



## Family Law Introduction Notes

### Some answers to your Family Law problems

*The breakdown of a relationship is traumatic. Inevitably, you are faced with a whole range of problems and need assistance from experienced professionals with advice regarding your rights and obligations to help you through a difficult period.*

*Some of the most common questions include:*

- *What arrangements can be made for the children of a relationship?*
- *How can we divide the marital assets, such as the home, in a way that is fair and reasonable?*
- *Will I have to pay child support and, if so, how much?*
- *Will I have to pay spousal maintenance, if so, how much?*
- *Can the process be shortened and expenses be minimised?*

*What you need right at this time is an understanding objective professional to give you sound, sensible advice.*

*Our experience at Bateman Battersby, as Family Lawyers, is that our clients have a range of both general and individual questions about their circumstances. The information in this advice is designed to answer only some of the general questions. Questions about individual circumstances can only be satisfactorily answered in a conference with one of our Family Lawyers.*

### Some of the important issues in Family Law are:

#### Separation

Parties are "separated" when one of the parties has formed the intention that the marriage has irretrievably broken down. This can be evidenced by one of the parties leaving the former matrimonial home or the parties leading separate lives "under the same roof". If you are separated under the same roof, and you file for a Divorce, then you may be required to provide evidence, from yourself or family and friends, that you have lived a separate life under the same roof with your existing spouse.

You can only file an Application for Divorce after twelve months has elapsed from the date of separation.



## Counselling and mediation

Separating from your spouse can be a very difficult and emotional time. Counselling, either separately or together, can assist you to adjust to the changes that are occurring and to recognise and deal with the feelings which you are experiencing. Mediation can help separated couples to settle disagreements about children, property and other financial matters. In relation to parenting issues involving children the Family Law Act requires that the parties must attend mediation in an attempt to resolve parenting issues. Whilst there are some exceptions to compulsory mediation unless you fall within these exceptions, you will not be able to file an application in Court regarding any children's issues without a mediation certificate from a recognized provider. We can assist in referring you to a mediator.

In relation to property issues the Family Law Act also requires that parties attempt to settle these matters before commencing proceedings. Whilst there is no obligation to undertake mediation there are requirements for full and frank disclosure of all financial matters.

## Divorce Applications

You cannot file for a divorce (also known as "dissolution of marriage") until twelve months has elapsed from the date of separation. There is a filing fee for a divorce application, however if you are unemployed or in receipt of a Centrelink benefit you can apply to the Court for a waiver of the filing fee.

After you have filed a Divorce Application your matter will be listed for hearing in approximately three months (depending on the availability of the Court). This time may take longer if your spouse is residing overseas.

It is important to show the Court that your spouse has been served with your Application. Applications can be served either personally (although not by you) or by post and evidence of service is required.

If there are children of the marriage the Court will need to be satisfied that proper arrangements have been made for the children such as their housing, education and financial support. A Divorce does not become final until one month after the date of hearing. The one month period can be shortened if there are special circumstances and an Application will need to be made to the Court.

## Children

Children are the most important consideration the Court has in family law proceedings. The Court considers that the "best interests of the child" are paramount. If you cannot come to an agreement with your former spouse regarding the children of the relationship, then the Court will make Orders based upon what the Court considers are the best interests of the children. Quite often the Court will order a Family Report, or perhaps an experts report, in regards to children's issues. In some circumstances, the Court may order that children be represented by an Independent Children's Lawyer (ICL). The ICL does not have to follow the wishes of the children but must make a determination upon what is considered to be in the best interests of the children. You and your spouse may be required to pay the costs of the ICL.

It is not only parents that can bring proceedings before the Court in regards to children. Grandparents or other relatives may also file Applications to have the children live with them, or to spend time with the children.



## ***Whom the children will live with***

Whilst you may have heard the expression "custody" the Family Court now uses the expression "live with". An order for with whom the children will live may be made in favour of one parent or there may be an order that the children spend equal time or significant time with each parent.

There is a presumption of shared parental responsibility, although this does not mean equal time between parents. The Court will consider, based on the best interests of the children, how much time the children will spend with a party.

## ***Children spend time with***

You may also have heard of the expression "access". This term is no longer used and has been replaced by the expression "spend time with". The expression defines the extent to which children will spend time with one of the parties of the marriage. It may be, for example, that the children live with one parent but spend time with another parent. The amount of time spent with a parent will depend upon what is in the best interests of the children. The Court, unless it is shown to the contrary, would consider it important that children spend time with each parent to maintain and develop a relationship.

In some cases one parent may seek to deny the child spending time with the other parent altogether or restrict such time. In some cases a parent may seek to have the children's time with a parent supervised. There are many reasons for this, including violence against the child, or violence within the home.

## **Financial matters**

### ***Property***

The Court has the power to make Orders for property adjustments between parties. All the assets of the marriage are pooled – whether these assets are in joint names or not and each party has an obligation to disclose fully to the Court, and to the other party, his or her financial position.

The Court is obliged to make Orders which are "fair and reasonable" having regard to:

1. the financial contributions of each of the parties
2. the non-financial contributions of each of the parties, particularly in the role of homemaker and parent
3. the future needs of the parties, including the need to provide for the children and the capacity of the party to provide for those needs.

If you have already obtained a divorce and your Application for Divorce has become final, you only have twelve months from the date the Divorce becomes final in which to file an Application for property in the Court. If you wish to file beyond the period of twelve months after a divorce has become final, you will need to obtain leave from the Court to commence property proceedings. However, you do not need to wait until you can file for divorce before you can file an Application for distribution of marital assets as property proceedings can be commenced any time after the parties have separated. A filing fee is payable to the Court for filing an Application, however, if your financial position is such or you are in receipt of a Centrelink benefit, you may apply for a waiver of that fee.

Currently, you may file for property either in the Family Court of Australia or the Federal Circuit Court. There are subtle differences in which Court you file:



1. If you file in the Family Court you will need to file an Application, and a Financial Statement; or
2. If you file in the Federal Circuit Court, not only will you need to file an Application and Financial Statement but also an Affidavit in support of your Application.

If you file an Application for property and financial matters in the Family Court you will first generally attend a Case Assessment Conference before a Registrar of the Family Court which is your first opportunity to attempt to settle the matter. This is an informal meeting between yourself, your spouse, your lawyer and your spouse's lawyer. If no agreement is reached then your matter may be referred to a Conciliation Conference which is a second opportunity to settle your financial matters. If no agreement is reached at the Conciliation Conference then directions will be made for filing of Affidavit material and you will then appear at a Pre-Trial Conference. Ultimately, if your matter does not settle then you will be allocated a hearing date.

If you file a Financial Application in the Federal Circuit Court upon your first return date you may be referred to a Conciliation Conference. The matter will then be listed again for mention after the Conciliation Conference and if no settlement is reached then you will be allocated a Hearing Date.

Our Family Law lawyers are experienced in analysing property issues, including complex financial arrangements, and are able to advise on the best presentation of property Applications. They are also able to advise you on the likely outcome of the case if it proceeds to Court. Our lawyers are skilled and experienced negotiators and will deal effectively with other legal representatives involved in the proceedings. Our aim is to provide you with realistic advice and see matters finalised to your satisfaction as early as possible.

### ***Spousal Maintenance***

Under current legislation a spouse is liable to maintain the other spouse to the extent of his or her ability to do so where the other spouse cannot support himself or herself adequately. This can often be because one of the parties is caring for young children or because he or she has been out of work for some time and requires retraining before being able to obtain employment.

### ***Child Support (Maintenance)***

For parents who separated after 1 October, 1989 there is a statutory scheme for child support administered by the Child Support Agency. The amount of support payable is determined according to a formula based on the number of children and the incomes of both parents. The Federal Government's Child Support Agency will assess the appropriate amount payable upon application by the parent entitled to receive support. If there is a dispute as to the amount properly payable, or there are other circumstances which require the assessed amount to be varied, then an Application for Review by the Child Support Review Officer, who is an officer of the Agency itself, can be made. After all Child Support Agency mechanisms for review have been exhausted, in some circumstances, an Application can be made to the Court.

### ***Superannuation***

Changes to the Family Law Act now include superannuation as "property" which may be distributed between the parties. Prior to these amendments superannuation was considered a financial resource.

The Court now has the power to deal with superannuation in a number of ways:

1. It may leave the entire fund to the member, however may adjust the entitlement that the non-member spouse may have in relation to other property such as homes, cars and bank accounts;



2. It may order that a member's superannuation amount be "split" and allow for that amount to be rolled over into a new fund for the non-member spouse; and
3. If a person is close to retirement there may be a "flagging" order by which the Trustee of the superannuation fund will pay out an ordered share of the member's superannuation fund to the non-member spouse upon the member cashing in his/her super upon retirement.

Please note that in order for there to be a Splitting Order or Flagging Order the Trustee of the superannuation fund must give its consent to such an Order.

## Domestic violence

If at any time you are assaulted, harassed, intimidated or molested by your spouse or former partner, or you fear that it is likely to happen, action can be taken by either contacting the police or attending a Local Court Chamber Magistrate to have a complaint for an Apprehended Violence Order sworn on your behalf.

Alternatively, provisions of the Family Law Act can provide restrictions on your former spouse. Under both the New South Wales legislation for Apprehended Violence Orders and the Family Law Act orders can include, amongst other things, restraining your former partner from living or entering the former matrimonial home. Any domestic violence, whether physical or emotional, is very relevant to arrangements for children. We ask you to speak to us freely in relation to any fears you may have so that we might advise you as to what can be done to protect you and your children.

Recent proposed amendments to the Family Law Legislation being the Family Law Legislation amendment (Family Violence and Other Measures) bill of 2011 will amend the Family Law Act to broaden the definition of "Family Violence". Family Violence will mean any violent, threatening or other behaviour by a person that coerces or controls a member of a person's family or causes a family member to be fearful. Such behaviour can include assaults, sexual assaults or other sexually abusive behaviour, stalking and derogatory torts plus intentionally destroying or damaging property causing death or injury to an animal and unreasonably denying a family member financial autonomy or reasonably withholding financial support needed to meet the reasonable living expenses of the family member or a child of that family when the family member is either entirely or predominantly dependent upon that person for financial support; it will also extend to preventing a family member from making or keeping connections with his or her family friends or culture and unlawfully depriving a family member or any member of family member's family with his or her liberty. A child can be exposed to family violence if he or she hears or sees family violence or otherwise experiences the effect of family violence including overhearing death threats or threats for personal injury, seeing or hearing an assault or being present when police or ambulance officers attend an incident involving an assault on a member of the child's family by another member of that family.

## Which Court to choose

In relation to Family Law matters there are currently two Courts which deal with this area in relation to parenting and property. The Family Court of Australia and the Federal Circuit Court. The Federal Circuit Court deals with matters which are perhaps not as complicated and may be dealt with in two days or less, this does not mean however that the Family Law matters taking longer than two days cannot be heard in the Federal Circuit Court. The Family Court of Australia generally will hear more complicated matters, including allegations of child sexual abuse and also more intricate financial/property matters.

It is not uncommon for matters to be commenced in the Federal Circuit Court and then transferred to the Family Court of Australia and vice versa. This will depend upon many circumstances.





If you live in a regional location where there is no Family Court Registry, Family Law matters may be instigated in a state Local Court where Magistrates, using the power of the Family Law Act, may make interim Orders and final Orders by consent. Often, Family Law matters commenced in the Local Court will be transferred to either the Family Court of Australia or the Federal Circuit Court. However, a Local Court may, if it considers it necessary, make Orders on an interim basis.

## Costs

At the start of your matter we will provide you with a Costs Disclosure which outlines how we will charge you and an estimate of the fees involved. We will also ask you to enter into a Family Law Costs Agreement with us. Before entering into a Family Law Costs Agreement you may wish to obtain independent legal advice in relation to your rights and obligation under such an agreement. To ensure that you are fully informed, accounts will be forwarded at intervals in line with proceedings in the Family Court or the Federal Circuit Court. We will provide you, as required by the Family Law Rules an estimate of fees at each stage of the proceedings. If you have any query about fees at any time, please contact us to discuss your query.