

The Family Law Handbook

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The family law system

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The big picture

[1.10] The end of a relationship is a process, not a moment. There are stages of separation, and different aspects of well-being to monitor and manage along the way. There may be steps forwards and backwards, and different routes to choose between at certain junctures. Sooner or later, though, most people reach a point where they can see that their own life has effectively disengaged from their former partner's, and that new financial and parenting arrangements are in place. It is only at this point that the process of separation is complete.

The most important thing at the start is to understand the landscape in which this journey to separateness takes place. Read the first few chapters of this book. Get some initial legal advice. Then take some time to think. The decisions you make at the outset may greatly affect the difficulty and duration of your separation experience. You need to plan the most effective and least costly (in the largest sense) way through.

If you have not yet decided about separation ...

[1.20] If you have not yet firmly decided to separate from your partner, then this is your only task for the moment. Don't sit down to calculate possible property settlement results if your relationship still hangs in the balance. You owe it to yourself (and to your children) to take whatever time and energy are required to work out the value of the entire relationship to you in personal terms – without the confusion of financial ramifications. This personal decision is tough enough in any case.

Don't put the cart before the horse. If you are not yet settled in your own mind about whether to continue in a personal relationship, do sort this out first. Talk with your partner. See a counsellor, together or separately. (For details about how to find a counsellor, see [3.190].)

Decisions at separation

[1.30] If you really have decided to separate, you have three main groups of decisions before you.

Practical arrangements

[1.40] You need to decide who is going to move, where to, and when; how to finance the move; and what interim income, expense and debt management arrangements you can make, including Centrelink payments. These matters are discussed in detail in chapter 2.

Parenting arrangements

[1.50] For couples with children, perhaps the most important task is the design of workable, cooperative post-separation parenting arrangements that meet the needs of the children in the new circumstances of the family. There may need to be several sets of interim arrangements before a sustainable, long-term scheme emerges. It helps if both partners realise this and agree to try different arrangements until the best plan is found. See chapter 7 for detailed information about parenting planning.

Property settlement

[1.60] Initially, in relation to the property of the relationship, all you need to do is set the wheels in motion to understand your own position. It is often better not to push on property issues too soon after separation. But it is useful to get an early idea of what the law would decide was a fair distribution of assets in your circumstances, and to plan the process for the smartest possible resolution of the issue at the right time. See chapter 8 for a description of the property settlement process, and seek legal advice, preferably before separation.

For couples separating amicably...

[1.70] Despite the stories people tell, the end of relationship does not have to be a nightmare, or even a really complex undertaking. Lots of Australian couples separate, make the necessary practical, parenting and property arrangements, and divorce without the need for external intervention, or for much legal formality at all. Despite this, much of Australian family law and the family law system – and indeed, much of this book – *is not for or about couples separating amicably*. There are risks in making entirely private arrangements in both the property and parenting spheres that each amicable party should be aware of. These are made clear at various points in this book. But many couples are able to manage a friendly, non-disputative, private and yet informed set of processes at the end of their relationship.

If you currently foresee continuation of good relations and agreement with your former partner, do not dwell on or worry about the possibility of dispute. You can always drop back in to this book for more detail at a later stage if the agreeableness depreciates.

There are a few up-front issues however that even amicably separating parties need to address and understand:

- ▶ for married couples, what will constitute the separation of the parties, and importantly, the date of separation. See “Defining separation for married couples” at [2.190] in chapter 2;
- ▶ for de facto couples, whether an “eligible” de facto relationship exists (giving rise to property rights under the law). See “The Legal status of de facto relationships” at [2.90] in chapter 2;
- ▶ despite the friendly relations now, you really should get some initial legal advice (not with your former partner) about appropriate arrangements for property and children in your particular circumstances. Remember, proceeding agreeably at this stage without understanding your entitlements or making appropriate arrangements for children is not likely to result in the continuation of good relations and could result in considerable loss, harm or unfairness. See [1.520] later in this chapter;
- ▶ how to, and when you can, get divorced. See “Divorce” at [2.650] in chapter 2;
- ▶ marshalling and rearranging finances and property. See “Financial and property matters” later in this chapter and then relevant sections of chapter 8 “Property”;
- ▶ setting up new parenting arrangements. (It is important for all parties to understand the value of the parenting principles implicit in the law and the importance of a child-centred approach to post-separation parenting.) See chapter 7 “Parenting”;
- ▶ how you plan to come to agreement about property, financial, parenting and practical matters —now, around the time of separation, but also into the future. See chapter 4 “Negotiation and agreement”.

Developing a dispute resolution strategy

[1.80] If there is, or if you can foresee, conflict, it is important to formulate a strategy for working through this at a very early stage of the separation. For, despite the relationship breakdown, and the conflict, you still have to make many joint decisions to achieve final separateness, preferably with the minimum possible damage to yourself, to the children and to the other party. How are you going to manage this? You know yourself, your partner and your conflict activation and resolution styles well. See chapter 4 for a detailed discussion of various dispute resolution strategies.

Keeping sane

[1.90] The process of resolving parenting, property and financial issues at the end of a relationship can be a very stressful experience – whether you achieve the resolution by private negotiation,

family dispute resolution or litigation. There is, firstly, the discomfort of a (perhaps non-private) discussion of highly sensitive personal issues, and the stress of trying to address those issues unemotionally. Second, parties on both sides are often still trying to come to terms with major and grievously unhappy changes in their life circumstances. They may not be in the best possible frame of mind for dealing with a dispute.

If you become over-stressed you are in danger, at the very least, of making poor decisions in settlement negotiations.

So it's important to plan seriously to take care of yourself. You will need a regular exercise regime, and someone outside the process – a professional or a friend – to talk to about what's happening. You need to try to maintain a life outside your family law issues. Eating, talking and constantly thinking about them will lead to poor decisions and poor outcomes.

Choosing a resolution strategy

[1.100] There are many different strategies available to separating couples seeking settlement of their property, parenting and finance issues. These include private negotiation (face-to-face, by telephone or by correspondence); a specialised form of mediation known as family dispute resolution (face-to-face, by telephone, in shuttle mode); joint counselling; negotiation assisted by lawyers; arbitration; and legal action (with self-representation, or legally-aided or privately funded representation).

All of these options are open to some people. The more expensive ones are not open to many. But decades of experience in the family law system have convinced community services workers, counsellors, the courts themselves and many lawyers that court action is not the most effective way – for anyone – to resolve a dispute about property, money or, especially, about parenting.

Australian society is changing. More and more people are agreeing to work privately together to resolve their disputes than ever before, and the trend is confirmed and encouraged by government policy. The Australian family law system requires parties to make a genuine attempt to resolve their disputes without a court decision, and provides processes and structures within the system to help them achieve this.

Behaviour check

[1.110] The stress of relationship breakdown and conflict over important matters leads many of us to exhibit our least appealing character traits. Despite reforms to the system, the process of separation continues to be a fertile breeding-ground for abuse, over-dramatisation, lies, violence, irresponsible behaviour and substance abuse.

Unfortunately, this is a time when you can ill-afford to lose control. You must try to ensure that your language and behaviour in the presence of your children and your former partner remain moderate and proper at all times – in private and public situations. Take particular care not to

denigrate (criticise or tear down) your former partner in the presence of your children. If you fail to control your behaviour on any occasion, and you end up in court, you can expect to find the details (of what might have been a momentary lapse) most unflatteringly detailed in the other party's documentation. If your lapse occurs in court, your case before a particular judicial officer might be irretrievably damaged.

At the very least, losing your cool with your partner is likely to result in the waste of your efforts to date towards finalisation of the issues and poison the landscape for early future resolution.

If you feel yourself becoming angry during communication or negotiation with the other party, terminate – or take a break from – the contact as soon as possible, and resume only when you feel back in control.

Children are not property; parents do not have “rights”

[1.120] Public policy officially discourages an approach to settling parenting arrangements by “dividing” the child between parents, like an asset to be distributed. By various reforms to family law, the Australian Parliament has worked hard to change parents' attitudes about what they might consider are their rights to their children, encouraging instead the idea that it is the children who have rights.

It is difficult for many parents to see their child's interests as separate and perhaps different from their own, especially when the pain of even a short-term separation from the child seems unbearable. But this is exactly the task for a separating parent. And although parents themselves are not legally bound to prefer their children's best interests to their own, many mediation organisations require parents to consider the children's best interests as a condition in their family dispute resolution agreements. Furthermore, if the dispute does reach a court, the court will determine an objective picture of what is in the child's best interests and may retrospectively assess whether the behaviour of parents indicates a similar orientation.

See chapter 7 for a full discussion of the “best interests” principle.

Winning and losing

[1.130] It is easy for participants in a family law dispute to be drawn into a false idea about winning and losing. Many people find that winning, in the end, is not the same as achieving the outcome they originally set out to obtain. They discover that winning is more about moving forward into the future with a sustainable lifestyle, good relationships, good health and a positive self-image.

If you have won in a court process at the expense of your health, your conscience, the good opinion of your children, or the ability to make cooperative decisions with the other parent, you may find, in the longer term, that you have lost – and possibly a great deal.

On the other hand, if you settle your dispute early (or even, by your own estimation, you “lose” or “give in” in family dispute resolution or at court) you may well be able to re-establish workable relationships to return fairly soon to a state of personal equilibrium, and retain the potential, in parenting matters at least, to negotiate more satisfactory arrangements later on.

It’s important to get a realistic idea of your prospects on the legal issues from a lawyer at an early stage. Pursuing small differences over months of haggling may be a waste of legal fees and of emotional and relationship resources. Settling early – *by making some concessions* – could be your most productive way out of a process that doesn’t in itself produce too many true winners.

Is it worth it?

[1.140] Damage to your, and your children’s, emotional states and recovery prospects continues to accrue in every week that a family law dispute goes on and on, as the destructive communications that seem to characterise the process are perpetuated. Many people who enter into family law litigation spend literally years of their lives in dispute about property settlements and parenting arrangements. They lose much of their settlement in legal fees. They suffer from depression, ill-health and loss of career impetus. Their children are sad, tired and disturbed. They sacrifice vast amounts of personal energy that could have been used to build a happier future sooner.

Remember that it is open to you, at any point, to choose not to be one of them. You can close the deal on the best terms available to you right now – and then get on productively with your new and real life.

Support services

[1.150] Feeling lost and confused – about how to sort everything out, what to do first, how to cope – is absolutely normal. There is just so much detail to address. Many people find that it can be worthwhile to connect at an early stage with people other than lawyers who are familiar with the landscape of family breakdown and who can provide much-needed specialised information, support and encouragement.

The services available are many and varied. For contact details of services in your area, of any of the types listed below, see Family Relationships Online at <http://www.familyrelationships.gov.au> or call the Family Relationship Advice Line on 1800 050 321 for a referral.

Counselling

[1.160] After separation, you may experience the extremes of anger, sadness and worry. You may feel dislocated, or lacking in control. Many people involved in the separation process have found that visiting regularly with a professional counsellor can be enormously helpful, even if they have never considered counselling in the past. Counselling is conducted by community-based,

government-funded and also by private practitioners. Many counsellors are professional psychologists. See [4.110] for more about counsellors.

Family dispute resolution

[1.170] Family dispute resolution is a form of mediation adapted specifically to the Australian family law system. It is conducted by an independent family dispute resolution practitioner who aims to help parties to resolve disputes by agreement instead of by going to court.

See [4.160]–[4.180] for more about family dispute resolution and about finding a registered practitioner, see [4.220].

Children’s Contact Services

[1.180] Children’s Contact Services are community-based services assisting the children of separated parents to establish and maintain a relationship with the parent with whom they don’t reside.

The services provide a safe, neutral place for the management of the changeover of children between parents. They also provide “supervised contact” services.

Eligibility requirements and waiting lists may apply.

Family and domestic violence services

[1.190] There are a range of domestic violence support services available in every State and Territory. To discover the most appropriate services near and for you, or to receive immediate counselling support, call the National Sexual Assault, Family & Domestic Violence Counselling Line (available 24/7 on 1800 RESPECT or 1800 737 732).

If you are unsafe, call the Police. You may wish to ask to speak with a Domestic Violence Liaison Officer (DVLO). A DVLO is a specialist police officer, trained in domestic and family violence, child protection, victim support and court processes required for the protection of victims of family violence.

Parenting Orders Program

[1.200] The community services operating under the Parenting Orders Program (PoP) assist separating families in high conflict with their parenting arrangements. Case workers engage intensively with parents in raising awareness about the effect of their conflict on their children.

As part of a PoP service, family members, including children, may have access to a range of services such as counselling, family dispute resolution and group work education.

Early intervention services

[1.210] Legal aid offices in some states provide services to assist separating parties in the very earliest stages of separation to identify and resolve property and parenting arrangements before dispute becomes an entrenched feature of relations between them.

Post Separation Cooperative Parenting services

[1.220] Post Separation Cooperative Parenting (PSCP) services help high-conflict separated parents learn to refocus on the needs of their children.

A PSCP program addresses parents individually. It may involve education, counselling or individual support as appropriate in each case.

PSCP services are located regionally.

Supporting Children After Separation Program

[1.230] The Supporting Children After Separation Program (SCASP) that is available in some States and Territories assists children to deal with issues arising from family breakdown, recover and maintain family relationships and participate in decisions that affect them.

Other family services

[1.240] There is a great range of funded community services addressing specific needs in the family relationship area, including the needs of men, indigenous people, young people and people of non-English-speaking background.

Finding the relevant law

[1.250] Even if you decide to try to come to agreement with your former partner on property, parenting and financial matters privately, it is important for both parties to understand the range of results they might expect in court if their dispute resolution efforts fail. If both parties understand and accept their legal rights and responsibilities there is likely to be a quicker settlement, and a more sustainable long-term agreement.

You need to understand both the overall legal framework, and the legal factors relevant to your particular circumstances.

A brief description of the overall legislative framework follows. Don't try to read and absorb great quantities of legislation. It is more important to know where to look for points of law and procedure when you need to.

All the legislation referred to is available online. Some relevant web addresses are listed in the "Contacts and resources" section of this book.

The Family Law Act (Cth)

[1.260] The *Family Law Act 1975* (Cth) is the cornerstone of the Australian family law system. It is in this Act that you will find “family law”. It is a Commonwealth Act, and it establishes an area of federal law that is exercised by a number of different courts. It applies in all Australian States and Territories. In Western Australia, however, it is applied in relation to married or previously married parties only.

The Family Court Act 1997 (WA)

[1.270] Western Australia has for many years maintained its own family law system, integrating both the federal and non-federal areas of concern around legal issues related to the family. Unlike the Family Court of Australia and the Federal Circuit Court and the various other State and Territory courts around Australia, the Family Court of Western Australia has power to deal with, say, adoption and surrogacy issues (areas of State-based law), as well as with divorce and parenting orders (areas of federal law).

The combined functioning, however, does involve some complexity in the Western Australian legislation. As it is essentially a State-based law, the detail of the differences between the *Family Court Act 1997* (WA) and the Commonwealth Family Law Act, as well as all of the differences in practice, cannot be comprehensively explored in this book, although some important areas of difference will be highlighted. Go to <http://www.familycourt.wa.gov.au> for direction to more information about the operation of the Western Australian family law system.

As a general rule, the Family Court of Western Australia applies the Commonwealth Family Law Act in matters related to currently or formerly married parties (parenting and property cases) and Western Australia’s own *Family Court Act 1997* in relation to parenting and property issues for de facto or unmarried parties.

In relation to parenting matters for de facto couples, the provisions of the Western Australian Act are substantially similar to the Commonwealth Act.

The law in relation to distribution of property cases for former de facto couples, covered by the Western Australian Act in Western Australia, differs significantly from the Commonwealth scheme, particularly in relation to eligibility. Go to the Western Australian Act itself or see <http://www.familycourt.wa.gov.au> for details.

The Federal Circuit and Family Court of Australia (FCFCA) Bill

[1.280] For the last decade, the work of Australian family law was divided between two courts, the Family Court of Australia and the Federal Circuit Court. In 2018, those courts merged. A new law, the Federal Circuit and Family Court of Australia Bill 2018 (FCFCA) was introduced

into Parliament to create the new court, with operations of the new merged court expected to commence in early 2019.

Legislation about court rules and procedure

[1.290] It has been announced that there will be new rules developed for the new combined Federal Circuit and Family Court of Australia in due course but that until consultation is complete, the “old” rules will remain in place. At the date of writing, it is not known which of the “old” rules will apply, even temporarily, in the merged court. It is expected that transitional arrangements will be announced before the operation of the new court commences.

These “old” rules include:

- ▶ The *Family Law Rules 2004*, that provided the detail of the main aspects of practice, procedure and evidence in a case before the old Family Court of Australia.
- ▶ The *Family Law Regulations 1984*, that detail a range of matters including fees, parentage testing and overseas orders.
- ▶ The *Federal Circuit Court of Australia Rules 2001*, that sets out the rules of procedure and forms that applied in the old Federal Circuit Court.
- ▶ The *Federal Court and Federal Circuit Court Regulations 2012* dealt with fees in the Federal Circuit Court.

The *Family Court Rules 1998* (WA) largely mirror the Commonwealth’s *Family Law Rules 2004* with some important exceptions.

The *Family Court Regulations 1998* (WA) deal with fees in the Western Australian Court and matters related to parentage testing (in Western Australia).

Child support legislation

[1.300] The *Child Support (Assessment) Act 1989* sets out the law about eligibility to receive, and liability to pay, child support. It also establishes the authority of the Child Support Agency.

The *Child Support (Registration and Collection) Act 1988* sets out the law about registration requirements for paying maintenance of various types, including child support, and the means by which the Department of Human Services can enforce payment.

Legislation about family violence

[1.310] See [3.170] in chapter 3 “Family violence and abuse”.

De facto property legislation

[1.320] See [2.120] in chapter 2 and also chapter 8 “Property” for more information.

Legislation about marriage

[1.330] The *Marriage Act 1961* was amended in 2017 to recognise same-sex marriages. See [2.220] in chapter 2 for more detail.

Where to find legislation

[1.340] For easy access to the full text for all family law legislation, see the Australasian Legal Information Institute's website at <http://www.austlii.edu.au>. You can also find copies in most major public libraries.

Case law

[1.350] Law is made by parliaments in the form of legislation, but it is also made by judges in the courts. This judge-made law is referred to as case law or the common law. The common law system applies in the United Kingdom, in the countries of the Commonwealth (including Australia) and in the United States. Common law principles grow and develop on a case-by-case basis.

Much less of our everyday law is decided solely on the basis of the common law than was once the case. The main role for the common law now is to expand our understanding of legislation and to apply it to fit the many different fact situations that arrive for decision in the courts.

A court hearing a case is generally bound to apply the existing case law (ie, the judge-made law from previous similar cases), unless there are special difficulties in applying it to the new facts. If this occurs, the case may become a major or landmark case. The court reinterprets the relevant legislation and then updates or clarifies the existing case law to explain its decision in the new case. This is how the common law changes.

The common law is actually written down only in the reported judgments in major cases. If more than one judge hears a case, the case law that arises from it consists of the principles expressed by the majority (as opposed to the dissenting judges, if any – those who came to a different conclusion).

Summaries of common law are published in looseleaf publications, online and in legal textbooks. But be careful when researching case law in textbooks. Case law tends to change much faster than textbooks are updated.

Cases in family law

[1.360] There are many important cases in family law. Some are cited in this book.

But the common law grows and changes all the time, and it can be enlightening to check how the courts are applying the law in the latest cases, especially those similar to your own. Particularly if your dispute goes to court and you are self-represented, you should spend some time before your hearing or trial reviewing the major cases dealing with the issues in dispute in your case. A librarian should be able to help you with this.

Alternatively, if you know that your case turns on the court's interpretation of a particular section of the legislation, or on how the section might be applied to your circumstances, you can find the text of recent cases that have referred to that legislative section using the "Noteup" function, once you have opened the law (and the relevant section) on the AusLII website at <http://www.austlii.edu.au>.

Alternative pathways for decision-making

Policy shifts

[1.370] Australian family law changed significantly in 2006 with new policy to encourage more cooperative parenting after relationship breakdown, and a shift away from litigation (taking a case to court) towards private decision-making and dispute resolution after separation.

Some of these measures have been more successful, in practice, than others. And despite the reforms, there is a large and increasing number of applications to the courts awaiting resolution, with delays also increasing.

At the time of writing, in 2018, a new review of the family law system is underway, one that is likely to result in new and substantial changes to the law.

The difference between divorce and other family law issues

[1.380] Many people, if not most, now handle their divorce without a lawyer. There is little scope for legal argument and evidence-gathering in a modern divorce, which now is more about filling in forms correctly (see [2.660]–[2.680]).

During divorce proceedings, the court will not make any rulings about maintenance, child support, property or parenting arrangements. If these issues are in dispute and not able to be resolved by the parties, they must be pursued under separate applications to the court, not in the divorce application.

Coming to agreement without going to court

[1.390] There can be no doubt about the benefits of early resolution of disputes between separating couples without final orders from a court – both for our community as a whole and for the adults and children involved. These include advantages of cost, time, health, certainty, self-determination and many additional benefits for children.

As mentioned earlier in this chapter, a separating person faces a set of decisions. One of the most important is planning a dispute resolution strategy appropriate to the people concerned and the circumstances of the case. Your strategy may contain only a few elements. It is unlikely, however, that court action should be the first, or even the main, strategy, though it is certainly true that there are a number of special circumstances – such as serious concerns about safety,

or the recovery of a child who has been removed – that require early and firm intervention through the courts. In most cases, however, a genuine effort directed towards the containment and finalisation of disputes and then for agreement with the other party, at least in the first instance, and as difficult as this might sometimes seem, should produce the optimum outcomes overall.

See chapter 4 for more detail and discussion about different types of non-litigious dispute resolution processes. If all relatively private efforts of dispute resolution fail, however, the option of court action remains.

Moving to court action

[1.400] Notwithstanding these options, however, many people still find they need the help of the courts to resolve their family law dispute. Commencing family law litigation is a big decision to make. Before you start a family law case, you need to clearly understand the possible cost and time involved.

You also need a broad understanding of the role of the several Australian courts and registries involved in family law matters.

The Federal Circuit and Family Court of Australia

[1.410] The Federal Circuit and Family Court of Australia is the court of principal authority in Australian family law. It is a federal court with a national support office in Canberra, but also with permanent locations in each of the Australian capital cities except Perth (as to why this is the case, see “The Family Court of Western Australia” at [1.440]).

Family law courts in regional Australia

[1.420] The Federal Circuit and Family Court has a number of permanent registries in major regional centres around Australia. It also operates visiting circuits, taking in many regional centres throughout Australia. Call your capital city Federal Circuit and Family Court registry for details of the nearest circuit program or check the court website for dates and locations.

Circuit sittings of the Federal Circuit and Family Court often take place in the local courthouse of a town on a day when the regular court is not sitting.

Family law registries and advice about processes

[1.430] The court registry is the centre of administration, management and client enquiry for all family law cases at Federal Circuit and Family Court.

Registries in different cities may have different programs and services, different workloads and a few special programs and practices of their own. Generally speaking, however, they run in the same way – implementing the provisions of the *Family Law Act* and managing cases in accordance with the rules and regulations.

There are a number of different ways of accessing information from the court registry. The Family Law National Enquiry Centre is available on 1300 352 000 and by email at <enquiries@familylawcourts.gov.au>. There is also a very useful Live Chat facility available at the Commonwealth Courts portal at <https://www.comcourts.gov.au>. These services provide answers to queries about family law court processes, forms, fees and referrals to other useful services. They cannot provide legal advice.

Queries in Western Australia should be directed to the Family Court of Western Australia.

The Family Court of Western Australia

[1.440] Western Australia has separate arrangements for dealing with family law. Unlike the Federal Circuit and Family Court, it can deal with matters falling under both State and federal law.

If you live in Western Australia, the Family Court of Western Australia is a one-stop shop for all family law matters, for both married and de facto relationships, including:

- ▶ divorce;
- ▶ property;
- ▶ parenting matters;
- ▶ maintenance;
- ▶ surrogacy; and
- ▶ adoptions.

As a general rule, the Family Court of Western Australia applies the federal *Family Law Act* in matters related to currently or formerly married parties (parenting and property cases) and Western Australia's own *Family Court Act 1997* in relation to parenting and property issues for de facto or unmarried parties.

The District and Supreme Courts

[1.450] Except in Western Australia, if the circumstances of a de facto couple don't satisfy the eligibility requirements for their property case to be dealt with under the Commonwealth's Family Law Act, they may still have recourse to legal remedies under State legislation which applies more generally to property disputes between people who are not married to each other, including de facto couples. The detail in this legislation varies considerably between the States and Territories (see the list of relevant legislation at [2.180]).

All property disputes between de facto couples under State or Territory legislation are heard in either the District Court or the Supreme Court (depending on the dollar value of the claim) in the relevant State or Territory.

Local and Magistrates Courts

[1.460] Local or Magistrates Courts or Courts of Petty Sessions (the name depends on which State you live in) operate as sub-registries for the Federal Circuit and Family Court. This means that you can obtain or lodge forms locally for family law matters.

These local courts also have limited powers to hear and determine certain matters under the family law legislation. These matters are mostly interim applications – applications for a type of stop-gap order for matters requiring immediate decision. This type of order is called an interim order.

But the local courts do also have authority under the *Family Law Act* to make final orders (if the court is willing and able to hear and make them):

- ▶ for property cases where the total value of the property is less than a certain amount (or more, if both parties agree) – check with your local court for the current dollar-value upper limit;
- ▶ about parenting issues, if both parties agree;
- ▶ that revive, vary, discharge or suspend certain existing parenting orders to resolve inconsistency with a family violence order; or
- ▶ if the case is about formalising an agreement already reached by the parties (called “consent orders”).

The power of local courts to hear and make final orders in family law matters is an important one for Australian conditions. In a remote location, this might be the only practical way of resolving a dispute.

How long does it take to go to court?

[1.470] The time it takes for even a simple family law matter to be resolved once a case is commenced in court varies greatly. A lot depends on how willing the parties are to compromise and to reach a negotiated solution. But there are, potentially, years between some of the milestones in the full, formal disputed process.

Consent orders

[1.480] If parties have come to a private agreement and would like the court to formalise it (so that the agreement is legally enforceable) they can apply to the court for consent orders. There is no court hearing on an application for consent orders, but the court does review the proposal. For more detail about this very useful way of ensuring certainty about arrangements, see chapter 4.

Depending on the workload of the registry in which the application for consent orders is lodged, and whether or not the registrar finds any difficulties with the proposed orders, applications for consent order can take between 4 and 9 weeks to process.

Divorce

[1.490] If there have been no conditions imposed or other complications, a divorce application may be finalised – that is, the divorce certificate issued – in about four months (see [2.650]–[2.800] for discussion on divorce).

Temporary (interim) orders: child and property applications

[1.500] The most urgent applications in relation to both child and marital property matters can be heard in the Federal Circuit and Family Court at very short notice: perhaps in one or two days, or even in the middle of the night in the most extreme circumstances.

Most applications for interim (temporary) orders in relation to children or property, however, are listed for hearing two to six weeks from the date the papers are filed. You should make known any concerns or constraints you have about the timing when you file your documents.

Final orders

[1.510] A family law court is likely to be able to hand down a decision in a final hearing somewhere around two years after the date of the initiating application.

However, the vast majority of applications will settle (ie, the parties will reach agreement) privately before the date for a final hearing arrives.

Getting legal advice

[1.520] Even if you have agreed to try to resolve your parenting and property issues privately, it is important that each party has a realistic understanding of their position at law. This is not gained by extrapolating from the results achieved by helpful friends and relatives, or from gossip at the local coffee shop or pub. Every person's circumstances are different. A unique result can be expected when the law is applied to them.

As helpful as the legislation itself and other written resources might be, it is almost impossible for a lay person to be confident about their legal position without the advice, initially at least, of a lawyer. Even then, the range of potential outcomes, if a case goes to court, can be very wide. It makes sense to narrow the field of that range, in your understanding at least, as much as possible.

Rather than feeling threatened, then, by your former partner making an appointment to see a solicitor, you should positively encourage it, and do the same yourself. Seeing a solicitor in the early stages is about getting information and understanding how the law would regard your individual circumstances. It does *not* mean that legal action is imminent.

See chapter 3 for information on strategies for dealing with solicitors and obtaining their assistance, not only for representation in court but for help in the early stages of separation.

Legal aid

[1.530] Legal aid is financial assistance or direct legal help provided through Legal Aid commissions or offices funded by the States and Territories. Grants are subject to stringent eligibility tests. If you do qualify for legal aid however, you will be entitled to certain amount of free legal advice, assistance and representation.

The policies applying to grants of legal aid differ between States and Territories. Generally speaking, however, aid is not available for the litigation of property matters, or divorce, although aid may be provided for family dispute resolution in property settlement matters. Aid for child support issues is also extremely limited.

There are many excellent family lawyers in Legal Aid offices around Australia. Private lawyers may also act for clients on a legally-aided basis, although fewer private family lawyers are still prepared to work in this way.

Legal aid eligibility tests

[1.540] The provision of legal aid is subject to the satisfaction of both a means test and a merit test. The means test is divided into separate sub-tests for income and assets, and both must be passed.

The means test

[1.550] Your net income after the deduction of certain living expenses (not all of them) must be very low to pass the legal aid income test. Only rarely will a person earning more than a Centrelink benefit qualify (and a benefit recipient can miss out because their expenses are too low!).

A common difficulty in relation to the assets test is ownership of investments – investment property, term deposit accounts and shares.

The merit test

[1.560] The merit test requires you to demonstrate that:

- ▶ there are reasonable prospects for success in your application to the court; and
- ▶ a “prudent self-litigant” would risk their money on such proceedings; and
- ▶ your claim is not trivial or otherwise unworthy of public expenditure.

Rejections on merit are frequently overturned when more information is given to Legal Aid in a letter appealing against a negative assessment.

How to apply for legal aid

[1.570] You can get a Legal Aid application form from your local courthouse or download an application from the website of your local commission. You can call in at, ring or email a Legal Aid office, or consult a lawyer who does family law work on a legally-aided basis (check by phone first) for help with your application. Bring a Centrelink statement of benefit, and a copy of your bank account statements for the last three months, to the interview.

Other sources of free legal advice and assistance

[1.580] There are a number of sources of free legal advice and assistance available. You can access many of them more than once.

Advisory services

[1.590] Even if you are not likely to be eligible for ongoing legal aid, you will still be able to access free family law advice services in the various Legal Aid agencies in metropolitan and major regional centres. Legal aid services have been subjected to significant budgetary restriction in recent years however, so it may best to telephone first to discover how your type of query is handled. See the Contacts and Resources chapter at the end of this book for Legal Aid contact details.

Legal Aid agencies usually provide additional forms of free family law information and assistance, such as telephone helplines, fact sheets, divorce classes and other self-help workshops.

There may be additional free public family law advice services available in each State and Territory. In NSW, for example, at the time of writing, LawAccess NSW is a free government telephone service that provides legal information, referrals and in some cases, legal advice.

Duty lawyers

[1.600] Legal Aid and some community legal centres provide duty lawyers at local and family courts around the country. Duty lawyers are “lawyers-on-the-spot” at court who can assist unrepresented people, help with preparation of court documents and provide information and referrals. They can be found at most courts, including local (magistrates) courts. The service is available to everyone, provided there is no conflict of interest (ie, provided that Legal Aid has not previously seen or is not seeing the other party in the same or a related matter) and provided the duty lawyer has time to see everyone who wishes to see them.

As you can normally see a duty lawyer only on the day you are due to appear in court, there is often little time to explain a complex family law situation. There may also be a queue. So try to be efficient and concise in your description of your case.

Keep in mind also that a duty lawyer is unlikely to be able to retain contact with your case on an ongoing basis.

Community legal centres

[1.610] Many community legal centres will advise, assist and sometimes even represent disadvantaged people, or women who have experienced domestic violence or sexual abuse, in a family law matter.

Check the National Association for Community Legal Centres website at <http://www.naclc.org.au> for details of your local centre.

Law Society Pro Bono schemes

[1.620] Law societies in each State and Territory run schemes for the provision of legal advice to people who are not, or no longer, eligible for Legal Aid, and who are not otherwise able to pay. There are various eligibility requirements however. Search on-line using the terms “Law Society”, your State or Territory name, and the words “pro bono” (means “no charge”) for contact details.

Court websites

[1.630] Family court websites provide a vast amount of information about all of the different family law issues and how to go about addressing them. All of the forms necessary for starting a family law case are publicly available on these sites. At the time of writing, this information is available at the websites of the Family Court of Australia and the Federal Circuit Court but likely to be drawn together and updated at the website of the new Federal Circuit and Family Court at some stage after its commencement in 2019.

Family Relationships Advice Line

[1.640] The Family Relationships Advice Line (1800 050 321) run by the Commonwealth Attorney-General's Department provides free information about family law issues and advice on parenting arrangements after separation.

Family Relationships Online

[1.650] The Family Relationships Online website contains information about separation and parenting after separation. It will also provide Australia-wide referral details for local services able to provide legal and other assistance in relation to dispute resolution, counselling, family violence and other family services. See <http://www.familyrelationships.gov.au>.

Free first consultation with a solicitor

[1.660] Many private law firms practising in family law have a free first consultation policy. Even if you ultimately decide not to engage a lawyer, you can learn a lot about your case and your options for dispute resolution in a first consultation.

Don't be embarrassed to ask, when you initially contact the firm, about whether it charges for its first consultations. (This is a real "frequently asked question".)

Advice booklets

[1.670] Useful booklets and factsheets to help separating families are published and available from the Child Support Agency (at <http://www.csa.gov.au>), Family Relationships Online (at <http://www.familyrelationships.gov.au>) and the Department of Families, Housing, Community Services and Indigenous Affairs at <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles>, at the various Legal Aid offices and websites and at public libraries.

Choosing a lawyer to advise and assist

[1.680] Although the law society or institute in each State or Territory can help you find a lawyer near you who does family law work, it should be the quality of the lawyer's experience in family law rather than their physical location that determines your final choice. Good family law expertise is worth a lot of extra inconvenience in travel time.

A family law-only firm may provide the most cost-effective range of services. These firms often employ less senior (therefore, usually, cheaper) solicitors who nevertheless have very good

experience and skills in family law. They also retain the accredited family law specialists and the reputed big hitters, who are said to be worth their higher hourly rates.

It is important that you feel personally comfortable with your legal representative. If you are planning to engage a lawyer on an ongoing basis, you might wish to consult two or three before making a choice. You may find, for example, that you feel more comfortable with a lawyer of your own sex.

How much does family law litigation cost?

[1.690] The costs of participation in court action in the family law system can be divided into three categories:

- ▶ court fees;
- ▶ legal fees; and
- ▶ disbursements (expenses).

Court fees

[1.700] Quite apart from fees you pay to your lawyer, you must pay a fee for each application you make to the court unless your circumstances meet the (quite generous) criteria for exemption or waiver of the fee (see either the relevant court website or registry to obtain exemption or waiver application forms).

A divorce currently costs \$900 (July 2018). Be ready to pay the whole amount yourself if you file for divorce independently of your spouse. (Alternatively, you could file jointly with your spouse and agree to pay half each.) You may be eligible to pay a reduced fee of \$300 or even less if you can demonstrate hardship conditions. Check with the courts website.

Applications for consent orders currently cost \$165.

New (disputed) applications for final orders in relation to children or property currently cost \$345 in an application for final orders only, or \$565 for an application for both final and interim (short-term, temporary) orders.

You may be eligible for reduced or exemption from court fees. Speak to your local family court registry about how to apply or check the Federal Circuit and Family Court website for details.

Legal fees

[1.710] There are many variables that will affect the size of the bill from a family law solicitor, including:

- ▶ the length of the case (including the negotiation period);
- ▶ the complexity of the case, including the size of the property pool and the number and location of assets;
- ▶ the jurisdiction of the case;

[1.740]

- ▶ the attitudes of the parties to resolving the dispute;
- ▶ the seniority of the lawyer;
- ▶ the size (and other characteristics) of the law firm you engage; and
- ▶ your location.

Most family law solicitors charge between \$300 and \$600 for each hour, with pro rata fees for shorter periods. Lower fees may apply in regional areas. You should expect that any part of an hour spent by the lawyer working on your case – including reading an incoming letter (“perusing”) or talking to you on the telephone – will be recorded and added to the total time for which you will be billed.

But doesn't the loser always pay legal costs?

[1.720] Parties usually pay their own costs in family law courts, in contrast to the practice in other civil courts. But a costs order (which means that one party has to pay the other's legal costs) may still be made against a party in a family law matter if the court thinks it appropriate on the basis of such considerations as:

- ▶ the parties' financial circumstances;
- ▶ their behaviour in the course of the proceedings; and
- ▶ the legal merit of the application in the first place.

Disbursements

[1.730] Disbursements are all the costs of running your case apart from the professional time of your lawyer. Besides such expenses as photocopying, if your case proceeds to litigation you will begin to incur third-party expenses in relation to the collection and presentation of evidence.

Medical, psychological and other expert reports to support your case are likely to cost upwards from about \$1,000 each. Valuation reports on various matrimonial assets – you may need several – will cost more than \$700 each. Expert witnesses will probably charge appearance fees at an hourly rate and include waiting and travelling times. Finally, you may require a barrister to present your case in the final hearing, who will charge between \$3,000 and \$8,000 per day over, perhaps, two days.

No really, how much will it cost ...?

[1.740] The range of hourly legal fees is so wide, and there are so many variables between cases, that it is impossible to make accurate generalisations about what you should expect to pay. On the other hand, this is exactly what you should ask your lawyer to do in relation to your particular case and circumstances.

You should insist that your lawyer explain in detail the likely range of legal fees and disbursements before you commence litigation. Don't be fobbed off with generalities. Emphasise that you would like to be kept informed of changes to the cost regime advised. Don't give instructions for the solicitor to commence any work on your behalf until you have made the costs agreement, which should include a statement of the scope of work you wish the solicitor to undertake.

Realistically you should expect that, if you engage a solicitor, you are unlikely to get any result at all – either by negotiation or by order – for under \$5,000, unless the matter resolves quickly after an exchange of letters, and the agreement reached does not need to be prepared for filing in court. Matters that proceed to or near to a final hearing routinely cost between \$40,000 and \$100,000 per party.

Getting an estimate and agreeing on costs

[1.750] Legal costs sound dramatic, and they are. Most people simply cannot afford to litigate in family law. If you have a property settlement coming up you may be able to negotiate payment to the solicitor on a deferred payment basis – that is, to pay when money from the sale of the property becomes available under the settlement. This arrangement is unlikely to include disbursements, however, and you need to be ready to pay these along the way.

Representing yourself in court

Reasons for self-representation

[1.760] You will far from alone if, after investigating your eligibility for legal aid, or your ability to pay a lawyer, you decide to represent yourself in court action. Around 50 per cent of cases commenced each year involve parties who represent themselves.

Most people who choose to represent themselves do so because they are not eligible for legal aid and cannot afford to pay a lawyer.

Should I try to avoid self-representation?

[1.770] Although changes to the *Family Law Act* in 2006 make self-representation in parenting cases a little easier, in most cases a party would be unwise to choose self-representation in a family law case (apart from a divorce) for any reason other than lack of funds.

This is because family law and procedure is not written for or easily understood by people who are not lawyers. It is also because self-represented litigants are likely to face a lawyer on the other side.

The disadvantages of being up against a lawyer are considerable. A self-represented person with a lawyer on the other side is, in many respects, out-gunned from the outset. Little things go the way of the represented party simply because the lawyer knows how to use the system to their client's advantage. Though it is not true to say that parties who represent themselves always lose their cases, the legal knowledge and experience on the other side is likely to be reflected, to a greater or lesser extent, in the final result.

There is also a personal toll in terms of the stress of the unfamiliar process of managing litigation (filing all the relevant forms in good order and time, for instance) and of feeling constantly on the back foot and suspicious of the strategic moves and overtures of the other party.

These particular disadvantages disappear if the parties agree that neither will be represented. But there is no guarantee that the agreement will be honoured throughout the process. Even if it is, differences in the parties' capacities – to manage the litigation, cope under stress and present an effective case – are likely to have a significant impact on outcomes.

Anyone who knows they might need to represent themselves if the case goes to court should make the greatest possible effort in dispute resolution processes before and after commencing formal litigation.

Options for partial representation

[1.780] The “unbundled” provision of legal services is a slowly developing phenomenon. Under unbundled arrangements with your lawyer, you do most of the work yourself, using the lawyer's services only occasionally.

Your lawyer might, for example, set out for you in stages what you should do. Then you might need to consult the lawyer from time to time, to check and finalise a document for filing, for instance, or to advise you on what to do next. You might engage a lawyer just to prepare your initial application for filing or to stand up for you in court on important occasions. You might take the matter as far forward as you can yourself and then hand it over to a lawyer in good time for preparation for the hearing.

But it can be difficult to find a solicitor willing to act on an irregular basis. There are complex questions of professional liability involved in moving into and out of a case not wholly controlled by the solicitor. On the other hand, it should be possible to engage a lawyer to perform certain discrete tasks (such as commencing or concluding your action). Your local Legal Aid office or community legal centre may be able to steer you towards any lawyers in your area with this type of flexibility.

The tenor of family law litigation

[1.790] Despite continuing efforts in family law reform, our court system still sets one adversary against another.

Lawyers are an integral part of the adversarial system. They are engaged to assist their client through the maze of procedures, forms and events involved in family law litigation. It is their task to attempt to ensure that the case is won – that the best possible deal is extracted – for their client.

The quality of the rest of their client's life and future relationships – and certainly of the other party's life and relationships – are not necessarily relevant to the solicitor's sense of his or her responsibilities, even though these may be strongly affected by the solicitor's actions, and by the litigation culture itself.

Lawyers almost always adopt an oppositional tone in dealing with the other side. They may sound aggressive, critical, sarcastic, cynical or personal. Many people are highly offended when they first come into contact with this. But though the statements made by the other party's lawyer (say, in correspondence) may seem

designed to upset, the lawyer does not necessarily believe them. Unpleasantness, sometimes, is strategy. It could be viewed as part of the lawyer's job, as distasteful as this might seem.

Recent reforms use the threat of costs orders to encourage solicitors and parties to use moderate language in settlement negotiations and in court. But it is still the case that many people find themselves badly hurt in family law litigation. Lawyers play hard, and clients do lie, recording the worst possible allegations about each other in writing and publicly. If you think you might be vulnerable to behaviour of this sort, think again about settling the matter sooner rather than later – even if this means accepting less than what you regard as ideal.

What help can I expect?

[1.800] Self-represented litigation has been recognised as a feature of our family law system that is here to stay. There is some public funding to support self-represented litigants with programs and materials. The various family law court websites have been revised to form a valuable plain-English resource full of information and materials, including downloadable court forms.

The courts have also worked to reform their internal culture to be more supportive of self-represented litigants, who should now find that registry staff are accustomed to providing information to non-lawyers about what forms to fill out and how, and about questions of procedure.

Court staff may provide information and assistance only. They cannot provide legal advice. See [1.580]–[1.670] for sources of free legal advice.