

The Family Law Handbook

Dr Maree Livermore

FIFTH EDITION

LAWBOOK CO. 2019

Published in Sydney by

Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668

19 Harris Street, Pyrmont, NSW 2009

ISBN: 9780455242118

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A catalogue record for this
book is available from the
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Product Developer: Karen Knowles

Edited and typeset by Newgen Digitalworks

Printed by Ligare Pty Ltd, Riverwood, NSW

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Marriage, de facto relationships, separation and divorce

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[2.10] This chapter examines the legal concepts of marriage, de facto relationship, separation, and divorce, and investigates how these definitions influence outcomes for people involved in family law processes.

It also discusses some of the practical issues associated with separation and divorce.

The law of marriage

What is a marriage?

[2.20] A marriage in Australia is legal if it is in accordance with the *Marriage Act 1961*. This Act contains details about how a marriage may be solemnised, about marriageable age and the marriage of minors, the formalities of making a legal marriage, about who can marry people, void marriages, and marriages made overseas.

Much has changed in recent years to the millennia-old institutions of marriage and family, at least in terms of Western culture. There has, of course, been disagreement as well as agreement on the need for change.

In 2004, the *Marriage Act* was amended to define marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. The amendment was inserted by the government of the day to as an effort to end speculation that the Act might allow for marriage between same-sex partners.

But support within the Australian community for same-sex marriage continued to strengthen. In December 2017, the definition of marriage at section 5(1) of the *Marriage Act* was amended again to refer to “the union of 2 people to the exclusion of all others, voluntarily entered into for life” and regardless of their gender.

Marriages made overseas

[2.30] Most marriages validly made in another country are recognised in Australia. You can also obtain a divorce for an overseas marriage, if:

- ▶ at least one of the parties lives in Australia, and
- ▶ the validity of the marriage can be formally proved by a marriage certificate or other document (with a translation if it is not in English).

Polygamous marriages

[2.40] The definition of marriage in the *Marriage Act* limits marriages in Australia to between two people only.

The *Family Law Act* (section 6) expressly recognises, however, that polygamous marriages validly made under the law of another country are valid in Australia.

Marriage under Aboriginal customary law

[2.50] A marriage in accordance with traditional Aboriginal law is not recognised as valid under Australian family law.

Ownership of property

[2.60] The law long ago established that men and women can own property separately after marriage. They can also hold it together if they wish, either as joint tenants or tenants in common, but co-ownership never arises from the simple fact of marriage, as it once did. This contrasts with the concept of community property which applies in Europe and some US States.

Nevertheless, in proceedings relating to property, the Family Court may “make such orders as it considers just and equitable” in respect of all the property of the parties, whether owned jointly

or separately: *Family Law Act* section 79. See chapter 7 for a detailed discussion of property issues.

Marriage also remains relevant to property distribution on the holder's death. For example, a marriage automatically revokes a person's will; and if someone dies without a valid will, their property passes under the laws of intestacy to their spouse.

The obligation to support a spouse

[2.70] The obligation on spouses to support each other financially comes into the *Family Law Act* (section 72) from the common law. The basic responsibility for maintaining a spouse differs from the old law in that it applies:

- ▶ to both spouses, not just a husband; and
- ▶ only when the supported spouse is unable to support him or herself.

This obligation exists for all spouses, all of the time. In practice, however, it usually only becomes relevant on marriage breakdown. For more about spousal maintenance, see chapter 8.

The legitimacy of children

[2.80] The concept of illegitimate children has been dead in Australia since 1987. The parents' relationship is irrelevant to the legal status of the children.

De facto relationship law

[2.90] The following section addresses only the legal status of de facto relationships under Australian family law. For the *content* of de facto property law provisions – that is, for the entitlements, obligations and processes now available to de facto couples for property matters under the *Family Law Act* – see chapter 8.

The developing legal status of de facto relationships

[2.100] Unlike some jurisdictions throughout the world, Australian law does not recognise common law marriage (usually now referred to as “de facto relationship”) as a form of legal union that gives rise to fundamental legal rights and obligations at common law *upon its formation*. For many years in Australia, there was no legal recognition of even long-term de facto relationships.

In recent decades, however, all Australian States, Territories and the Commonwealth have enacted legislation that gives the parties to a *developed* de facto relationship certain rights and duties.

The Commonwealth's *Family Law Amendment (De Facto Financial Matters and other Measures) Act 2008*, which came into effect in 2009, gave people in de facto relationships access to Commonwealth family law on property and maintenance matters, being access equivalent to that enjoyed by people in marriage relationships (such as distribution of superannuation entitlements).

Importantly, also, the 2009 changes recognised same-sex de facto relationships on the same basis as heterosexual de facto relationships.

The 2009 changes did not refer to parenting issues because Australian family law on parenting matters already covered unmarried parents. All the child-related provisions in the *Family Law Act*, and everything in this book about parenting responsibilities, arrangements, and issues, as well as the rights, welfare and development of children, applies equally to children from both de facto and marriage relationships (although not necessarily with equal treatment to same-sex and heterosexual parents).

Gateway requirements

[2.110] A de facto relationship is defined at section 4AA of the 2008 de facto property law amendments as a relationship where the parties:

- ▶ are not legally married to each other;
- ▶ are not related by family; *and*
- ▶ have a relationship as a couple, living together on a “genuine domestic basis”.

Additionally, section 90SB requires that:

- ▶ the de facto relationship lasted at least two years; *or that*
- ▶ there is a child of the relationship; *or that*
- ▶ the party applying to the court made substantial contributions to the relationship and serious injustice would result if the court did not make the financial order or declaration that the party has applied for; *or that*
- ▶ the relationship has been registered under State or Territory law.

What is an eligible de facto couple?

[2.120] The Act then sets out, at sub-section 4AA(2), factors that a court will consider in deciding whether two people have an eligible couple relationship (providing the gateway requirements are satisfied). These include:

- ▶ the length of the relationship;
- ▶ the nature and extent of their living together;
- ▶ whether there was a sexual relationship;
- ▶ financial arrangements between the parties;
- ▶ property arrangements between the parties;
- ▶ the degree of mutual commitment to a shared life;
- ▶ whether the relationship has been registered under a State or Territory law;
- ▶ the care and support of children; and
- ▶ the reputation and public aspects of the relationship.

It is not necessary to prove any one of these factors to establish that the de facto relationship actually exists: sub-section 4AA(3). They will be considered by the court, all together, and along with other circumstances of the individual case: sub-section 4AA(4). It is notable that neither arrangements for housework nor having children together forms part of the list. As the list is not closed, however, such factors could be, and have been, taken into account in deciding whether a de facto relationship exists. As noted in *Keaton v Aldridge* (2009), the task of the court is to identify:

“the point at which relationships cross an invisible line to become one recognised by law ... it [may be] difficult ... to discern what, if any, circumstances will carry them across an invisible threshold to be a relationship recognised by law”.

Importantly, in *Keaton*, it was held that the fact of the existence of separate households is no particular bar to the existence of a de facto relationship under the law.

In *Jonah & White* (2011), the court was asked to make a declaration of de facto status about a relationship of 17 years, which existed outside the marriage of one of the parties to the relationship. The parties met secretly for only a couple of days every two or three weeks, had separate households and the children of the married party had no established relations with the other party. Though the relationship was long and stable, and there had been some financial dependence, the court decided against declaring de facto status because of the absence of an essential coupledness – being the “merger of two lives into one” on a “genuine domestic basis”.

The requisite coupledness, however, need not be well known. It was recognised in *Baker & Landon* (2010) that a same-sex de facto couple may not be public about their relationship because of concerns about discrimination.

Multiple relationships

[2.130] A de facto relationship can exist despite the fact that one or both of the persons is legally married to someone else, or is in another de facto relationship at the same time: sub-section 4AA(5).

Same-sex relationships

[2.140] The Act expressly states that it covers both heterosexual and same-sex relationships: para (a) of sub-section 4AA(5).

Close personal relationships (that are not de facto)

[2.150] People in certain close personal relationships, such as carer relationships, that have elements of domestic support and personal care, and yet are not de facto relationships, have rights under law in some States and Territories.

The new Commonwealth de facto property law does not apply to close personal relationships that are not covered by the definition of de facto relationship at section 4AA of the *Family Law Act*.

Court declaration about de facto status

[2.160] The law provides for the early resolution of the issues that may arise around these complex eligibility requirements. Under section 90RD, at the same time as, or after, a party applies to the court for other financial orders, they can also apply for a declaration of the court that decides such matters as:

- ▶ the period of the de facto relationship;
- ▶ when it ended;
- ▶ where the parties “ordinarily resided”;
- ▶ whether there is a “child of the de facto relationship”; and
- ▶ whether a party has made “substantial contributions”.

After a declaration is made, it takes effect as an order of the court. This means that the “facts” it refers to are decided, and no longer form part of the dispute between the parties (subject to appeals).

Different arrangements in Western Australia

[2.170] Except as described in this section, de facto couples in Western Australia do not have access to the Commonwealth’s de facto property law provisions (in the *Family Law Act*). De facto property law in that State continues to be wholly covered by Western Australia’s *Family Court Act 1997*.

But the Commonwealth’s de facto family property provisions apply to any relationship with particular connections to a “participating jurisdiction” (State or Territory covered by *Family Law Act*). Since South Australia came on board in 2010, the participating jurisdictions now include all the States and Territories of Australia, except Western Australia.

Under the provisions of section 90SD, a person now living anywhere in Australia, including in Western Australia, can make an application to the court under the de facto property law in the *Family Law Act* if they can show *either that*:

- ▶ when the de facto relationship broke down, they were “ordinarily resident” in one of the participating jurisdictions; *or that*
- ▶ at least one of the parties is *currently* “ordinarily resident” in one of those places, *and either*:
 - that the couple were ordinarily resident in a participating jurisdiction during at least one-third of their de facto relationship, *or*
 - that the party applying for the order made substantial financial or non-financial contributions to property or as a homemaker or parent in one or more of those States or Territories.

What if the relationship is not eligible?

[2.180] If a relationship is not an eligible de facto relationship under the Commonwealth’s *Family Law Act*, it may be still covered by the State or Territory laws that guide the distribution of the property of the relationship. The relevant State and Territory statutes are:

- ▶ Australian Capital Territory – the *Domestic Relationships Act 1994*;
- ▶ New South Wales – the *Property (Relationships) Act 1984*;
- ▶ Northern Territory – the *De facto Relationships Act 1991*;
- ▶ Queensland – Part 19 of the *Property Law Act 1974*;
- ▶ South Australia – the *Domestic Partners Property Act 1996*;
- ▶ Tasmania – the *Relationships Act 2003*;
- ▶ Victoria – the *Relationships Act 2008*;
- ▶ Western Australia – Part 5A of the *Family Court Act 1997*.

What is separation?

Separation in a marriage

[2.190] Since 1975, the only ground for a divorce in Australia is “irretrievable breakdown of a marriage”.

The only way to prove “irretrievable breakdown” is by separation for at least 12 months before the date of the application for divorce: section 48.

A change in the character of the relationship

[2.200] Separation must be proved by *evidence that the marital relationship has been severed*. A court will not consider a marriage to be over by reason of temporary or trial separation, or even of physical separation, without evidence of the severance of the relationship.

Because people live their married lives in such different ways, the law does not try to define, in practical terms, what final separation must look like. Instead, the severance of the marital relationship is proved by evidence of *change in the overall character of the relationship*.

If there is a dispute about the date, or about whether there has been a final separation at all, the court will look at the total circumstances of the relationship both before and after the alleged separation. It will look at whether the parties live together, have sexual relations, cook or clean for each other, go about together as a couple, jointly care for children, spend time together, or support and protect each other. These are some of the natural indicators of a marital relationship. But the absence of one or another of them will not, in itself, be conclusive – there is no magic about deciding not to cook for someone that will prove final separation.

It is in a significant change in the pattern of the natural indicators of a marital relationship – from before the alleged separation to after it – that the court will find evidence of final separation.

For more about evidence of separation, see the practical ideas set out under “Separation under one roof” at [2.270].

Must both parties want to separate?

[2.210] If the marital relationship has been severed (according to the law), separation is established even if only one party wants it.

Communication of intention to separate is vital

[2.220] It is not possible to finally separate – either accidentally, or on purpose – without letting your spouse know about it. One party, at least, must form an intention to sever the relationship and then communicate that intention to the other.

To satisfy this requirement, your words and actions must clearly point to only one conclusion – that the marriage is over.

Separation for de facto couples

[2.230] The de facto relationship provisions in the *Family Law Act* do not describe how the court should decide whether and when the separation of a de facto relationship has taken place.

Unlike a marriage, which exists as a separate union under common law, a de facto relationship does not exist at law outside the particular pieces of legislation that define it. This means that, in law, a de facto couple will be considered to be separated when the de facto relationship, *as defined in the Act*, no longer exists. (See “What is an eligible de facto couple?” at [2.120].) Using the same factors that prove the existence of an eligible de facto relationship, the time of separation equates with when those factors are no longer present.

The checklist of factors indicating de facto status is similar in many (but not all) respects to characteristics the cessation of which have been held to indicate separation in a married relationship. But the courts have warned against the application of the marriage-based separation case law to decisions about whether a de facto relationship exists or not. The legal status of married and de facto couples is simply not comparable. As noted in *S & B* (2009), in a separation situation, a married party has the onus of proving that the relationship is no longer on foot by demonstrating *the absence* of certain factors. In de facto relationship cases, the onus will always be on the party attempting to prove the *existence* of those characteristics.

Constant fighting, extramarital sex and loss of love do not prove the end of a marriage ...

[2.240] Peaceful coexistence and monogamous sexual relations are not part of the legal profile of a marriage. Many people have workable marriages that do not include these characteristics. Thus, the date that “he started his affair” or from which “we never stopped fighting” is not in itself very useful.

As many poets have more than adequately described, love is neither observable nor classifiable. The contrary applies, however, for the legal indicators of a marital relationship – they are generally observable, and about practical matters. The death of love itself is not provable in court and thus is not an indicator of the end of a marital relationship.

Similar considerations apply for the end of a de facto relationship. In *Clarence & Crisp* (2016) the facts that the parties did not live together any more, and that they fought a lot, was not sufficient to establish separation. They continued to progress arrangements for artificial conception and texted intimately and regularly.

Why is the date of separation important?

[2.250] The date of the formal, legal separation affects many matters, including:

- ▶ when a person can file for divorce – you must be separated for not less than 12 months before the date of the filing of the application for the divorce;
- ▶ the time frame for applying to the court for orders for a property settlement or maintenance order (includes orders by consent giving legal force to an agreement to distribute the property of the parties between them):
 - Ordinarily, formerly married partners must apply within 12 months of the date of the issue of the Certificate of Divorce.
 - Ordinarily, former de facto partners must apply within two years of the date of separation.

There are special hardship provisions for applying for property settlements and maintenance orders outside these times. See chapter 8 “Property” for details.

- ▶ when child support becomes payable; and
- ▶ when new Centrelink benefits become payable.

Getting back together (temporarily)

[2.260] Section 50 of the Act allows that the necessary period of 12 months’ separation will not require re-starting if the parties resume a marital relationship but then split up again within three months. The three months’ cohabitation will not count towards the 12 months’ separation, however, and this allowance can only be made once.

Separation under one roof

[2.270] In these times of low housing affordability, continuing to live under one roof with an ex-partner has become an increasingly common choice.

If the relationship is effectively severed and you have either communicated your intention to separate, or agreed with your partner that the relationship is over, there is no requirement that one party must move out. After all, “separation really means a departure from the state of things rather than from a particular place”: *In the Marriage of Falk* (1977).

If, however, you wish to count the period of separation under one roof towards the 12-month separation period, you will have to prove that you actually separated on a specific day some time before you finally lived apart.

You should try to collect observable evidence of the change in the status of your relationship from the date you want to establish as the date of separation. It is easier to do this at the time rather than retrospectively. This evidence can be included in or attached to an *affidavit* (a sworn statement – see [2.280]) when you apply for divorce.

Evidence of separation under one roof

[2.280] Items that might be used in evidence of separation under one roof could include:

- ▶ recording the fact of the separation and/or future arrangements in writing (preferably signed and dated by both of you);
- ▶ moving into another bedroom and telling someone outside the marriage that you have done so;
- ▶ telling or emailing friends to say that you and your partner have separated as of a particular date;
- ▶ advising Centrelink, the Child Support Agency or other government bodies;
- ▶ a diary entry;
- ▶ a revised will;
- ▶ social media relationship status changes; or
- ▶ letters informing other parties about the separation, such as the school, bank or insurance company.

Remember that the date of separation is important for access to property settlement processes. Though you may think you have agreement about the date of separation at the time it occurs, the other party may seek to dispute it later for personal or financial purposes. It is important to ensure that you have objective evidence of the date of separation created at the time separation occurs.

Separation under one roof

[2.290] After the wife discovered her husband's affair, the parties slept and ate in separate rooms, rarely communicated directly with each other, and led separate social lives. At one point the wife applied for and obtained an order for maintenance against her husband. On the other hand, she continued to do his washing and cleaning, and occasionally prepared his food.

The original decision of the trial judge that the parties were not properly separated for the required period was overruled on appeal. The Full Court stated that the “evidence must examine and contrast the state of the marital relationship before and after the alleged separation”, and show that there has been a “change in the relationship” constituting the separation: *In the Marriage of Pavey* (1976).

Should I stay or should I go?

[2.300] It can be difficult to stay mentally clear and making good decisions during the incredible stress of relationship breakdown. It is important, however, to try to *think and plan first*, and then to take the necessary and appropriate action that minimises negative fallout in subsequent interactions with the other party

Weighing up the pros and cons

[2.310] It is not necessary for one party to physically leave the home once separation is established. Both parties are entitled to continue to live there for as long as they choose. But most people, once they decide to separate, feel pressure to put physical distance between their own and their former partner's lives.

There are a number of considerations to bear in mind about whether, or when, to leave the family home.

- ▶ *Safety issues* – Leaving may be the best option for you if you are feeling unsafe, or if your partner refuses to leave and feelings between the parties are running high.
- ▶ *Stability for children* – Your leaving might be in the best interests of your children if it means that they can stay in their own home.
- ▶ *Exposure of children to conflict* – Leaving, either with or without your children, may be in their best interests if it would mean removing them from exposure to continual parental conflict (the most damaging aspect of relationship breakdown for children).
- ▶ *Setting up a status quo for parenting arrangements* – If you leave your children behind, you may endanger your prospects for achieving an order for residence, or a particular amount of time with them in the future. A court may not be prepared to order a change to settled arrangements for their care.
- ▶ *The cost of two households* – Do your sums carefully before rushing out to rent a new place. Community services may be able to connect you with cheaper, temporary accommodation. You might also consider sharing for a time.
- ▶ *Property issues* – The partner remaining in possession of the home may have little motivation to facilitate its sale to finalise a settlement. Furthermore, if you leave and continue to make payments towards the mortgage until the property settlement, you are unlikely to receive full value for those payments in that process.

If you do decide to leave

[2.320] The small details of personal possessions, documents, furniture and household effects tend to get lost in the big picture approach – percentages and dollar values and the like – that characterises property settlement negotiations. You should try to take everything personal and important to you, and a fair share of joint household gear, when you first leave.

But my partner owns the house ...

[2.330] The decision about who goes or stays should not turn on who has built or bought the house or whose name is, or is not, on the title. It is a question of:

- ▶ what is financially feasible;
- ▶ what is fair;
- ▶ most particularly, the needs of children;
- ▶ the parties' needs; and
- ▶ the personal safety of one or both of the parties.

Exclusive sole occupancy orders

[2.340] Sometimes one party becomes fixed in their determination to remain in the home. It may be necessary for the other party, in the interests of fairness and safety, to obtain a court order for *exclusive sole occupancy*, particularly if there is violence or the threat of violence, or if the interests of children are at stake.

All courts exercising jurisdiction under the *Family Law Act* can make an interim exclusive sole occupancy order for the home on the application of one of the parties (for more details, see [8.920]–[8.930]). This now applies both to married and de facto couples. An exclusive occupation order has the effect of forcing one partner to leave their own home to the sole occupation of the other. It will not ordinarily be made unless there is family violence.

State or Territory domestic/family violence legislation provides another possible avenue of obtaining sole occupancy of a residence.

Can I come back if I wish?

[2.350] Even though you have the right to continue living in the home after separation, once you move your possessions, and apparently agree to the other party's sole occupancy, it will be hard to move back in without your partner's consent. It may even be difficult to enter the property.

If you move out, your partner acquires a form of tenancy. Generally speaking, a tenant has the right to decide who may enter the property, and when, and the right to privacy. It does not matter if your name is on the title jointly with your partner's – or even if it is the only name on the title.

On the other hand, your partner should give you a reasonable opportunity to remove your possessions from the house around the date of separation. You may be able to obtain an interim order if your partner will not allow you access to obtain things you need.

It is best to be sure about your decision to leave before you go, and when you do go, to take with you everything you ever plan to take.

A right to change the locks?

[2.360] The legal basis of the right of the partner in possession to change the locks at the former joint residence is not very clear. Usually, lock changes will be considered justifiable once:

- ▶ the separation is clearly accepted by both parties;
- ▶ another residence for the departing partner is fully established; and

- ▶ all the possessions of the departing partner have been removed from the joint residence.

Be aware that a locksmith will usually agree to help a person to get into an unoccupied house where the person does not have a key, if they can show ownership rights and also some evidence of recent occupation.

A locksmith may also assist a party who can prove ownership to change locks again after locks have been changed.

Changing locks can really inflame feelings and be counterproductive in terms of early resolution of issues and the de-escalation of conflict. It need not occur unless there are safety issues, or reasonable fears, that the other partner will enter uninvited or cause trouble by removing disputed items, damaging property or abusing or harassing occupants.

Assistance with the costs of relocating

[2.370] If physical separation is desired and a sole occupancy order is not appropriate, but an earning partner refuses to leave the house, a court can require that partner to assist with the costs of relocating the dependent party – for example, by paying the rental bond and the initial set-up costs. See [8.1680] for details about applying for an urgent maintenance order.

Financial and property matters

[2.380] A court may eventually make final orders for the settlement (distribution) of all of the parties' property, including items recorded as being in one or both names, and items coming into the relationship from one side or the other. Put simply, everything that either party owns forms part of property of the relationship and will be considered for distribution in the property settlement process.

Joint accounts

[2.390] Be aware that any cash held in joint accounts may be withdrawn by either party at an early stage. If the money is used for legitimate expenses arising from the separation or other ordinary expenses of the parties, there will likely be no specific accounting for it in the later property settlement process.

Similarly, any jointly held credit cards, or credit cards with an additional cardholder, may be used and up to their limits. If you do not want this to happen, speak to your bank or credit service provider about cancelling cards at an early stage.

Assessing your situation

[2.400] To make sensible decisions at the time of separation and to prepare for future negotiation, you need a reasonably accurate understanding of the full extent of your assets, liabilities, expenses and income. You will need to make some lists.

Do not try to use these preliminary lists and figures to negotiate a final settlement. The most pressing task at separation is to understand the scope of what must be done to disentangle your joint lives and begin to create two sustainable, separate lives. There are usually major emotional issues to deal with too. Apart from the fact that you are unlikely to have all the information you need, this is not a time when most people are capable of finely tuned negotiations about a fair and final property distribution.

Do try to use the lists to work out:

- ▶ what you can both afford to pay for a second household;
- ▶ what you can agree to sell if necessary to finance the separation;
- ▶ what you should take from the house when you leave; and
- ▶ what records you need to take or copy before you leave.

Each party needs to do this for their own sake. The task for the person who is leaving is to find out as much as possible while there is still an opportunity for informal, and cooperative, information sharing. The task for both is to begin to grapple with the business of taking, and facilitating, independent responsibility for personal affairs and finances.

Assets list

[2.410] Make an inventory (a list) of all the assets you consider yours personally, yours jointly with your partner, and the assets held by your partner only – including real estate, shares and other investments, bank accounts, superannuation, collections, art and antiques, tools, boats, cars, business assets and interests, and so on. Make a separate list for furniture and household effects.

Try to put a value on each item. Get some up-to-date account statements at least. For personal possessions, the relevant value is the garage sale value, or the price you could get from a dealer – not the “best price” (for more about asset valuations, see chapter 8).

Note carefully what you *do not* know about the existence or value of assets that form part of the property of the marriage, including your partner’s business assets. You need to understand everything you can about your partner’s true financial position.

Use particular care to try to identify the value and location of your partners’ superannuation accounts.

Liabilities list

[2.420] You will soon be taking action to minimise the number of joint liabilities (debts) you share with your former partner. Until this happens, however, you will continue to be responsible for regular payments on all liabilities that are in both names and either name, including loans, accounts, joint credit cards and the mortgage. Make a list of them all, noting both the amount of the total liability to date and the amount of regular payments.

Expenses list

[2.430] Your household expenses list should provide valuable information on the true cost of your present lifestyle. It will help both of you work out where savings might be made, and to understand the full cost of establishing a second household. Ensure you include food, services,

education, clothing, gifts, holidays, phone costs, children's activity expenses and all of the costs of running a car.

Income list

[2.440] If your partner kept separate savings and investment accounts during your marriage, ask to be given, or otherwise try to obtain, details or copies of statements that show income from any source. Find out details of the source, if possible – particularly if the income was kept secret from you, or was unknown to you for another reason.

If your own income is low or non-existent, and you will have the children living with you most of the time, you will probably be entitled to new Centrelink benefits from the date of separation. If possible, you should attend Centrelink for an interview before separation. If you will not have the children living with you most of the time, you should expect to make child support payments at some level from the date of separation.

Financial and other records

[2.450] If you are leaving, take with you:

- ▶ all your personal documentation – diaries, letters, tax returns and other records of your own financial affairs;
- ▶ copies of all records pertaining to joint financial or property dealings;
- ▶ either the original or several certified copies of your marriage certificate and the children's birth certificates (if relevant); and
- ▶ your children's passports, if there is a risk that the children will be taken overseas without your consent.

Furthermore, and particularly if your partner is self-employed, you should ask to be provided with, or otherwise try to obtain, records of all of their assets and liabilities, including tax returns and electronic accounts. Once you leave the house, you may lose the opportunity to obtain an accurate profile of your former partner's financial interests.

You should also ensure you have the contact details of your partner's business partners and financial advisers.

Unfairness at separation

"Freeze and starve"

[2.460] Sometimes, either out of spite or as a tactic (eg, to force the other person to settle), one party will refuse the other access to important assets (such as the car, or tools of trade) or sources of income to pay expenses

The courts will not allow the major earning partner to cut off their partner from income support or from vital assets that were available to their partner in the course of the relationship and are required to maintain a reasonable quality of life. There will be an especially strong case for intervention if the quality of the parties' lifestyles after separation is manifestly unequal.

Financial deprivation may also qualify under the definitions of family violence or child abuse. See chapter 3.

How to respond to deliberate deprivation at separation

[2.470] If your partner is denying you access to important assets, do not suffer quietly! Instead:

- ▶ Immediately open negotiations, either by writing a letter or by a face-to-face approach, in which you:
 - explain your perception of the unfairness in relation to particular assets or income, stating what you need specifically;
 - inform your partner of their maintenance obligations (see “Maintenance” at [8.1590]); and
 - tell your partner that you may pursue an interim court order to get a fair result if you cannot agree on one together.
- ▶ Make an appointment for family dispute resolution to:
 - discuss your short-term financial arrangements; and
 - seek to come to an agreement about the disputed asset or income, recorded in writing and signed by both parties. This may be filed at court as consent orders for the interim period (the period until your property settlement) if both parties agree and want the authority of the court behind their temporary agreement (see chapter 4).
 - If these other methods fail, apply to the court for an interim order in relation to property or maintenance.

Urgent court orders

[2.480] The relevant legal principles for obtaining an urgent court order about property or financial arrangements at separation are:

- ▶ that a party may be liable to support the other party *to the extent that they are able* (*Family Law Act* section 72 for married couples and section 90SF for de facto couples); and
- ▶ that a court may order short-term arrangements if a party is “in immediate need of financial assistance” (section 77 for married couples and section 90SG for de facto couples). Depending on the problem, the actual legal remedy for unfairness at separation might be a property injunction or an urgent maintenance order. These are discussed in detail in chapter 8.

Disposal of property by one party

[2.490] Some partners start disposing of the assets of a relationship at, or even before, separation, to avoid sharing the benefits of the sale with their former partner. A new partner of one of the parties may sometimes be the beneficiary of these arrangements.

On other occasions, the disposal (sale or transfer) is arranged so that the benefit or ownership of the asset can revert to the disposing partner at a later date.

Property injunctions to prevent property disposal

[2.500] You can apply for an injunction under section 114 or 90SS(1) of the *Family Law Act* to prevent your partner from disposing of property and spending the proceeds prior to the property settlement or final orders. See “Injunctions preventing dealings with property” at [8.990] for information about this.

If the asset is already gone

[2.510] Do not panic if the asset has been disposed of and it is too late to get an injunction – or if the value of the asset is such that it does not warrant the cost and trouble. Do collect as much information about the asset and the circumstances of its disposal as you can. If you can produce enough evidence that it was part of the property of the relationship, as well as evidence of the terms of its disposal, the proceeds of its sale may be accounted for as property (or value) already in the possession of the disposing partner, and deducted from their entitlement, in the final property settlement.

Dividing household goods

[2.520] It is a painful process to divide a joint life – perhaps harder for every year that the parties were together. Many people say that walking around and gathering up possessions – dividing the photos, removing pieces of furniture from rooms and so forth – is the absolute low point of the separation experience. For this reason, it is usually a good idea to do the physical division and removal at one go, and just get past it with the minimum possible conflict.

Try to avoid treating lampshades and mattress protectors as symbols of your time together, of the extent of your financial contribution to the household, or of your rights as against your partner. Remember that even photographs can be replicated.

Do not forget to list the pictures on the wall, important photographs, collections of various sorts, pot plants and the items in the garage, the shed and the laundry.

Share your list with your partner. If you can, work through it together. Alternatively, indicate in writing on the list the items you would like either to keep, either in the house or to take with you, and ask your partner to consider it and get back to you.

It may be difficult to agree on the value of items. If this happens, you might agree to have the item valued professionally, or use the average between your value and your partner's value. You could also try the *two-list* or the *silent auction* methods (see [2.540]). If one party appears to be taking more value in the goods than the other, an additional cash payment (to even up the deal) may be agreed.

Try to be fair. Consult your children about where they want their possessions to be.

Buying things for the new household

[2.530] The reasonable costs of setting up a second workable household will be regarded by a court as a legitimate expenditure of any joint funds.

Two ideas for fairly dividing household goods

The two-list method

[2.540] One party divides the full list of household goods and furniture into two separate lists, then gives both lists to the other and invites that person to choose which one they want.

Under this simple system, the list-maker is forced by self-interest to be fair in constructing the lists – they may end up with either of them. The process is aided if the values of various major items are agreed before the two lists are made.

The silent auction method

Each party lists a value for each disputed item. The person listing the highest value for an item gets it. The value of all items taken by each party is totalled. The person with the highest overall value makes a cash payment to the other to even up the deal.

Money in joint accounts

[2.550] Sometimes a separating partner will withdraw all of the funds in a joint account. These funds may not be lost forever. If the matter goes to court (or is settled with a view to the likely result in court), and the amount taken is significant, or not used for reasonable purposes, that partner's possession of the cash may be accounted to them in the final settlement.

There is no doubt, however, that denial of access to financial resources can hurt one partner enormously in the short term. If the situation is clearly unfair and has created hardship, the disadvantaged party can apply to the court for an urgent maintenance order requiring the return of needed funds.

As soon as you know you are separating, and after considering both partners' needs for, and rights to, any available cash, and unless you agree otherwise with your partner, you should withdraw the amount you decide on and deposit it into an account in your sole name.

Money in a joint account can be legitimately used by a party after separation for living expenses such as rent, bills and food (not going on a cruise, buying jewellery or presents for a new partner) without affecting the share of the property settlement that might eventually be ordered by the court.

What about the car?

[2.560] Each party usually keeps the car they drive regardless of whose name is on the registration papers. If incomes allow, responsibility for any payments should go with the car.

If there is only one car, the person with whom the children are living, or who has the greatest need, would normally keep it. Alternatively, you might agree to sell it and split the proceeds.

If the car you plan to drive after separation is not in your name or in your joint names, you could try to negotiate with your partner to sign the car over to you. Ask the registration authority about a waiver of the usual stamp duty where the transfer occurs as part of a property settlement on relationship breakdown.

Electricity, telephone and other services

[2.570] Practices among utility providers differ, but, generally, if your service accounts are in joint names, you will need to apply for disconnection and reconnection of the service to get the account into your name alone. There may be fees associated with this process.

If your partner is angry and potentially vindictive, it may be wise to have the provision of essential services to your home under your exclusive control.

Credit cards

[2.580] If you are the principal cardholder, it may not be wise or appropriate for your partner to continue to have access to your credit accounts. If you decide that you wish the secondary access to cease, you will need to:

- ▶ make arrangements with the card issuer to cancel the secondary card; and
- ▶ inform your partner that you have done so.

Who pays the mortgage?

[2.590] If the home or any other property is mortgaged in both names, you will remain jointly liable with your partner to make payments until either:

- ▶ the mortgage can be discharged; or
- ▶ ownership of the property is transferred (with the approval of the mortgage institution) from one party to the other at settlement.

In practice, however, separating partners frequently agree that one of them will be responsible for paying the mortgage, or that they will each pay a certain proportion, until settlement is reached or the home is sold.

When one party leaves, the other is effectively renting the property from the joint estate of the marriage. Though the state of the property market, the size of the mortgage and the capacity of the parties to pay may have a considerable bearing on the deal you make in your particular situation, it is reasonably common for the mortgage payment to be deemed a fair rent in the circumstances. The mortgage often becomes the responsibility of the partner remaining in possession.

It may be useful for the person who leaves to continue to contribute to the mortgage so as to be able to argue for a higher percentage of the capital gain on the property between the date of separation and the date of settlement or hearing.

If you are the principal payee to the mortgage, and yet move out of the property, you should be aware that you are unlikely to receive full dollar credit for your mortgage payments in the period from separation, in the calculation of the property settlement. Most lending institutions will approve a short suspension of repayments in certain circumstances of hardship, including relationship breakdown.

Banks now have detailed procedures for dealing with requests for amendments to loan arrangements. Before you agree with your former partner on any long-term change to ownership of the security or responsibility for repayment of the loan, you should discover what these are.

Other joint loans

[2.600] You will remain legally liable for any other debt in joint names, such as an overdraft, a personal loan, or a lease arrangement, until the liability is either discharged or transferred into one name – which may or may not be possible under the agreement establishing the debt, but should be possible by court order in the property settlement if not before (see [8.1580]). You

should discover the relevant policies of your lending institution before making any agreement about loan repayments with your partner.

Again, the parties can agree between themselves on payment arrangements. You will need to discuss the matter to decide what percentage each should contribute. Often loans relate to business, or to an asset in the possession of one partner. Unless there are maintenance obligations, possession and use of an asset related to the loan by one party would tend to suggest that responsibility for payment rests mainly with that person.

Life insurance

[2.610] There are important legal distinctions between being the owner of a life insurance policy, the beneficiary under the policy and the person whose life is insured under the policy.

Many couples jointly own a policy which will benefit the surviving partner if the other dies. When you separate, you may not want to pay premiums for this possible future benefit to your former partner. But you may still wish to insure against that person's death. If your former partner dies, you might, for example, lose the benefit of child support, or the services of a primary carer for your children.

If you wish to insure the life of your former partner, you may be able to change the existing arrangements simply by a signed, handwritten endorsement transferring ownership on the policy. The policy document itself may provide for this. It will only be possible, of course, if your partner agrees. In any case, you should contact your insurance company to find out the options and the correct procedures.

You may also wish to insure against your own death, with your children named as beneficiaries. In this case you will need to set up a policy that you own and pay for yourself, and that benefits only you and/or your children.

Your Will

[2.620] Depending on your State or Territory, a divorce (not a separation) may automatically revoke – make invalid – your entire Will, or a part of it. Check with the Office of the Public Trustee in your State or Territory.

Remarriage automatically revokes a Will in *all* States and Territories.

If, as a married person, you happen to die at any stage between separation and divorce, a valid Will made during your relationship will remain valid. The property you bequeathed to your former partner will go to that person on your death. Similarly, if you die without making a Will, your estate will pass under the laws of intestacy to your partner, even if you are separated.

You may consider that you have more important things to do immediately after separation than changing your Will. If the interval between separation and divorce or property settlement will be fairly long, however, it is wise to either make a new Will or to amend your existing Will.

Be aware that under the law, your interest in any property held by you and your partner as joint tenants will pass directly to your partner on your death, whatever your Will says. To avoid

this, you could decide with your partner to amend the title to your joint property so that you each hold your interest as a tenant in common instead of a joint tenant. You could pay a lawyer to help you do this, or contact the authority responsible for land titles in your State or Territory about doing it yourself.

Centrelink

[2.630] Contact your local Centrelink office as soon as possible after you know the date of separation to:

- ▶ determine whether you are eligible for a Centrelink pension or benefit;
- ▶ apply for an assessment of your or your partner's liability to pay child support; and
- ▶ obtain information about the child support system.

Arrangements for children

[2.640] In the now-very-olden days, when a mother routinely worked at home, it was assumed that the children would live with her following separation. With changes in the work and family roles of both men and women, however, and increased appreciation of the value of shared parenting, a wider range of options has opened up for children to spend time or live with both, or either, of their parents.

The law and issues relating to post-separation parenting arrangements for children are discussed in detail in chapter 7.

Divorce

[2.650] It is really not very difficult to get a divorce. Many people now manage the process without a lawyer. The courts provide extensive and high-quality information and assistance to divorce applicants.

Eligibility for divorce

[2.660] There is now little scope for argument in the divorce proceeding itself. Any dispute about property, maintenance, child support or parenting arrangements will proceed in the family law system entirely separately from the divorce.

You are eligible to divorce under Australian law if you or your spouse:

- ▶ is an Australian citizen; or
- ▶ ordinarily lives in Australia and has lived in Australia for the year immediately before the divorce application; or
- ▶ regard Australia as your home and intend to live indefinitely in Australia.

Either or both of the parties can apply.

Grounds for divorce

[2.670] Australia has a no-fault system for the dissolution of marriage. The only thing to be proved in divorce proceedings is “irretrievable breakdown of marriage”. The only way to prove this is to demonstrate that the parties have been legally separated for at least 12 months.

If there is no doubt about the date of separation, and the arrangements for any children are clearly appropriate, the court will probably grant the divorce on the application of one party even if the other party does not want it.

Evidence of separation under one roof

[2.680] If the applicant (or applicants) claim that there was “separation under one roof” for any part of the vital 12 months, the court will require evidence of this. See [2.820] for the types of evidence that may be useful to demonstrate this.

An *affidavit* must be filed from:

- ▶ the applicant, or at least one of them; and
- ▶ at least one other person (friend, relative, neighbour) with knowledge of the couple and the circumstances of the marriage breakdown.

The affidavits must be sworn and filed in accordance with the rules about affidavit-making (see [6.740] for further details). They should also:

- ▶ identify the person making the affidavit and their relationship to, or identity as one of, the parties; and
- ▶ attest to the person’s knowledge of the fact that the marriage is over and the circumstances in which they obtained this knowledge.

If you have documentary evidence of the date of separation – something signed by both of you at the time, or letters or documents detailing changed financial arrangements – certified copies should be numbered and attached to the affidavit. Make sure the affidavit identifies and refers directly to all the attachments.

There are sample affidavits at [2.840]–[2.850].

You will also need to attach your marriage certificate, or a certified copy of it, to your divorce application. If the certificate is not in English, you will need to obtain a translation and a short affidavit by the translator. The substance of the affidavit is contained in the divorce application form itself, but is obtainable as a separate document, called an Affidavit of Translation of Marriage Certificate, and available from <http://www.familycourt.gov.au> or a court registry.

Marriages of less than two years duration

[2.690] If a marriage has lasted for less than two years, the parties must attend counselling to investigate the prospects of reconciliation. A document known as the “Counselling certificate for applicants married for less than two years”, signed by a family counsellor, should be attached to your application for divorce. The certificate

states that the person has “considered” reconciliation with the assistance of a specified person, being a family counsellor or other nominee: sub-section 44(1B)(a).

The certificate is available from <http://www.familycourt.gov.au> or a court registry. Joint family counselling may not be advisable or practicable for a number of reasons – for example:

- ▶ the other party refuses to attend;
- ▶ the other party cannot be found; or
- ▶ there has been violence in the relationship.

In such cases, speak to registry staff who will advise you about alternatives.

Which court?

[2.700] Applications for divorce must currently be lodged in:

- ▶ the Federal Circuit and Family Court; or
- ▶ the Family Court of Western Australia for people living in that State.

Costs

[2.710] In August 2018, the standard fee for lodging a divorce application was \$900. A significant reduction in fees (to \$300) may be payable in cases of financial hardship, if you have a healthcare card or if you are otherwise eligible as described in Regulation 2.06 of the *Family Law (Fees) Regulations 2012*. You will need to complete and file at court an “Application for Reduction of Court Fees (Divorce)” form which is available from <http://www.familycourt.gov.au>. Speak to your nearest court registry for more details.

Applications and filing

[2.720] Divorce applications are available separately or as part of a do-it-yourself kit from the court, their websites, from <http://www.familycourt.gov.au> or from <http://www.australia.gov.au> [<http://www.australia.gov.au/information-and-services/family-and-community/relationships/getting-divorced>].

The “Application for Divorce Kit” can be completed online and printed. You must print off your completed application and file it in person at a court registry or by post.

There is now also an avenue for electronic filing for individuals (and for organisations, like legal firms) who want to complete and file a divorce application online. Go to <http://www.comcourts.gov.au> and first register as an individual user. Select “Family Law e-filing”, then “Application for Divorce”, and then “Federal Circuit Court” (unless you have been formally advised to file in the Family Court of Australia). Using the e-filing method you can save your application and come back to it (until you lock it), as well as file it electronically. You will need access to a printer, a scanner and a valid email address. Download the “Online

Application for Divorce” document at <http://www.australia.gov.au> [<http://www.australia.gov.au/information-and-services/family-and-community/relationships/getting-divorced>] for a full description of the process.

Documentation checklist: application for divorce

[2.730] To file an application for divorce, you need:

- ▶ a completed Application for Divorce form;
- ▶ your marriage certificate (the original or a certified copy);
- ▶ if you have been married less than two years, a signed counsellor’s certificate; and
- ▶ if you have been separated under one roof for any part of the 12-month separation period:
 - an affidavit from one or both of the applicants; and
 - an affidavit from a person associated with the couple.

Service of a divorce application

[2.740] An Australian divorce application made by a single party must be properly *served* (ie, posted or directly handed) to the other party. This is not necessary if a divorce application is jointly made.

Proof of service of the documentation must be lodged with the court within a certain time after the application has been filed. The rules for proper service are quite technical – it may be a good idea to seek the services of a professional process server unless you can be sure that the other party will be doing their best to cooperate by returning to you the signed “Acknowledgement of Service” form to enable you to prove service. You might wish to start with the “Divorce Service Kit” downloadable from the family law courts website.

If your spouse is refusing service, or cannot be located, there are procedures available for getting a court order for substituted service or, more rarely, to dispense with the requirement for service altogether. See [5.850] for more about serving court documents.

Opposing an application

[2.750] If you disagree with the details in an application filed by your partner, you can lodge a Response to Divorce form within 28 days of being served with the Application for Divorce. This form is obtainable from court registries, from court websites or from <http://www.familycourt.gov.au>.

If you file a response, you will need to arrange for it to be served on the other party (see [5.850]). You will also need to appear in court.

Advantages of joint applications

It is cheaper

[2.760] If you apply for a divorce by yourself, you will have to pay the full fee. If you apply jointly with your partner, the cost can be split between you.

You do not have to go to court

[2.770] If you apply jointly, you can ask for the application to be heard without either of you attending at court, even if there are children under 18 involved. If you apply on your own, and you have a child, you must attend the hearing.

There is no requirement for service

[2.780] If you apply by yourself, you must comply with the rules for service (see “Serving documents” at [5.850]) to ensure that the other party has formal notice of the commencement of proceedings. If you apply together, this sometimes-tricky technical procedure is avoided.

Working together towards closure

[2.790] It is a genuine step towards acceptance of reality, and the peaceful resolution of issues, if the parties can move together, cooperatively, to formalise the end of the relationship. By contrast, the arrival of unexpected divorce documents in the mail, or on the doorstep at dinnertime in the hands of a process server, is an unpleasant and confronting experience that tends to aggravate disagreements.

The Application for Divorce requires an outline of the arrangements made for the care of your children. Working through the application together may help you identify practical issues, and resolve uncertainties, about parenting arrangements and financial matters.

Timing

[2.800] The average time between filing an Application for Divorce and receiving the certificate of divorce varies between registries, but an undisputed joint application (with no service requirement), that is not delayed because the court requires extra information, could take four months or more from filing to finish. When you lodge (file) your application, you will be allocated a hearing date – probably even within four to eight weeks.

After the hearing, if the court has established that the requirement of separation has been met, it issues a decree nisi. This usually lasts for 30 days, unless:

- ▶ there are pressing reasons why the period should be shorter; or
- ▶ the court has asked for more information (eg, about arrangements for children) which may require another court appearance and prolong the decree nisi period.

At the end of the period, and when any conditions specified in the decree nisi are satisfied, the decree absolute (divorce certificate) is issued.

For the vast majority of applications, the minimum decree nisi period applies. If this is the case, the court will send out the certificates of divorce one month and one day after the date of the decree nisi.

What about remarriage?

[2.810] An early date for remarriage is not ordinarily considered a sufficient reason for early issue of the divorce certificate.

To marry, you must lodge a Notice of Intended Marriage with a marriage celebrant for a minimum of 30 days. Most celebrants will not accept a notice from a previously married person without a divorce certificate. You should not arrange a new marriage until you have that document in hand.

Disputes in relation to children

[2.820] The court may not grant a divorce if it is not satisfied that proper arrangements have been made for children. If at the time of the application there is a dispute about child support, or care arrangements, the court could adjourn the application until:

- ▶ the issues are resolved;
- ▶ further action (such as counselling) is taken; or
- ▶ further specified information is provided.

This will likely not happen, however. Divorces are often granted despite that there are outstanding parenting issues. If the court is not satisfied about arrangements for children, it may order the parties to attend an interview with a court-appointed family consultant, who will make their own investigation into the issues and make a report to the court: sub-section 55A(2).

Nullity

[2.830] If you think your marriage was invalid in the first place, you can apply to the Family Court to have your marriage declared a nullity. Your application would be for a *decree of nullity* – that is, a declaration that your marriage was void and invalid from the outset. The grounds for a decree of nullity are listed in sections 23 and 23B of the *Marriage Act*, and include that:

- ▶ at the time of the marriage one party was already married to somebody else (bigamy);
- ▶ the parties are within a prohibited relationship;
- ▶ the requisite formalities were not followed;
- ▶ one or both parties did not properly consent; or
- ▶ one or both parties was too young to marry.

Nullity cases can be difficult (and therefore expensive), while divorce, even early divorce, is relatively easy to achieve. Nullity applications are therefore infrequent.

The decree of nullity in the family court system should not be confused, in either process or effect, with *annulment* as defined under certain church laws. The two processes have nothing to do with one another.

Polygamy and bigamous marriages

A polygamous marriage lawfully conducted outside Australia may be recognised in Australia. An attempt to create a polygamous marriage in Australia, however, will be invalid. It may also constitute the federal crime of bigamy.

Prohibited relationships

You cannot marry an ancestor or descendant or a brother or sister, whether the sibling is your whole or half-blood relative, or even if they (or you) are adopted: *Marriage Act* section 23B(2). In Australia, however, you can marry your (differently gendered) first cousin, aunt or uncle, niece or nephew.

Non-compliance with formalities

There are circumstances in which an allegation of insufficient compliance with the formalities for a lawful marriage will be upheld, including where the celebrant was not properly authorised and both parties knew this.

Arranged marriages

Australian law does not require that a marriage partner be known to, or chosen by, the individual. However, the Australian courts tend to uphold the rights of a person who has been forced into a marriage against their will.

Fraud and mistake

A person may be able to establish fraud or mistake as a basis for the no consent ground where the supposed consent was given to something other than a marriage, or in relation to a person who was not, in the end, the person standing at the altar. It is very difficult to argue that fraud or mistake nullifies consent by reason of broken promises or the incorrectly understood attributes (such as the wealth) of one of the parties.

Incapacity

The person must be “mentally incapable of understanding the nature and effect of the marriage ceremony”: *Marriage Act* section 23B(1)(d)(iii).

Sample separation under one roof affidavits

Affidavit 1

[2.840] I, MARY ANN BLACK of 75 Risalt Street, Tadbugnall in the State of New South Wales, salesperson, make oath and say/affirm as follows:

- 1 I am the applicant for the dissolution of my marriage to Daniel John Black (“Daniel”).
- 2 Daniel and I were married on 29 January 1990.
- 3 There are two children of our relationship: Samuel Black, born 6 June 1995 and Anna May Black, born 5 May 1997.
- 4 Daniel and I lived together with our children at 36 Antonen Road, Tadbugnall, New South Wales (“the marital home”).
- 5 I am 40 years of age and am employed full-time as a jewellery salesperson at David Jones in Tadbugnall. My average weekly income is approximately \$1150.00 gross. I have no other income.
- 6 Throughout our marriage and until our separation, my salary was deposited each fortnight into a joint account in both Daniel’s and my name at the Commonwealth Bank, Tadbugnall. The mortgage and all the housekeeping expenses were paid from this account with free access to the account available to both of us.
- 7 Since our marriage, Daniel has not been formally employed nor earned an independent income.
- 8 In the course of our marriage, Daniel cooked on weeknights for the whole family and did most of the housework and laundry.
- 9 After experiencing difficulties within our marriage for some months previously, Daniel and I had a heated argument on 3 March 2005. At the end of it, I screamed at him: “I’ve had enough. We’re finished.”
- 10 At this point on 3 March 2005, I regarded my marriage to Daniel as over. We remained separated under one roof without reconciling until 12 December 2005.
- 11 On 4 March 2005 I moved all of my clothes and personal possessions out of our double bedroom and into the spare bedroom. I have not slept with, nor had sexual relations with, Daniel since that time.
- 12 Daniel and I have danced as partners in ballroom dancing title competitions throughout NSW since 1992. Ballroom dancing has been a very important part of our life together.
- 13 On 4 March 2005 I attended at the RSL hall where our team rehearses each week and put up a notice advising that I would no longer be dancing with Daniel and asking for potential new dance partners to contact me directly. I have not danced with Daniel, competitively or otherwise, since our separation.
- 14 Also on 4 March 2005, I closed the joint account, and arranged for my pay to be deposited to an account in my name only. I arranged to pay the mortgage directly from my account and gave Daniel \$600 in cash each payday from 10 March 2005 until my child support assessment in January 2006 for food and housekeeping expenses for himself and the children.

- 15 After our separation, we did not eat together as a family anymore. I prepared my own meals late in the evening or ate out and I looked after my own washing. Daniel continued to do most of the other housework.
- 16 Between 3 March and the end of November 2005, I tried unsuccessfully to find affordable, alternative accommodation near to the marital home so that I could continue to see the children easily.
- 17 In early December 2005, I found a unit at my current address in Risalt Street, Tadbugnall, which is only a few minutes drive from the marital home. I moved in on 12 December 2005.

SWORN/AFFIRMED by the Deponent at

On theday of20.....
(Signature of Deponent)

Before me
(Signature and title of person before whom affidavit is sworn)

.....
(Print name of person before whom affidavit is sworn)

Affidavit 2

[2.850] I, EVA LARSON of 24 Gidibal Street, Tadbugnall in the State of New South Wales, dance teacher, make oath and say/affirm as follows:

- 1 I am a friend of both Daniel Black (“Daniel”) and Mary Black (“Mary”). I first met them as my next-door neighbours in Antonen Street, Tadbugnall in 1991.
- 2 I introduced Daniel and Mary to competitive ballroom dancing. Between 1992 and March 2005, they danced as a couple with the dance team the Tea-Trees that I founded and continue to manage.
- 3 On Thursday 5 March 2005 I went to the RSL hall for rehearsals as usual. Mary handed me a piece of paper. Her name and signature were at the bottom of the page. The document was headed “Public Notice” and included words to the effect: “Daniel and I will no longer be dance partners. If anyone else is interested in partnering me in the Samba section at the upcoming Regional titles, please contact me directly.”
- 4 Neither Daniel nor Mary attended at rehearsal that night. Daniel has not attended club activities since that time. Mary found a new partner and continues to compete with the team.
- 5 On 15 November 2005, being the weekend after the Regional Dance Championships, I pulled up outside 36 Antonen Street to drop Mary back after a rehearsal. She hesitated

before opening the car door, staring through the window at the house. The front room was clearly full of people. Mary said: "I'll have to go round the back." I said words to the effect: "Mary this is ridiculous, you can't continue to live like this." She replied: "I know – but I am looking for places all the time. Something has to come up soon."

- 6 On 14 January 2006, at rehearsal, Mary handed around a little card with her new address in Risalt Street on it.
- 7 I believe that Daniel and Mary were living separated under one roof at the Antonen Street house between early March and late December 2005.

SWORN/AFFIRMED by the Deponent at

On theday of20.....
(Signature of Deponent)

Before me
(Signature and title of person before whom affidavit is sworn)

.....
(Print name of person before whom affidavit is sworn)