

Chapters 1 and 2: General Information and Getting Help

women and family law
10th edition



WOMEN'S LEGAL SERVICES NSW



Acknowledgements

The 10th edition of *Women and Family Law* was updated by the solicitors at Women's Legal Services NSW.

Cover designed by Miska Graphics
Layout and design by Miska Graphics.

©Women's Legal Resources Ltd trading as Women's Legal Services NSW

ISBN (paperback) 978-0-9807623-0-3

ISBN (online) 978-0-9807623-1-0

Produced by Women's Legal Services NSW

Tenth Edition, April 2014

Disclaimer

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

Copies of this publication are available from:

Women's Legal Services NSW
PO Box 206 Lidcombe NSW 1825
Tel: 02 8745 6900

Electronic copies available online at www.womenslegalnsw.asn.au

Contents page

Chapter _____ Page No.

1. General Information

1.1	About this booklet _____	5
1.2	The legal framework _____	5

2. Getting Help

2.1	Counselling and emotional support _____	7
2.2	Lawyers _____	8
2.3	Legal aid _____	13
2.4	Information sheet _____	15

3. Divorce

3.1	Ending the marriage _____	18
3.2	Legal process and procedure _____	19
3.3	Marriage certificates _____	24
3.4	Life after the divorce _____	25

4. Children

4.1	When parents can agree _____	27
4.2	Family Dispute Resolution _____	28
4.3	Decisions of the Family Law Courts about children _____	34
4.4	Who can apply for court orders? _____	37
4.5	Going to court _____	38
4.6	Contravention of parenting orders _____	41
4.7	Taking children without consent of a parent _____	42
4.8	Appeals _____	45
4.9	Other common questions _____	45

5. Protection against violence and harassment

5.1	Domestic violence _____	47
5.2	Apprehended Domestic Violence Orders _____	48
5.3	ADVOs and family law _____	55

6. Child support and maintenance

6.1	Centrelink family assistance payments _____	57
6.2	Child support _____	59
6.3	Applying for child support _____	60
6.4	Child support payments _____	61
6.5	Disagreeing with child support decisions _____	64
6.6	Ending child support payments _____	65
6.7	Child support agreements _____	65
6.8	Collection of child support payments _____	67
6.9	Enforcing child support payments _____	68
6.10	Child maintenance _____	68
6.11	Spousal maintenance _____	69

7. Property

7.1	What is considered property of a relationship? _____	71
7.2	How long after we separate do I have to sort out property issues? _____	71
7.3	Which law applies to me? _____	72
7.4	What if we can agree on how to divide our property? _____	73
7.5	What if we can't agree on how to divide our property? _____	74
7.6	Can we make an agreement about our property before we separate? _____	78
7.7	Superannuation _____	78
7.8	What else should I think about? _____	80

8. Legal language - what does it all mean? _____ 85

9. Referrals and resources

9.1	Referrals _____	95
9.2	Useful resources _____	104
9.3	Family law fees _____	106

1 General information

1.1 About this booklet

This is the tenth edition of *Women and Family Law*. It states the law as at April 2014 that applies to married and de facto couples (including same sex de facto couples) after relationship breakdown.

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

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

When reading this booklet, please note:

- The terms ‘partner’ or ‘ex-partner’ are used to describe a person’s husband or de facto partner, including a same sex de facto partner.
- Words and phrases are printed in bold for a number of reasons:
 - A term that is defined in Chapter 8 (definition section) is printed in bold the first time that it appears in each chapter.
 - The first time a term is abbreviated in each chapter, it is printed in bold.
 - Time limits are printed in bold.
 - Cross references to other sections of the booklet are printed in bold.

1.2 The legal framework

What laws apply?

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

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

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

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

Which courts deal with family law matters?

There are three courts that deal with family law matters:

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

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

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

2 Getting help

2.1 Counselling and emotional support

Why do I need advice and support?

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

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

Is there anyone I can talk to?

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

Family Relationship Centres provide information and advice about parenting, relationship and separation issues. These centres also provide **family dispute resolution** services, which can help you and your partner reach agreement about parenting arrangements for your children without going to court.

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

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

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

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

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

2.2 Lawyers

Do I need to get legal advice?

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

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

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

Do I need a solicitor or a barrister?

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

Solicitors can:

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

Important Information

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

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

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

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

How can I find a solicitor?

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

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

What can I expect from a lawyer?

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

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

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

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

Handy Tip

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

What will my legal costs be?

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

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

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

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

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

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

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

Handy Tip

*Every time you talk to your lawyer you pay for their time. You can save money by taking any important documents (e.g. marriage certificate, bank account statements, receipts, superannuation details and details of any property you own) to your lawyer on the first visit. You can also prepare notes for your lawyer about yourself, your family and your property. See the **Information Sheet** at the end of this chapter.*

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

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

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

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

If you:

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

you can challenge your lawyer's bill.

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

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

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

Can anyone else help us to agree about important decisions?

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

There are many benefits of using family dispute resolution:

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

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

What if I have trouble understanding or speaking English?

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

2.3 Legal aid

Can I get legal aid?

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

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

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

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

How do I apply for legal aid?

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

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

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

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

What if I'm not eligible for legal aid?

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

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

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

See the Family Law Courts website: www.familylawcourts.gov.au and Find Legal Answers: www.legalanswers.sl.nsw.gov.au

2.4 Information Sheet

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

1. **You**

Name: _____
 Date of birth: _____
 Address: _____
 Telephone: _____

2. **Other party**

Name: _____
 Date of birth: _____
 Address: _____
 Telephone: _____
 Name and contact details for lawyer (if relevant): _____

3. **Family history and details**

Date you and your partner started living together: _____
 Date of marriage: _____
 Date of separation: _____
 Children (names, gender, date of birth): _____

Name	Male/Female	Date of Birth	Name of other parent

Current care arrangements for the children: _____

4. Property

Current assets	Details	Estimated value
House		
Car		
Furniture		
Shares		
Insurance		
Superannuation		
Other		
Current debts	Details	Estimated value
Credit cards		
Personal loans		
Mortgage		
Other		

List the assets you brought to the relationship: _____

List the assets the other party brought to the relationship: _____

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

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

5. Checklist of documents to take to your lawyer

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