a relationship with the same person

Domestic Violence Liaison Officer

A Domestic Violence Liaison Officer (DVLO) is a specialist police officer, trained in the dynamics of domestic and family violence, child protection procedures, victim support and court AVO processes.

The role of the DVLO is to:

- provide advice to police and victims;

- assist in referral to appropriate support agencies;
- assist victims through the court process for Apprehended Violence Orders; and
- monitor repeat victims and perpetrators.

Equal shared parental responsibility

This is how the responsibility for the major decisions in a child's life is shared between the parents once a family court order is made. Parents must talk to each other and agree about major long terms issues including: the child's education, religion and culture, health, name and changes to living arrangements. Equal shared parental responsibility does not mean that parents spend equal time with the child or children.

Equal time

Each parent spends time with a child on an equal basis.

Error of law

A mistake in the way the judge interpreted or applied the law.

Ex parte order

A court order made without the other party to the application being present.

Family Consultant

A family consultant is either a psychologist or social worker who specialises in family issues arising from separation and divorce and

who is employed by the family law courts to help make decisions about a child's living arrangements. They prepare **Family Reports**.

Family Dispute Resolution (FDR)

Family Dispute Resolution also known as FDR is a compulsory mediation process where the parties (usually the parents of the child) are encouraged and supported to try and make a decision about the care of their children. There are exceptions to the compulsory requirement to mediate.

Family Dispute Resolution Practitioner (FDRP)

An independent person who helps separating couples to resolve some or all of their family law issues through mediation. They must complete an accreditation course and be registered with the Federal Attorney General's Department.

Family Law Conference

The Legal Aid family dispute resolution service.

Family Law Courts

The Family Court or the Federal Circuit Court.

Family Member

Usually refers to a person you are or were in a relationship with or have a family connection to. The *Family Law Act* defines family member for the purposes of certain sections of the Act, particularly in relation to **Family**

Violence. See also ► *Domestic Relationship* and *Relative*.

Family Relationship Centre (FRC)

Family Relationship Centres or FRCs are government funded agencies which provide family dispute resolution services to assist separated parents to make decisions about children after separation.

Family Report

A Family Report is a report prepared by a Family Consultant to help the Court make a decision in a family law matter about children.

Family Tax Benefit Part A

The primary payment from the federal government to help with the cost of raising children. It is usually paid to a parent or guardian for a child aged less than 21 years or a dependent full time student aged between 21 and 24 years.

Family Tax Benefit Part B

An extra payment to help families with the cost of raising children where there is only one main income earner (including sole parent families) with a dependent full time student up to the age of 18 years.

Family violence (as defined in the Family Law Act)

Family Violence (as defined in the *Family Law Act*) means violent, threatening or other behaviour by a person that coerces or controls

a member of the person's family, or causes the family member to be fearful.

Examples of behaviour that may constitute family violence include (but are not limited to):

- (a) an assault; or
- (b) a sexual assault or other sexually abusive behaviour; or
- (c) stalking; or
- (d) repeated name-calling; or
- (e) intentionally damaging or destroying property; or
- (f) intentionally causing death or injury to an animal; or
- (g) unreasonably stopping a family member from having access to and control of money; or
- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

Family Violence (as used in reference to ADVOs in NSW)

Family violence and domestic violence are often used to describe the same thing when people are talking about getting an AVO. When family violence is in this context, it means violence from a family member or other person within a **Domestic Relationship**. See above definition of **Apprehended Domestic Violence Order** and **Domestic Relationship** for more information.

Federal Circuit Court

A court that is part of the federal court system designed to deal with less complex family law matters and divorce applications. Cases are heard by Federal Judges.

Independent children's lawyer

A solicitor appointed by the Court to represent the interests of a child or children in a family law case.

Injunction

A court order that forbids a person from doing something or commands him or her to do something. Also known as a restraining order.

Interim application/order

An application to the Court for a temporary order until the Court can hear all the evidence. For the purposes of this booklet, it might apply to interim AVO orders or interim orders about property or children.

Irretrievable breakdown of marriage

No reasonable likelihood of getting back together. Under family law this is proved by 12 months separation.

Judgment

A decision by a judge resolving a dispute after a hearing, together with their reasons for the decision.

Justice of the Peace

A person who has formal authority to witness legal documents.

Lawyer

A general word for solicitors and barristers.

Litigation

A court dispute.

Local Court

A state court where a magistrate hears cases and makes decisions.

Magistrate's Court

Same as a Local Court.

Maintenance

Money paid by one former partner for the support of the other former partner and/or their children.

Mention

A brief hearing when the Court gives a case some attention but not a full hearing.

Oath

A promise to tell the truth sworn on a religious book that is important to the person making the promise.

Party or parties

People involved in a court case or a dispute – usually, an applicant and a respondent.

Parenting order

Any order about children made under the *Family Law Act*.

Parental responsibility

All the duties, powers and responsibilities and authority that parents have for their children. Parents have joint parental responsibility for their children until a court orders otherwise.

Property

Any assets of value including a house, investment properties, cars, boats, trailers, cash in bank accounts, superannuation, household contents, shares, or interest in a business. Even if the property is in one spouse or partner's name, it can still be divided in a family law property settlement.

Provisional Order

A provisional AVO is an order made by the court in response to an urgent application by the police who believe someone needs immediate protection.

Recovery order

An order of the Court that directs a person or people (such as the police) to find, recover and deliver a child to a parent of the child; a person who has parental

responsibility for the child, or a person with parenting orders that state the child must live with, spend time with or communicate with them.

Registrar

A person who works for the Court and provides information, assistance with court forms and may make decisions in Court about procedural issues. In Local Courts Registrars can take applications for AVOs.

Relative

A person is a relative if they are or were:

- (a) A father, mother, grandfather, grandmother, step-father or step-mother of the person; or
- (b) A son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or
- (c) A brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or
- (d) An uncle or aunt of the person; or
- (e) A nephew or niece of the person; or
- (f) A cousin of the person; or
- (g) If the person is or was married, a person who is or was a relative, of the kind described in (a)–(f), of the person’s spouse; or
- (h) If the person is or was in a de facto relationship with another

person, a person who would be a relative of a kind described in (a)–(f) if the persons in that de facto relationship were or had been married to each other.

Respondent

The other party in an application you make to the Court.

Response

A form lodged to respond to an Application in a family law matter.

Section 60I certificate

A section 60I certificate enables a person to file an application in court for orders about their children. Unless a person is eligible for an exception to the requirement to participate in **family dispute resolution (FDR)**, all parties must attempt to resolve their dispute using FDR prior to filing in Court. Section 60I certificates can only be signed by an accredited **FDR practitioner**.

Separation

The situation when a married or de facto couple lead separate lives and usually live apart. There is no need to formally register when you first separate.

Serve documents/Service of documents

A process where the documents filed in a court case are given to the other party. All documents in a court case must be formally given to the other party before the Court

will hear the case. Different rules for service apply in different cases.

Settlement

An agreement between parties to a dispute about how to resolve it without a court decision.

Solicitor

A lawyer who may give clients legal advice, help with legal problems and who may appear in court.

Spouse

Another word for partner, including husband, wife, heterosexual and same sex de facto partners.

Stalking

A form of harassment when someone follows you around or waits outside your home or workplace.

Status quo

A Latin phrase that means 'the way things are'. A phrase that refers to current situation or circumstances.

Stay of execution

A court order that temporarily stops a court judgement from being carried out.

Subpoena

A court order to make a witness come to court to give evidence and/or to bring documents to court.

Substantial and significant time

In family law, time that enables parents to be involved in daily routines and special occasions and

includes weekends, weekdays and holiday times.

Substituted service

A court order that enables you to **serve** your court documents on a relative or friend of the respondent or put a notice in the paper, instead of serving them on the other party in circumstances where you do not have an address or do not know where he or she is.

Victims Services

The NSW government agency that provides counselling, financial support and recognition payments for people who have been injured as a result of an act of violence in NSW.

Women's Domestic Violence Court Advocacy Service

Women's Domestic Violence Court Advocacy Services or **WDVCAS** provide assistance and support to women experiencing domestic violence. Their workers can help women experiencing domestic violence by providing information about ADVOs and the court process, support at court, assistance with access to legal representation if required and referrals to counselling, accommodation or support groups.

Witness

Any person who tells a court what she or he knows about a case.

9. Referrals and resources

9.1 Referrals

For people who are deaf or have a hearing or speech impairment

If you are deaf or have a hearing or speech impairment, you can ring any telephone number using the **National Relay Service**.

TTY/Voice calls	133 677
Speak & Listen	1300 555 727
SMS Relay	0423 677 767

Internet Relay	internet-relay.nrscall.gov.au
Captioned Internet Relay	captioned-relay.nrscall.gov.au (Some services may not use)

Video Relay	Choose the available NRS video relay contact on Skype Open Skype and contact NRS.VIDEORELAY (Some services may not use)
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If you are unsure how to use the National Relay Service, you can contact the **National Relay Service Helpdesk**.

Hours	Monday–Friday (8am–6pm Sydney time)
Voice	1800 555 660
TTY	1800 555 630
Fax	1800 555 690
Email	helpdesk@relayservice.com.au
SMS	0416 001 350

For people who are non-English speakers

If you do not speak English or it is not your main language, you can call **TIS National** (Translating and Interpreting Service) for an interpreter. It is free to call most government services and many non-profit services.

Phone **131 450**
 Website www.tisnational.gov.au

Department of Human Services

<i>Service</i>	<i>Contact</i>	<i>Hours</i>
Families	136 150 • Family Tax Benefit • Parenting Payment	Monday–Friday 8am–8pm
Child Support	131 272 • General enquiries • Applying	Monday–Friday 8:30am–4:45pm
Indigenous phone services	1800 136 380 • Centrelink	Monday–Friday 8am–5pm
	1800 556 955 • Medicare	Monday–Friday 8am–5pm
Multilingual phone services	131 202 • Centrelink	Monday–Friday 8am–5pm
TIS National phone services	131 450 • Medicare and Child Support	Monday–Friday 8am–5pm

For details of your closest Centrelink, Medicare or Child Support location, go to the Human Services website.

Website www.humanservices.gov.au/findus

Children’s Contact Services

Contact the Family Relationship Advice Line for the location and telephone number of your closest Child Contact Service.

Phone **1800 050 321**
 Hours Monday–Friday, 8am–8pm
 Saturday, 10am–4pm

Community Legal Centres NSW

CLCs NSW is the peak body for community legal centres in NSW. To find the Community Legal Centre closest to you, go to the CLCs NSW website.

Phone **1300 888 529** (LawAccess)
 Website www.clcnsw.org.au

Domestic Violence Line

The Domestic Violence Line is a **24 hour, 7 day a week** phone service that offers referral to refuges and accommodation, counselling and support services to victims of domestic violence.

Phone **1800 656 463**
 TTY **1800 671 442**

Domestic Violence NSW (formerly Women's Refuge Movement)

Phone **(02) 9698 9777**
 Fax **(02) 9698 9771**
 Email admin@dvnsw.org.au
 Website www.dvnsw.org.au
 Mail PO Box 3311, Redfern NSW, 2016

NSW Family & Community Services (formerly DoCS)

The Child Protection Helpline is a phone service to report suspected child abuse or neglect, 24 hours, 7 days a week.

Phone **132 111**
 TTY **1800 212 936**

Enquiries, feedback & complaints

Phone **1800 000 164**
 Email complaints@facs.nsw.gov.au

To find a Community Services office closest to you, go to the Community Services website.

Website www.community.nsw.gov.au

Family Relationship Advice Line

The Family Relationship Advice Line is a national telephone service that provides information on family relationship issues, advice on parenting arrangements and referrals to local services.

Phone **1800 050 321**
 Hours Monday–Friday, 8am–8pm
 Saturday, 10am–4pm

Family Relationships Online

The Family Relationships Online website provides families with information about relationship issues and services to assist them with their relationship issues, including family dispute resolution services. The website also includes the contact details of Family Relationship Centres across Australia.

Website www.familyrelationships.gov.au

Family Law Courts

The Federal Circuit Court and the Family Law Court website have general information about family law court procedures and can make referrals. These websites has information on many topics, court forms, do-it-yourself kits and information about court fees.

Federal Circuit Court

Website www.federalcircuitcourt.gov.au

Family Court of Australia

Website www.familycourt.gov.au

You can call the **National Enquiry Centre 24 hours** if you have an urgent family law situation, such as children at risk of being taken overseas without consent:

Phone **1300 352 000**
 Hours Monday–Friday, 8:30am–5pm
 Email enquiries@familylawcourts.gov.au

Family Violence Prevention Legal Services (NSW)

Family Violence Prevention Legal Services are community based organisations that provide legal assistance and support to **Aboriginal and Torres Strait Islander** victims of family violence.

Bourke, Moree HO, Walgett (Thiyama-li Family Violence Service)	(02) 6751 1400 or (02) 6752 1188
Broken Hill	(08) 8087 6766 (Warra Warra Legal Service) or 1800 812 800
Forbes	(02) 6850 1234 (Binaal Billa Family Violence Prevention Legal Service) or 1800 700 218
Kempsey	(02) 6562 5856 (Many Rivers Family Violence Prevention Legal Service)

Link2Home – Statewide Homeless Service

Link2Home provides an information and referral service, including for refuge accommodation.

Phone **1800 152 152**
 Website www.facs.nsw.gov.au/housing

International Social Service (ISS) Australia

The International Social Service provides telephone information and social work support for international parental child abduction and tracing cases.

Phone **1300 657 843** or **(02) 9267 0300** (NSW Office)
 Email iss@iss.org.au or issnsw@iss.org.au
 (NSW Office)
 Website www.iss.org.au

LawAccess NSW

LawAccess provides free legal information, advice and referrals. It is a main referral point to find your nearest Legal Aid, Women's Domestic Violence Court Advocacy Service, Community Legal Centre, Family Violence Prevention Legal Service or Aboriginal Legal Service as well as private solicitor referrals.

Phone **1300 888 529**
 Hours Monday–Friday, 9am–5pm
 Website www.lawaccess.nsw.gov.au

Law Society of New South Wales

The Law Society of NSW provides a solicitor referral service and a pro bono solicitor scheme.

Phone **(02) 9926 0333**
 Hours Monday–Friday, 9am–5pm
 Email lawsociety@lawsociety.com.au
 Website www.lawsociety.com.au

Legal Aid NSW

Legal Aid NSW provides free legal advice and information, as well as legal representation for eligible clients.

Phone **(02) 9219 5000** (Head Office)
1300 888 529 (LawAccess)
 TTY **(02) 9219 5126**
 Website www.legalaid.nsw.gov.au

Legal Aid NSW Child Support Service

Phone **(02) 9633 9916** or **1800 451 784**
Hours Monday–Friday, 9am–5pm

Legal Information Access Centre (LIAC)

The Legal Information Access Centre provides legal research assistance and access to legal information resources (including legislation and case law). Specialist librarians are available to assist with legal research.

Phone **(02) 9273 1414**
Hours Monday–Friday, 10am–5pm
Monday–Friday, 10am–1pm
(Telephone enquiries)

Location State Library of NSW, Macquarie Street, Sydney, 2000 (corner of Hunter and Macquarie Streets)

Email liac.library@sl.nsw.gov.au
Website www.legalanswers.sl.nsw.gov.au

LGBTIQ Services

Inner City Legal Centre

ICLC is a community legal centre which provides Lesbian, Gay, Transgender and Intersex people with legal services including court assistance for people escaping domestic and family violence and a statewide legal advice service.

Phone **(02) 9332 1966** or **1800 244 481** (Toll free)
SMS **0466 724 979**
Email iclc@iclc.org.au
Website www.iclc.org.au

Another Closet – Domestic and Family Violence in LGBTIQ Relationships

Website www.anothercloset.com.au

ACON's Say It Loud website

Phone **1800 063 060** or **(02) 9206 2000**
Hearing Impaired **(02) 9283 2088**
Website www.sayitoutloud.org.au

Local Courts NSW

To find the Local Court closest to you, go to the Local Courts' website.

Website www.localcourt.justice.nsw.gov.au

NSW Office of the Legal Services Commissioner (OLSC)

You can contact the OLSC to make a complaint against a legal practitioner or service.

Phone **(02) 9377 1800** or **1800 242 958**

TTY **(02) 9377 1855**

Email olsc@justice.nsw.gov.au

Website www.olsc.nsw.gov.au

Staying Home Leaving Violence (SHLV)

The Staying Home Leaving Violence program helps women and children escaping domestic violence to remain safely in their homes.

Bega	(02) 6492 6239
Blacktown/Mt Druitt	(02) 9677 1962
Campbelltown	1800 077 760 or (02) 4633 3777
Dubbo	(02) 6883 1561
Eastern Sydney	0439 414 673
Fairfield, Liverpool	(02) 9602 7795
Kempsey	(02) 6562 2272
Lake Macquarie	(02) 4943 9255
Maitland, Cessnock	(02) 4397 1927
Moree	(02) 6752 8027
Newcastle	(02) 4926 3577
Penrith	(02) 4721 2499
Redfern	(02) 9699 9036
Shoalhaven	(02) 4421 7400
Walgett, Coonamble	(02) 6829 4352 or (02) 6828 3570
Wollongong	(02) 4255 5333
Wyong, Gosford	(02) 4356 2600

Wirringa Baiya Aboriginal Women's Legal Centre

Wirringa Baiya is a statewide community legal centre for Indigenous women.

Phone **(02) 9569 3847** or **1800 686 587**

Website www.wirringabaiya.org.au

Women's Domestic Violence Court Advocacy Services (WDCAS)

WDCAS provides information, support and referrals to women who have experienced domestic violence. To find a WDCAS closest to you, or to find if there is one at the court you are going to you can contact the local police DVLO or call LawAccess.

Phone **1300 888 529** (Law Access)

Women's Health NSW

Women's Health NSW is the peak body for Women's Health Centres in NSW. To find the Women's Health Centre closest to you, go to the Women's Health NSW website.

Email info@whnsw.asn.au

Phone **(02) 9560 0866**

Website www.whnsw.asn.au

Women's Legal Service NSW

Women's Legal Service NSW (WLS) is a statewide community legal centre for women. WLS provides free legal advice, information and referrals through the advice lines and outreaches provided below. Limited casework and representation may be available. WLS also does community legal education and law and policy reform work.

Phone **(02) 8745 6900** (administration)

Website www.wlsnsw.org.au

Women's Legal Contact Line

Free legal advice for women in NSW

Phone **(02) 8745 6988** or **1800 801 501**

Indigenous Women's Legal Contact Line

Free legal advice for Aboriginal and Torres Strait Islander women in NSW

Phone **(02) 8745 6977** or **1800 639 784**

Domestic Violence Legal Advice Line

Free legal advice for women in NSW with legal issues relating to domestic violence

Phone **(02) 8745 6999** or **1800 810 784**



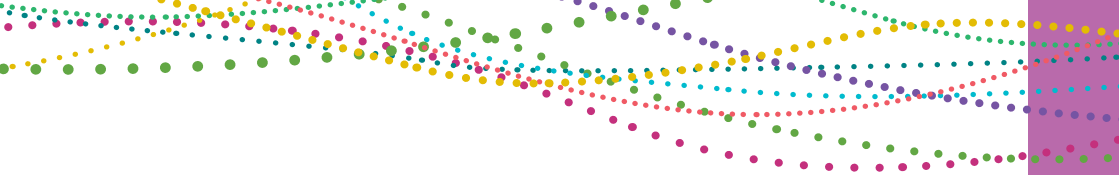
Outreach Services

WLS provides face to face legal advice by appointment at a number of locations across Sydney. Phone to book an appointment at an outreach service nearest to you.

Blacktown	(02) 9831 2070
Bonnies (Canley Heights)	(02) 9729 0939
Liverpool	(02) 9601 3555
Penrith	(02) 4721 8749

9.2 Useful resources

Organisation	Resource	Website
Attorney General's Department	Information about international child abduction.	www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/default.aspx
Australian Federal Police	Family Law Kit: Information about recovery of children and the family law (airport) watchlist.	www.afp.gov.au/policing/family-law/family-law-kit
Family Law Courts	Pamphlets, fact sheets and kits about court's services, court processes, costs and a range of family law issues.	www.familycourt.gov.au www.federalcircuitcourt.gov.au
Thomson Reuters	The Law Handbook 12th edition Sydney 2012.	www.legalanswers.sl.nsw.gov.au/guides/law_handbook
Law Access	Factsheets and referrals on many areas of law.	www.lawaccess.nsw.gov.au
Legal Aid NSW	Pamphlets and fact sheets on family law, child support and domestic violence as well as other criminal and civil law issues.	www.legalaid.nsw.gov.au
Legal Information Access Centre (NSW State Library)	Hot Topics: Publications about legal issues in plain language. Find Legal Answers: lists useful legal resources, by topic, available on the web and in print from public libraries across NSW or in the State Library of NSW.	www.legalanswers.sl.nsw.gov.au
Shoalcoast Community Legal Centre	Family Law Property Settlement Workbook and other publications about children's court care matters.	www.shoalcoast.org.au
Victims Services	Forms for applying for Victims Support, publications and links to other resources.	www.victimsservices.justice.nsw.gov.au/



Organisation	Resource	Website
Welfare Rights Centre	Factsheets about social security benefits and dealing with Centrelink (e.g. 'Declaring your same sex relationship to Centrelink', and 'Prosecution of social security offences').	welfarecentre.org.au
Wirringa Baiya	Infosheets on a number of topics including victims' support, sexual assault, domestic violence and AVOs.	www.wirringabaiya.org.au
Women's Legal Services NSW	Women and Family Law Booklet and brochures about domestic violence.	www.wlsnsw.org.au

9.3 Family Law Fees

Fees are as at 1 July 2019 subject to increase please check with the court or service for up to date fees.

The Family Court and Federal Circuit Court may give you an exemption from fees if you are in financial hardship. Check court guidelines to see if you have to pay the fee or if you may fill in the application for exemption from fees.

Family Court of Australia

Application for consent orders	\$165
Initiating application (<i>Parenting or financial, final only</i>)	\$350
Initiating application (<i>Parenting or financial, final and interim</i>)	\$470
Initiating application (<i>Parenting and financial, Final only</i>)	\$575
Initiating application (<i>Parenting and financial, final and interim</i>)	\$695
Response to initiating application (<i>final</i>)	\$350
Interim application	\$120

Federal Circuit Court of Australia

Application for divorce	\$910
Application for divorce—reduced fee (<i>no fee waiver allowed</i>)	\$305
Initiating application (<i>Parenting or financial, final only</i>)	\$350
Initiating application (<i>Parenting or financial, final and interim</i>)	\$470
Initiating application (<i>Parenting and financial, final only</i>)	\$575
Initiating application (<i>Parenting and financial, final only and interim</i>)	\$695

Multicultural NSW (was Community Relations Commission)

Translation of Standard documents—14 days	\$77
Translation of Standard documents—7 days	\$96
Translation of Standard documents—24 hours (<i>not available in all languages</i>)	\$117

NSW Registry of Births Deaths & Marriages

Marriage Certificate—Standard	\$60
Marriage Certificate—Urgent	\$88

For more details, other filing fees or exemption applications call the Family Law Courts National enquiry line **1300 352 000**.



Women ^{and} Family Law

Women's Legal Service NSW

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 **WOMEN'S**
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