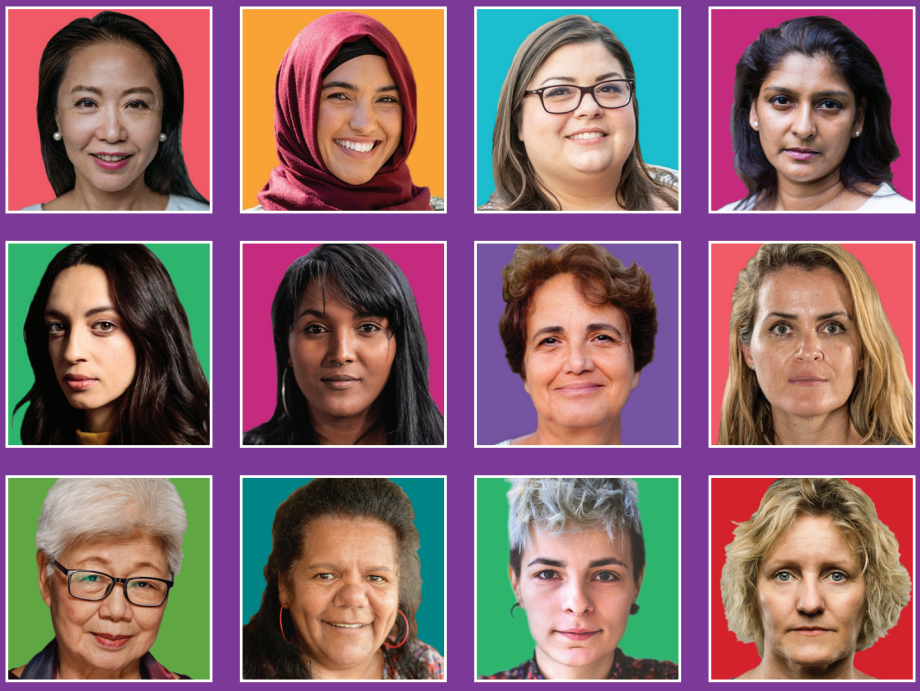
13th Edition

Women and Family Law

Women's Legal Service NSW



WOMEN'S LEGAL SERVICE NSW

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Acknowledgements

The 13th edition of *Women and Family Law* was updated by the solicitors at Women's Legal Service NSW.

ISBN (online) 978-0-9945808-7-0

Produced by Women's Legal Service NSW

Thirteenth Edition, May 2024

Layout and design by ARMEDIA.

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.

Electronic copies available at wlsnsw.org.au

Contact Women's Legal Service NSW on (02) 8745 6900

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1. General information

1.1 About this booklet

This is the thirteenth edition of *Women and Family Law*. It states the law as at May 2024.

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

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

When reading this booklet, please note:

- The terms 'partner' or 'ex-partner' are used to describe a person's husband or wife or de facto partner, including a same sex de facto partner.
- 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 – those who are or were in a de facto relationship (including same sex de facto relationships) and married relationships (same sex and opposite sex marriages); and
- children's matters (except child welfare or child protection issues which are dealt with by the **Children's Court**, **under the *Children and Young Persons (Care and Protection) Act 1998*** **(NSW)**). The *Family Law Act* covers children whose parents were married or in a **de facto relationship** (including a same sex de facto relationship) and children whose parents have never lived together and may not have ever been in a relationship.

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

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.

Which courts deal with family law matters?

There are two courts that deal with family law matters:

- the Federal Circuit and Family Court of Australia; and
- the Local Court.

The Federal Circuit and Family Court of Australia is referred to throughout this book as the **Family Law Court**.

For further information about how to find the Family Law Court 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 have emotional support. It is sensible to keep the two areas separate. Do not rely on a **lawyer** for emotional support and 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 Court** has information on many topics including helping your children cope with the end of a relationship.

Usually going to counselling is your own choice, but the Family Law Court will usually require at least one visit to a family counsellor if you want a divorce and you have been married **for less than two years**.

Usually what is discussed in counselling is confidential, but there are some exceptions. Most counsellors must report a risk of child abuse to **NSW Community Services**. 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:

- give you legal advice 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 they are clear and 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. For this reason, we always recommend you get legal advice about whether consent orders are in your best interests and the best interests of your children; sometimes it is better not to have orders which you will be obliged to follow. You can file a completed Application for Consent Orders form through Family Law Court or the Local Court. There is a filing fee for this form. For current filing fees and for the Family Law Court website refer to ➤ *Chapter 9: Referrals and Resources*.

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

Barristers (sometimes referred to as counsel) specialise in court work and are usually contacted through and hired by your solicitor on your behalf to represent you in court. If your solicitor recommends a barrister, your solicitor must tell you how much the barrister charges and get your agreement in writing to pay her or his fees. You will have the advantages of having two lawyers on your side, but you may also have extra expenses. Sometimes you will get Legal Aid for barrister's fees.

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

How can I find a solicitor?

To find a solicitor, ask LawAccess NSW or a community legal centre or the Law Society Solicitor Referral Service for names of solicitors experienced in family law. The NSW Law Society has a specialist accreditation program for

family law solicitors. You can ask for the names of solicitors with specialist accreditation. See ➤ *Chapter 9: Referrals and Resources* for more details.

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

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

What can I expect from a lawyer?

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

It is important to understand what your lawyer says so you can make informed decisions. If you have difficulty understanding your lawyer's advice, ask your lawyer to explain in a different way that is easy for you to understand. 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 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.

It is important to know though that many lawyers charge more than the fee set by the *Family Law Act*. This is permitted, but they must first:

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

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

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

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

Handy Tip

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

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

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

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

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

you can challenge your lawyer's bill.

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

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

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

Can anyone else help us to agree about important decisions?

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

There are many benefits of using family dispute resolution:

- it costs a lot less than going to court;
- it may be more satisfying to be in control of the process and to come up with your own agreed resolution; and
- when there are children, parents may have to continue to relate to each other as parents long after their intimate relationship is over. Taking a matter to court can make this 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. To get 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. If you own a house or other significant assets, Legal Aid might also require you to have a charge agreement with them over your house. This means that when or if the house is sold, Legal Aid will take the money you owe to it out of the settlement funds. Legal Aid NSW has a Contributions Policy which sets out how it calculates a person's contributions and how it can enforce its repayment.

Legal Aid NSW may require that you participate in a mediation called a Early Resolution Assistance 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 it is not safe for you to do so, there are serious concerns for the safety of a child, or an urgent recovery order for the return of a child is needed. An Early Resolution Assistance 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 will ask you to pay a contribution towards your legal fees. Legal Aid NSW has a Contributions Policy which sets out how it calculates a person's contributions and how it can enforce its repayment.

Legal Aid NSW may say that they cannot represent you because in the past they have represented the other party and have a **conflict of interest**. If this is the case and you are eligible 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.

NSW Legal Aid's Domestic Violence Unit and the Early Intervention Service may assist with the preparation of urgent court documents. Sometimes their lawyers might represent you in court on a duty basis (meaning just for that day) where a matter is urgent even where you might not be eligible for legal aid for your whole case or where eligibility is yet to be decided.

Some private solicitors and barristers give you free legal advice and possibly assist you. 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:

- Federal Circuit and Family Court website: fcfcoa.gov.au
- Find Legal Answers: legalanswers.sl.nsw.gov.au

2.4 Preparing to get legal advice

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	Date of Birth	Name of other parent

Current care arrangements for the children: .....

.....

.....

.....

Any history of domestic and family violence (violence and abuse can be coercive control, verbal abuse, emotional abuse, sexual abuse, physical abuse and so on): .....

.....

.....

.....

Any AVOs (current and past): .....

.....

.....

.....

4. Property

Current assets	Details	Estimated value
House		
Car		
Furniture		
Shares		
Insurance		
Superannuation		
Business		
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 for the last 3 years
- ☐ credit card statements for the last 3 years
- ☐ superannuation statements for the last 3 years
- ☐ insurance statements for you and your partner for the last 3 years
- ☐ 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 for the last 7 years
- ☐ any apprehended domestic violence orders taken for your protection or against you
- ☐ any statements you have given to the police about violence and abuse perpetrated by your former partner

3. Divorce

3.1 Ending the marriage

What is a divorce?

A divorce is the process to legally end a marriage. Once you are divorced, you can legally re-marry.

Divorcing does not sort out arrangements for children or how the property will be divided. You have to make separate **applications** for orders about children and property/spousal maintenance if you need them.

How can I get a divorce?

To legally end a marriage, you need to apply to the **Family Law Court** for a divorce.

Australia has a 'no fault divorce' system. This means that when granting a divorce, the court does not consider the reason/s why the marriage has ended and neither spouse has to prove that the other did (or did not) do something which caused the breakdown of the marriage.

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

- you have a valid marriage (e.g. by providing your marriage certificate or equivalent documentation); and
- your marriage has broken down and there is no chance that you will get back together. This is called an **irretrievable breakdown** of your relationship; and

- you have been separated for 12 months before you applied for divorce;
- you are an Australian citizen, a permanent resident or have been living in Australia for at least 12 months before applying for the divorce; and
- if you have children under the age of 18, that there are proper arrangements in place for their care (the court wants to know information like who they live with, time spent and communication with both parents, their health and wellbeing, educational arrangements, financial support). The court does not require you to have formal orders about your children.

If the court is satisfied that you have proved these things, the court will grant the divorce.

What does 'separated' mean?

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

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

You may be able to get a divorce if you and your spouse have separated but still live in the same house for financial or other reasons. This is called *separation under one roof*. When you apply for a divorce, you will need to prove that your marriage has ended and you and your spouse live separate lives even though you still live (or lived for part of the 12 months) in the same house. You do this by providing the court with two **affidavits**, one from you and one from a friend or family member, telling the court about your separate lives. For example, you sleep in separate rooms, do not cook each other dinner or do each other's laundry, do not go out as a family, or eat and entertain together. Children over 18 can make this affidavit.

What if I was married for less than two years?

If you have been married for less than two years, you usually need to see a family counsellor to discuss the possibility of reconciliation before you can apply for a divorce. If your spouse is violent and you are afraid to see him or her, discuss this with the counsellor when you make an appointment. The

counsellor should arrange separate appointments. If your spouse will not attend counselling, you may still get your divorce by applying for permission (called special leave) from the court. Unless you urgently need a divorce, it is easier to wait for two years from the date of marriage to apply for your divorce.

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

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

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

How much will it cost me to get a divorce?

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

- the filing fee
- a certified copy of your marriage certificate if you do not have the original
- translation of marriage certificate (if not in English – see What if I need my marriage certificate translated? in **section 3.4** below)
- if you use one, a process server to serve your divorce application on your spouse – on average costs between $70–$140 (depending on location of spouse)
- if you use one, your lawyer's fees.

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

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

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

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

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

Reduced filing fees for divorce are granted to primary cardholders (but not dependants of the primary cardholder) of a Health Care Card, Health Benefit Card, Pensioner Concession Card, Commonwealth Seniors Health Card, or any other card issued by Centrelink or the Department of Veterans' Affairs that entitles you to Commonwealth health concessions.

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

Can I get legal aid for a divorce?

You may be eligible for a grant of legal aid for your divorce application if you:

- meet the means test (the income test);
- meet the merits test (is it fair and reasonableness to use public money for your case);
- meet the complexity test (e.g. language barriers, difficulties in proving the marriage, need for substituted or dispensed service, forced marriage); and
- meet the personal circumstances test (is experiencing, or at risk of, domestic or family violence, or ongoing health condition or disability or is currently experiencing significant financial hardship.)

Your grant of legal aid will usually mean you have a solicitor to represent you in preparing your application and appearing for you at the hearing and it will usually cover your costs such as filing fees, service and translation of a marriage certificate etc.

3.2 How do I apply for a divorce?

What are the steps involved in getting a divorce?

Doing your own divorce application is not too difficult and you can get legal advice and assistance with forms from Legal Aid or some community legal centres.

The *Application for Divorce Kit* on the Family Law Court website (fcfcoa.gov.au) provides a step-by-step guide to doing your own divorce. You will need to eFile (file documents over the internet) your divorce application via the Commonwealth Courts Portal (**the Portal**) (comcourts.gov.au).

If you are filing an application for divorce, you are called the Applicant and your spouse is called the Respondent.

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

1 Complete an application for divorce online

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

You need to complete and print your application. You must sign the divorce application in front of a **solicitor** or **Justice of the Peace**. Once signed and witnessed, you need to upload the following onto the portal:

- the signed divorce application;
- your marriage certificate;
- any affidavits; and
- any other documents e.g. evidence of your citizenship by way of your Medicare card and any documents to support an application for a filing fee reduction.

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

The Portal will stamp the documents you uploaded with a court seal. You will need to print the sealed (stamped) documents and **serve** them on your spouse.

2 What you need to serve on your spouse

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

The following documents need to be served on your spouse:

- the application for divorce;
- a copy of the *Marriage, Families and Separation* brochure (available on fcfcoa.gov.au); and
- any other sealed documents you eFiled on the Portal, like an affidavit.

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

3 Serve the application on your spouse

It is very important that you follow the strict rules for serving (formally giving) your spouse with a divorce application. You can download a Divorce Service Kit (do it yourself kit) from the Family Law Court website. If your spouse is in prison, please see below for further information about how to serve a person who is in prison.

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

- Service by post;
- Service in person (by hand).

Service by post

If you are confident that your spouse will sign and return an Acknowledgement of Service form, you can serve by post. The Acknowledgement of Service shows the court that you have given a copy of the divorce application to your spouse.

To serve your spouse or their lawyer by post, you should:

- send your documents by pre-paid post in a sealed envelope to their last known address – remember to record the date you sent your documents;
- ask your spouse or their lawyer to sign Part C of the Acknowledgement of Service (Divorce) and return it to you;
- provide a stamped, self-addressed envelope for your spouse or their lawyer to return the signed Acknowledgement of Service (Divorce) to you.

If your spouse or their lawyer does not sign and return the Acknowledgment of Service (Divorce), you will have to serve them by hand.

Service in person (by hand)

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

To serve your spouse or their lawyer by hand, the server must:

- hand your spouse or their lawyer your Application for Divorce and supporting documents, or put the Application for Divorce and supporting documents down in your spouse's presence and explain what the documents are;
- ask your spouse or their lawyer to sign Part C of the Acknowledgment of Service (Divorce);
- sign and have witnessed by an authorised person (a Justice of the Peace or lawyer) the Affidavit of Service by Hand (Divorce).

It is helpful to partially complete the Affidavit of Service by Hand (Divorce) to give to the server when you ask them to serve your Application for Divorce and supporting documents.

You may also want to give the server a photo of your spouse to make it easier for them to identify them. If you do, you must make sure that a copy of this photo is attached to the Affidavit of Service by Hand (Divorce) when it is filed.

What if my spouse is overseas?

You can serve your spouse by post or in person. The court can order some other type of service, for example, substituted service (service on someone else, such as a relative, or by email). See below for more information about substituted service.

Service where your spouse is in prison

If your spouse is in prison, there are different rules you must follow to serve them with your Application for Divorce. You can find a step by step guide here: Serving your spouse in prison.

4 File the service documents

You must prove to the court that your spouse has been served. You do this by going to the Portal and eFiling:

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

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

If your spouse was served in person, your spouse does not need to sign, and you do not need to eFile, the *Acknowledgement of Service (Divorce)*.

If your spouse signed the *Acknowledgement of Service (Divorce)* and the server does not know your spouse, you will need to complete and eFile an *Affidavit* proving signature and attach the *Acknowledgement of Service (Divorce)* to it. The person who witnesses your signature on the *Affidavit proving signature (divorce)* must also sign the Annexure Note on the *Acknowledgement of Service (Divorce)*.

5 The court hearing

If you have made a joint application or there are no children aged under 18, then generally, the court will not hold a divorce hearing.

There are some exceptions to this, for example, if you are asking the court to make other orders about service (see below), or if you have been living separately under the same roof or you have been married for less than two years.

If any of the above circumstances apply or if you have children aged under 18, the court will hold a divorce hearing. This will usually be over the phone.

The Portal will give you the information about your court hearing including the date and time of your hearing, what telephone number you need to call and the code you need to enter. It's a good idea to log into the Portal a few days before your hearing to get this information.

A court officer will come onto the phone when the court is ready for your hearing. You can let the court officer know you are the **applicant** and that you want the court to grant your application for divorce. If you have a solicitor, she or he will talk for you.

6 The court makes its decision

The court can:

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

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

What if I cannot find my spouse?

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

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

3.3 What if my spouse serves me with an application for divorce?

If you are served with an application for divorce, you are called the Respondent and your spouse is the Applicant.

What if my spouse serves me with an application for divorce and I do not want to divorce?

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

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

You can eFile a Response, putting your version of events in a statement. If you eFile a Response there will be a hearing. It is best to have the record set straight, as the divorce application will remain in the court file.

3.4 Marriage certificates

What if I can't find my marriage certificate?

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

If you were married overseas and you don't have a copy of your marriage certificate, you will need to apply for a copy from the country where you were married. If you can not obtain a copy of your foreign marriage certificate, you must file an affidavit with your divorce application explaining why the certificate is not available.

What if I need my marriage certificate translated?

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

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

3.5 Life after the divorce

When can I get married again?

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

What about my will?

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

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

When can I get a property settlement?

You can make a property settlement any time after you separate. Once a divorce becomes final, you must apply to court **within 12 months** if you need a property settlement or **spousal** maintenance. Generally, it is better to do a property settlement first or at the same time as applying for a divorce. If your spouse applies for divorce, seek legal advice to get a property settlement if you have not already done so. See ➤ *Chapter 7* for information on property settlement and spouse maintenance.

4. Children

In this chapter we mostly refer to parents. However, the information in this chapter is not just relevant for parents. It's also relevant for carers and others who are concerned with the care, welfare and development of a child and who might want to participate in family dispute resolution or make an application for a parenting order.

4.1 Changes to the Family Law Act as of 6 May 2024

On 6 May 2024, significant changes to the *Family Law Act 1975* (***Family Law Act***) parenting provisions came into effect. These changes include:

- simplification of the best interest factors (see ➤ *best interest factors*);
- removal of the presumption of equal shared parental responsibility;
- removal of the need for courts to consider whether equal time or substantial and significant time with each parent is in the best interests of the child;
- new laws about how separated parents or the person who has care of the child are to make decisions about major long-term issues for their children (see ➤ *section 4.3*);
- new laws about when the court can reconsider final parenting orders (see ➤ *section 4.5*);
- new laws about independent children's lawyers;
- new laws about harmful proceedings;

- changes to the definition of 'member of family' and 'relative' to better capture family arrangements for Aboriginal and Torres Strait Islander families, including kindship systems; and
- new enforcement provisions including providing the court with the power to order a child spend 'make-up' time with a parent or for a parent to attend courses and programs.

These changes will be discussed in more detail throughout this chapter.

These changes will affect you if you have a parenting matter before the court and where the final hearing has not commenced before 6 May 2024 or where you are trying to decide the best parenting arrangement for your child.

4.2 When parents can agree on future arrangements for the children

Do we have to go to court about the children?

The *Family Law Act* encourages separating parents or the people caring for a child to agree on parenting arrangements without going to court if it is safe to do so. If you and the other parent or person caring for the child can agree about arrangements for your children, then you do not have to go to court at all.

We agree about arrangements for the children – what now?

There are three options:

- You can have an **informal agreement** about the care and living arrangements of children. Your agreement can be verbal or in writing. There are some benefits to having informal arrangements, for example, they can be much more flexible than court orders. However, they are not enforceable and if they are not detailed enough, this can lead to misunderstandings about what the agreement means.
- You can write a **parenting plan** about the arrangements for children. A parenting plan is a written agreement, signed and dated by you and the other parent or person caring for the child. It sets out the future care arrangements for the children. It can cover who has parental responsibility for the child, who the child lives with, spends time with and communicates with, child support payments and other issues. Parenting plans are not legally binding and cannot be enforced if one person does not follow the agreement. However, the court will take

into account the agreement made in a parenting plan if your case later goes to court and the court believes it is in the child's best interests to do so. You can write a parenting plan yourselves or get the assistance of a Family Dispute Resolution Practitioner (FDRP) (see ➤ *section 4.3*) or a lawyer.

- You can have your agreement or parenting plan made into **consent orders** by way of an *Application for Consent Orders* filed with the court. Generally, this does not require you to attend court; the Application and orders are considered by the judge in Chambers (meaning, where the Judge looks at the matter in private and not in open court, without the parties being present). The court will only agree to the orders if they are in the best interest of the child. The advantage of consent orders is that they are legally enforceable by filing a contravention application with the court, to try to get the other party to comply with the orders.. This means you and the other parent or person caring for the child must comply with the agreement.
- That said, it is important to know that having consent orders won't mean that a court will force a parent to spend time with children if a parent doesn't want to – see ➤ **What can I do if the other parent doesn't want to see the children?** Consent orders are usually in place until the child turns 18 years old. It is difficult to change consent orders and usually, unless both parents or person caring for the child agree to a change, you will need to show the court that there has been a significant change in circumstances if you want the court to change them. Because consent orders will be in place for a long period of time and because they are very hard to change once you have agreed to them, it is particularly important to get advice from a lawyer before you agree to them or sign anything.

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

When we can't agree on future arrangements for the children

When you cannot agree, there are two options:

1. Attend **Family Dispute Resolution** (FDR) to see if you can reach an agreement (see ➤ *section 4.3* below); or if that is unsuccessful or not appropriate,
2. File an Application in the Family Law Court for parenting orders (see ➤ *section 4.3* below).

4.3 Family Dispute Resolution

What is Family Dispute Resolution?

Family Dispute Resolution (FDR) is a way of trying to sort out family law disagreements without going to court. This method is sometimes also called mediation and the mediator is called an FDR practitioner (FDRP).

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

You can do FDR at a Family Relationship Centre, at Legal Aid (if you are eligible) or with a private FDRP. If you are doing FDR through a service that is not an FRC or Legal Aid, it is important to make sure that the FDRP is accredited to provide FDR in family law matters.

What is a Family Relationship Centre?

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

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

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

Do I have to participate in FDR?

In most circumstances, you must participate in FDR with the other parent or person caring for the child before you can make an application to the court for parenting orders.

However, there are important exceptions to this requirement (see below).

If you cannot reach an agreement at FDR or an exception applies, you may be able to apply to the court for parenting orders. However, you will also need to make sure that you have followed the pre-action procedures outlined below. See ➤ *section 4.4*.

If you are not eligible for an exception and you do not attend FDR or comply with the other pre-action procedures, then a costs order may be made against you if you file in court.

How does the court know I have attended FDR?

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

- you have a section 60I certificate; and
- you have complied with the pre-action procedures; or
- an exception applies to you, and you include this information in your application.

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

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

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

A section 60I certificate is only valid for 12 months. This means that if you want to use your certificate, you must file an application for parenting orders within 12 months from the date of the last attempt at family dispute resolution. If you miss the 12 months and still want to file parenting orders, you will need to try FDR again unless you are eligible for an exception.

What are the exceptions to FDR?

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

- you and the other party are applying for consent orders;
- your application is in response to the other party's application;
- the court is satisfied there are reasonable grounds to believe there has been or is a risk of abuse or family violence;
- your application is about a contravention of parenting orders made in the last 12 months, and the person who breached the court order showed serious disregard for their obligations under the order;
- your application is urgent; or

- one of the parties is unable to participate in FDR for a reason such as having a disability or living in a remote location.

If you think that you may be eligible for an exemption, you should get legal advice as soon possible.

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

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

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

However, a woman may still be able to achieve a safe and appropriate agreement which is in the best interest of the children if she has good legal advice and a lawyer (see below) and feels safe to say what she thinks is best for the children in FDR. FDR can be part of a healing and empowering process but should be entered into with caution and good support where there has been a history of family and domestic violence.

If you are thinking about inviting the other parent to go to FDR and you have experienced domestic violence, it is important to get legal advice first. Sometimes it's better not to start the FDR process at all and a lawyer can help you work through this before you approach the FDR provider or the other parent about it.

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

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

- Tell the FDRP about your experience of family and domestic violence and discuss what they can do to provide a safe process;

- If you will feel intimidated or afraid to be in the same room as the other party, ask about a telephone FDR or a shuttle FDR (See ➤ *What is shuttle FDR below*);
- Make arrangements for separate times to arrive and leave and the use of separate waiting rooms;
- Get legal advice before attending FDR. A lawyer can give you advice about your circumstances and what proposals you could offer to ensure the proposal is in the best interests of your children, is safe and which will also keep you safe;
- Get legal advice about any potential agreement to make sure your agreement is in the best interest of the children and safe. Don't sign an agreement if you are unsure about what you are agreeing to or if you are unsure about whether it is in the best interests of your children;
- Have a lawyer represent you in your FDR session. This provides an important safeguard if there is a history of family and domestic violence;
  - Legal Aid provides family dispute resolution services, and if you are eligible for Legal Aid, you can have a lawyer represent you;
  - Ask your local FRC about having a lawyer represent you in FDR. Some community legal centres provide free representation in FRCs, or you can pay a lawyer to represent you in the FDR session;
  - You can have a lawyer represent you in FDR provided by a private FDR service.

What is shuttle FDR?

Shuttle FDR is where the parties are in different rooms. The FDRP moves between rooms to listen and pass information about the issues and possible solutions between the parties, meaning you don't have to see or speak directly with the other party. Shuttle FDR is one way of attempting to provide a safe environment where there is a history of family and domestic violence.

FDR can also be done by telephone in appropriate circumstances.

What happens in FDR?

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

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

1 Opening statement by the FDR Practitioner

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

2 An opening statement by each party

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

3 The FDRP summarises both opening statements

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

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

The FDRP identifies issues and works with the parties to set an agenda for the session. It might include issues like where the children live, when and how they spend time with the other parent or person caring for the child and any other significant people in the child's life, schooling, how the parties will communicate with each other about the children and so on.

5 Exploration

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

6 Private sessions

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

7 Negotiation

Some FDRPs enter into a negotiation stage towards the end. At this stage, the FDRP might become more involved in problem solving, assessing

options, identifying common interests and focusing on the best interests of the children.

8 Agreement

Agreement in FDR is by consensus, that is, both parties agree on the outcome. You might reach agreement about some but not all issues. The FDRP may want to put your agreement in writing. It is really important to get legal advice before signing any written agreement.

9 Termination

Termination of FDR occurs where there is no agreement. This may be because a party walks out or does not show up, where the parties cannot reach an agreement or where safety issues cause the FDRP to decide to end the FDR. If this happens the parties will be given a section 60I certificate that states that FDR was unsuccessful.

This certificate allows either party to file an application in court within 12 months of the date that they last attempted family dispute resolution. Prior to doing so, the filing party would need to comply with the rest of the court's pre-action procedures unless there is an exception that applies. See ➤ *Pre-action procedures*.

Important Information on preparing for FDR

The following suggestions may help you prepare for FDR.

- Get legal advice before going to FDR. Consider your best and worst alternatives to a negotiated agreement. You might hear this called a 'BATNA' and 'WATNA'. They may be the range of orders a court may make. Knowing the best and worst alternatives will help you in the negotiations.
- Prepare a short opening statement to make at the beginning of the FDR meeting. Give your view of the situation and how you and/or the children have been affected.
- Prepare for the rest of the FDR meeting by writing notes to take with you and help you remember what to talk about. Write notes about:

  - your main concerns - the issues that you need to have resolved. Focus on what is in the best interests of the children and explain why;
  - what you want and why it is best for the children; and
  - what you might agree to in the short term and what would need to happen or change for you to move beyond this short-term arrangement.

- If the other party gives their opening statement first, do not respond to what is said – stick to the opening statement you prepared. The FDRP's job is to identify the issues and give you a chance to respond to them later.
- Be prepared to let the FDRP know if you need a break, if you want to continue in separate rooms because you're feeling unsafe or too stressed to continue in the same room or if you feel the session needs to end. It's important the FDRP knows any difficulties you are having with the session. Otherwise, there is a risk that the FDRP may decide that a genuine effort wasn't made to resolve the dispute and this may affect future court decisions about legal costs.
- Stick to the agreed ground rules during the session.
- Try not to interrupt when others are speaking. Write down your concerns and raise them when it's your turn.
- Don't feel pressured to sign a parenting agreement at the FDR session – get legal advice first.

4.4 What do I need to do before going to court?

When parents, people caring for a child or someone concerned with the care, welfare and development of a child cannot agree on the arrangements for children, they can apply to the court for a decision about what is in the best interests of the children.

It is important to get legal advice quickly so you can decide whether you need or should apply for court orders. Sometimes it's better not to apply for court orders even when you can't reach an agreement. A lawyer can give you advice about this based on your personal circumstances.

Generally, the *Family Law Act* requires parties to try and reach an agreement and to complete a number of steps before they file an application in court for parenting orders. See ➤ *Pre-action procedures* below. If you have completed these steps, then you can file an application to the court for parenting orders.

However, there are some important exceptions to these requirements. See > section below.

Pre-action procedures

The things that a person must do before they file an application in court are called "pre-action procedures."

Generally, before filing an application for parenting orders, you must:

- invite the other party to FDR;
- agree on a FDR service and attend FDR;
- provide written notice to the other party of your intention to file an application to the court for parenting orders (if the other person refused to attend FDR, or if the FDRP assessed it as unsuitable for FDR or if there was no agreement at FDR).

What does my Notice of Intention need to include?

Your Notice of Intention should:

- be in writing;
- set out any issues that are in dispute;
- outline the orders that you want;
- include a genuine offer to resolve your dispute;
- include a nominated time (at least 14 days after the date of the letter) within which the other person must reply.

Are there any circumstances where I do not need to comply with all the pre-action procedures?

You may not have to complete all of these steps if it is not safe to do so, if your matter is urgent or it is impractical to comply with the pre-action procedures (for example when you don't have any way of contacting the other party).

If you think have circumstances where you might not need to comply with the pre-action procedures or there is a reason it would be very difficult or

impossible to comply with these requirements, you should get some legal advice as soon as possible to see if you might be eligible for an exemption from compliance.

It is important to check with a lawyer because in some circumstances the court can make a costs order against you if you have not completed all of the pre-action steps and you were not eligible for an exemption.

What if I receive a Notice of Intention?

If you receive written notice from another person advising that they intend to file in court for parenting orders, you should reply to this letter in writing.

You should get legal advice before responding to the letter.

How do I respond to a Notice of Intention?

Your response to a Notice of Intention to commence legal proceedings should:

- be in writing;
- say whether you accept an offer (including if it is only a part of the offer) that has been made by the other person;
- set out any issues that are still in dispute;
- outline the orders that you want;
- include a genuine counter-offer to resolve the issues; and
- include a nominated time (at least 14 days after the date of the letter) within which the other person must reply.

4.5 Parenting Orders

Who makes parenting orders?

Parenting orders are any orders about children which are approved or made by the court. Parenting orders can be made by the parties by consent (by agreement) (see ➤ *section 4.1*) or by a judge after hearing all of the evidence and deciding what arrangements are in the best interests of the child.

What can parenting orders cover?

Parenting orders deal with who has parental responsibility and whether decision making is to be done jointly or by just one parent (or person caring

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

Who can apply for parenting orders?

An application for a parenting order can be made by either or both parents, the child, a grandparent or anyone concerned with the care, welfare and development of a child. This means it is not limited only to parents .

What is parental responsibility?

Both parents automatically have parental responsibility for a child until that child turns 18. Parental responsibility means 'all the duties, powers, responsibilities and authority that, by law, parents have in relation to children'. If you separate from the other parent, your parental responsibility does not automatically change. Both parents can still make important decisions about the child's life unless this is changed by a court order.

If it is safe to do so, and subject to any court orders, parents are encouraged to consult each other about major long-term issues in relation their children. These issues include:

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

How does a court decide who has parental responsibility?

Decisions about parental responsibility are made by deciding what is in the best interests of the child (see ➤ *Best interest factors*) and the particular circumstances of the case.

The court can make parental responsibility orders which state that decision making is to be made jointly or that just one person has decision making responsibility. Sometimes the court might make an order that there is to be

joint decision making on some things, while on other things, just one person has decision making responsibility.

What is joint decision making?

A court can make an order for **joint decision making** for all, or some major long-term issues in a child's life if it is in the child's best interests to do so. This means that both people who are to make joint decisions for a child are required to consult each other and make a genuine effort to reach an agreement about major long-term issues for the child.

A court can make an order for **sole parental responsibility** it is in the child's best interests to do so. Sole parental responsibility means that one person can make all or some (as specified in a court order) of the major long-term decisions for a child without needing to consult with the other parent or anyone else.

What are the best interest considerations?

The 'best interests of the child' is the most important consideration when the court makes orders about children. In the *Family Law Act*, it is called the paramount consideration.

When deciding what is in a child's best interests, the court must consider:

- what arrangements would promote the safety (including safety from being exposed or subjected to family violence, abuse or neglect) of the child and each person who has care of the child;
- any views expressed by the child;
- the developmental, psychological, emotional and cultural needs of the child;
- the capacity of each person who has, or is proposed to have, parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs;
- the benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so; and
- anything else that is relevant to the particular circumstances of the child.

When considering what arrangements would promote the safety of the child and their carers, the court must consider:

- any history of family violence, abuse or neglect involving the child or a person caring for the child; and
- any family violence order that applies, or has applied, to the child or a member of the child's family.

If the child is Aboriginal or Torres Strait Islander, the court must also consider the child's right to enjoy their Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:

- to connect with, and maintain their connection with members of their family and with their community, culture, country and language; and
- to explore the full extent of that culture, consistent with the child's age, developmental level and the child's views;
- to develop a positive appreciation of that culture; and
- the likely impact any proposed parenting order will have on these rights.

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

The main aim of making parenting orders about children spending time or communicating with the other parent or other people significant in a child's life is to foster an ongoing relationship between a child and those people if it is safe to do so. As long as the arrangement for time will promote the safety of the child and the people caring for the child, and it is safe to do so, it helps children if you encourage them to spend time with the other parent and people significant in their lives.

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

Parents do not have an automatic right to spend time with or to communicate with a child. However the child can benefit from knowing and being cared for by both parents as long as it is safe. Unless you can show that doing so would not promote the safety of the child or people caring for the child and having a relationship with the other parent is unsafe, the court is likely to makes orders for a child to spend time and communicate with the parent (or other people significant in the child's life) that the child does not live with.

I have a child with my same sex partner. What are my options? Am I a parent?

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

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

Can I apply for a parenting order?

You can apply to the court for a parenting order if you are the child, the child's legal parent, a grandparent of a child or as a person who is concerned with the child's care, welfare or development.

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

If you are a grandparent, you can apply to the court to see your grandchild. The Family Law Act says that there is a benefit to a child to have a relationship with people who are significant to a child where it is safe to do so. In many cases, people significant in a child's life will be grandparents. Before filing in court for an order to spend time or communicate with your grandchild, generally, you must make sure you comply with the pre-action procedures (see above), including attempting FDR before applying to the court for order, unless an exception applies. You will need to tell the court why it is in the best interests of your grandchild to make the orders you want. It is possible to apply for court orders even if the child's parents are still together. Legal Aid NSW has a brochure about legal options for grandparents. See ➤ *Chapter 9: Referrals and Resources*.

4.6 Going to court

Do I need a lawyer?

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

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

Legal Aid NSW's Domestic Violence Unit and the Early Intervention Service may assist with the preparation of urgent court documents. Sometimes their lawyers might represent you in court on a duty basis (meaning just for that day) where a matter is urgent even where you might not be eligible for legal aid for your whole case or where eligibility is yet to be decided.

Some lawyers will do what is commonly called "unbundled legal services." This is when a lawyer might not be acting for you right through the proceedings, but might do thigs like prepare affidavits or case outlines or appear for you in court on a specific occasion.

The Federal Circuit and Family Court of Court of Australia has tried to simplify procedures so it is easier for you to apply for orders without the assistance of a lawyer. Check the court rules and case management and practice directions. These are available on the Federal Circuit and Family Court of Court of Australia website: fcfcoa.gov.au.

While it is possible to represent yourself, it is in your interest to get advice from a lawyer and have your paperwork reviewed by a lawyer before you file it with the court. It is important to see a lawyer who is experienced in family law.

What is a ban on personal cross examination?

In certain circumstances, unrepresented parties may be prevented from cross examining another parent. This is often called a section 102NA order. The court must make this order in certain circumstances including:

- where either party has been charged with or convicted of an offence involving violence or threat of violence involving the other party;
- a final Family Violence Order Applies to both parties; or
- an injunction has been made under section 68B or section 114 of the *Family Law Act*.

The court can also make this order if there have been allegations of family and domestic violence and if it considers the order appropriate.

If the court makes a 102NA order that prevents a party from cross examining another party, the unrepresented party (whether they are the victim survivor and/or the perpetrator) can apply for assistance under the Legal Aid Family Law Cross Examination Scheme. This means that person will have a lawyer for the final hearing and a small amount of preparation work for the final hearing. This is not means tested and the unrepresented person does not have to pay for the lawyer.

For more information, see ➤ *Chapter 2: Getting Help*.

What documents do I need to start my court case?

To start your court case, you must file the following documents:

- Initiating Application;
- Affidavit;
- Notice of child abuse; family violence or risk;
- Undertaking as to Disclosure; and
- Genuine Steps Certificate.

While you don't have to get a lawyer to prepare these documents, the documents can be complicated and it is very important that you include all the relevant information, so it is a good idea to get legal advice about them before you file.

There is usually a filing fee payable when you file your documents. In some circumstances you may be eligible for an exemption from paying these fees, for example if you have a health care card or pensioner concession card you may not have to pay the fee. You may also be eligible for an exemption if you have a grant of legal aid or if you are represented by a community legal centre. It is a good idea to check on the court website or with the court registry to see if you may be eligible for a fee exemption.

What do I do if I have been served with an Initiating Application and other court documents?

If you are served with a court application, you are referred to as the respondent. It is very important that you don't ignore any court documents, and it is a good idea to get legal advice as soon as possible.

You will need to file the following court documents:

- Response to Initiating Application;
- Affidavit;
- Notice of child abuse, family violence or risk;
- Undertaking as to Disclosure; and
- Genuine Steps Certificate.

The court documents will tell you the date by which you need to file your response as well as what day you need to attend court. It is very important that you file your response by the date ordered and attend court, especially if you don't have a lawyer.

Can a lawyer be appointed for the children?

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

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

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

The independent children's lawyer must meet with the child and provide them with an opportunity to express any views unless:

- the child is under 5 years old;
- the child does not want to meet with the independent children's lawyer, or express their views; or

- exceptional circumstances apply, for example, meeting with the child will expose the child to a risk of harm that cannot be safely managed.

Special Court Lists

The Federal Circuit and Family Court has special lists for some types of matters. This is to make sure that these matters are dealt with appropriately and as quickly as possible.

What is the Evatt List?

The Evatt List was developed to deal with high-risk domestic and family violence cases. After filing, the court sends a questionnaire (called the Family DOORS Triage Risk Screening Questionnaire) to the Applicant and the Respondent. It is very important to complete this questionnaire and return it to the court. If the court assesses a case as 'high risk' because of responses to the questionnaire, the case will be included in the Evatt List. Families are provided with appropriate resources and support to ensure everyone's safety including specialist case management and the court aims to deal with these cases as quickly as possible.

Matters which go to the Evatt List are those seeking parenting orders only, or parenting and financial orders.

What is the Magellan List?

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

What is the Indigenous List?

The Indigenous List is a specialist list and case management process to support First Nations families. There are specialised support services available for families on the day that they attend court.

The Indigenous List currently operates in the following locations:

- Sydney;
- Newcastle;
- Lismore;
- Adelaide;

- Alice Springs
- Brisbane;
- Cairns;
- Coffs Harbour;
- Darwin;
- Melbourne; and
- Townsville.

If you would like your case to be dealt with in the Indigenous List, it is important that you let the court know that you are a First Nations person and that you include this information and your desire to have your matter put in the Indigenous List in either your Initiating Application or your Response to Initiating Application.

What is the National Contravention List?

The Contravention List deals with all contravention applications. See ➤ *4.7* for more information on this list and contraventions.

What is the Critical Incident List?

The Critical Incident List is a special list for urgent applications made where there is no parent available to care for the child in circumstances such as the death or incarceration of a parent or parents.

What if the children are in danger or if I am not safe?

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

Police can apply for an apprehended domestic violence order (ADVO). See ➤ *Chapter 5*.

Urgent Applications to the Federal Circuit and Family Court of Australia

You should get legal advice as quickly as possible if you or your children are in danger. You can apply to the court for an urgent order for your children to live with you. If your child is at risk of harm, you may be exempted from having to participate in FDR and other pre-action procedures and be able to go straight to court.

In a genuine emergency, a court can make orders without the usual requirement that notice be given to the other party. An order made without the other party being present is called an ex parte order.

The court can also make a temporary order about the children, called an interim order. If there are risks to the child's safety, then an interim order should be made to protect the child from this risk.

The Federal Circuit and Family Court of Australia can also give you a protection order (called an injunction in family law) for you and the children, where there is a clear threat to you or your children's safety or welfare.

If you are asked to complete the Family DOORS Triage Risk Screening Questionnaire, you should do this as soon as possible as this will determine whether your case will be placed in the Evatt List. (See ➤ above).

If your child has been sexually abused or is at high risk of being sexually abused, the court will also assess whether your case should be put in the Magellan list.

Notice of Child Abuse, Family Violence or Risk of Family Violence

All Initiating Applications and Responses seeking parenting orders in the Federal Circuit and Family Court of Australia must be accompanied by a Notice of Child Abuse, Family Violence or Risk. This form can be found on the Federal Circuit and Family Court of Australia website at fcfcoa.gov.au and can be filed electronically through the Commonwealth Courts Portal (comcourts.gov.au).

What if I don't feel safe at court?

If you have any fears for your safety when you attend court, you should tell the court as soon as possible and they can help arrange a safety plan for you. There are safety measures that can be put in place to keep you safe. The safety measures can include the use of a safe room, assistance from security and separate entrance and exits. In some circumstances it may be possible for you to participate in the court process by telephone or online.

4.7 Appeals

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

If you think a registrar has made an incorrect decision you may be able to ask for a 'review' by a judge. You need to lodge an Application for Review. Usually, an Application for Review must be filed within 21 days of the date of the original decision but it is important to get legal advice at the time to make sure that this is the correct time limit.

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

When you file an appeal, you should also apply for a stay of execution from the court that made the orders you think are incorrect. The stay will stop those orders from having effect while you wait for the appeal.

Appeals can be complex and if you are unsuccessful, a cost order may be made against you. You should get legal advice before you file an appeal.

4.8 Contravention of parenting orders

What is a contravention?

A contravention is when a party intentionally does not comply with court orders or makes no reasonable attempt to comply with court orders in circumstances where they do not have a reasonable excuse.

Applications in the contravention list are taken very seriously.

If you think you could be contravening court orders or if you think the other parent is contravening orders, it is very important to get legal advice.

The court can take serious action against a parent found to be contravening court orders without a reasonable excuse. (See ➤ below).

A costs order can also be made against a party who has filed a contravention application which does not have merit and there are circumstances justifying the court doing so.

National Contravention List

All contravention applications are dealt with in the National Contravention List. This is a special list which allows contravention matters to be dealt with quickly.

Applications in the contravention list are taken very seriously so it is very important that you comply with all the directions made by the court and attend court when ordered.

Do I need to comply with court orders?

Parenting orders must be taken seriously. If there is an order for the child to spend time with the other parent or any other person, and you do not allow this to happen, you risk being taken to court for contravention (breach) of the court order. You must comply with a family court order unless you have a "reasonable excuse."

What is a reasonable excuse?

It is important to get legal advice quickly if you cannot comply with court orders or if you think it would not be safe to do so. A lawyer will be able to tell you if you have a reasonable excuse.

A reasonable excuse includes, but is not limited to, the following:

- you did not understand the court orders and you can show good reason why you did not understand them; or
- you had a reasonable belief that the contravention was necessary in order to protect the health and safety of a child or if it was necessary to protect your own health and safety; and
- the contravention did not last longer than was necessary in order to ensure the safety of the child or to ensure your own health and safety.

If there are parenting orders in place and you are concerned that the children are in danger when spending time with the other party or another person named in the orders , you may need to immediately apply to the court to change the parenting orders. It is important to get legal advice first before filing for a change of orders.

What happens if I don't have a reasonable excuse?

Contraventions of parenting orders are taken seriously by the court.

If the court finds that the parenting orders have been contravened because there was no reasonable excuse, the court can order the contravening party

to attend a parenting program, order a child to spend make-up time with the other party, or in serious or persistent cases, issue a fine, or make an order for the jail, and/or pay for the legal costs of the other party.

The court can also order that a child spend additional time with a person, vary a parenting order or order parties to attend parenting programs at any stage of contravention proceedings, without necessarily finding the orders have been contravened.

If the parenting orders are no longer workable, the court might consider changing the orders. Sometimes this can include changing where a child lives.

If the court believes a person only filed a contravention application to harass or threaten the other party, the court can order that party to pay the other party's legal costs.

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

Even if there are parenting orders for the children to spend time with the other party, the courts are not willing to force that person to see the child. A practical option may be to ask for help from a family counsellor or parenting program to assist the other party to see the importance of spending time with the child and the damage it might be doing to a child to not turn up when promised.

If the children live with me, can I move?

If moving house will make it more difficult for the other party to spend time with a child or will make the existing arrangements unworkable, then you should try and get their consent to move. If they won't agree, you may need to apply for parenting orders allowing you to move.

These cases are called relocation cases. You will have to show the court why it is in the best interests of the child to allow you to move with the children.

You should get legal advice before you move. If you move with the children without the consent of the other party or without a court order allowing you to move, the court can make orders for the children to live with the other party or force you to return if the children are to live with you.

If there are current parenting orders in place and the move would mean that you cannot comply with the orders, you will need to apply to the court

to vary the orders before you can move unless the other party agrees to you moving. It is important to get this agreement in writing.

What if the other parent takes the children without my permission?

If it is safe to so, you should first try to contact the other parent or person caring for the child to see if you can get an agreement about returning the children.

If you do not have a parenting order and the children are taken and not returned, you can apply to the court for a recovery order for the children to be returned and a parenting order for the children to live with you. If you already have a parenting order, you still need to go back to court and apply for a recovery order. A recovery order is like a warrant for the return of the children and empowers the police to find and return the children to you.

You will need to prove that the court should deal with your case urgently. For this reason, it is important to get legal advice quickly and to file an application in court quickly.

If your case is not urgent you will have to follow the pre-action procedures and try FDR before you can file an application to the court (unless one of the other exemptions to complying with pre-action procedures or attending FDR applies to you). (See ➤ *section 4.2*).

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

If the child has been taken and you think you need a recovery order, it is very important you get legal advice right away.

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

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

I am worried about the children being taken overseas. Can I stop the children being taken overseas?

If the children have current passports and the other parent has access to the passports or can get a passport for the children, the children could be taken overseas without your knowledge. If you are afraid someone will take the children out of Australia, get legal advice straight away.

Important Information

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

If the children already have passports, keep the passports in a safe place.

If the other parent already has the children's passports, ask the court to order the other parent to give the court the children's passports and get an order which prohibits the children from being taken out of the country without the court's permission.

If the children do not have Australian passports, ask the Australian Passport Office to stop passports being issued for your children. You can also make a Child Alert Request so that if an application for a passport is lodged, the Passport Office is warned that there may be circumstances to consider and is more likely to notify you about this application. This Alert Request will remain valid for 12 months. If you have a court order for a Child Alert Request, it will remain valid until the child is 18 years of age.

If it is possible that your children could get foreign passports or be added to the other parent's foreign passport, you should contact the embassy or consulate about that country's policy to protect children from being abducted overseas.

If you have real concerns about your children being taken out of Australia without your consent, you can ask for a specific court order to place the children on the Airport Watchlist (also known as the Family Law Watchlist). You will need to provide a sealed/stamped copy of the application for an Airport Watchlist order to the Australian Federal Police (AFP), which directs them to place the children on the Watchlist. Any child on the Watchlist will be stopped before boarding a plane

or ship that is leaving Australia. The child's name will remain on the Watchlist until they are 18 years of age or until a future court order directs the AFP to remove the child's name from the Watchlist.

What if the children are taken out of Australia?

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

- where a child lives;
- when a child spends time with a person;
- with whom a child communicates with; or
- when a person has parental responsibility for a child.

It may also be an offence to assist someone to take a child overseas in these circumstances.

Similarly, unless there is clear written consent for a child to travel or the court has made an order for overseas travel, section 65Z of the *Family Law Act* makes it an offence to take or send a child overseas from Australia if there is an application filed in court seeking orders of the type set out above. It may also be an offence to assist someone to do this.

If there is a risk that your children may be taken out of the country before the next working day, the Family Law Court has an out-of-hours service for emergencies. See ➤ *Chapter 9: Referrals and Resources*.

4.9 Harmful proceedings orders

Courts have the power to make an order, either on their own initiative or on application by a party to the proceedings, prohibiting a party from starting proceedings if the court is satisfied that there are reasonable grounds to believe that the other party, or the child who is subject of the proceedings, would suffer harm if the first party instituted further proceedings.

Harm includes psychological harm or oppression, major mental distress, behaviour which causes a detrimental effect on the other party's capacity to care for a child, or financial harm.

4.10 How can I change my child's name?

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

Application to the Federal Circuit and Family of Australia

In most circumstances, you first need to attempt to reach agreement with the other parent if you want to change your child's name, if it is safe to do so.

If you cannot reach agreement, or if you cannot find the other parent, you can apply to the court to change the child's name. However, before you can apply to the court you must comply with the pre-action procedures. This usually includes attending FDR. For further information about FDR and pre-action procedures, including exemptions, see ➤ *section 4.2*.

You will need to persuade the court that the name change is in the best interests of the child.

Application to the District Court

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

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

5. Protection against violence and harassment

5.1 Domestic violence

What is domestic violence?

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

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

What is the difference between domestic violence and family violence?

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

In NSW, the terms 'domestic violence' and violence in a 'domestic relationship' are used in the *Crimes (Domestic and Personal Violence) Act 2007* (***Domestic Violence Act***). This legislation deals with personal

protection orders called Apprehended Violence Orders (**AVOs**). However, the federal *Family Law Act 1975* (***Family Law Act***) refers to 'family violence'. The definition of family violence in the Family Law Act changed in 2012 and acknowledges more types of abuse. See ➤ *Chapter 8* for the definition of 'domestic relationship' and 'family violence'.

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

Is domestic violence a crime?

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

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

If you would like the violent person excluded from the house so you (and your children, if you have them) can safely remain in the house, Police have the power to exclude the violent person from the house.

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

5.2 Apprehended Domestic Violence Orders

What is an ADVO and how can it protect me?

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

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

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

The information in this booklet is about **ADVOs**.

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

What kind of orders can be made as part of an ADVO?

Every ADVO includes orders that the defendant must not:

- assault or threaten;
- stalk, harass or intimidate;
- intentionally or recklessly destroy or damage property of;
- you or anyone in a domestic relationship with you. This includes anyone living with you or in a relationship with you.

These orders are called mandatory orders.

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

- go to your home or workplace; and/or
- approach you (by telephone, text, email, social media or in person); and/or
- live at your place; and/or
- contact you except as agreed in writing between you and the defendant about contact with children; and/or
- contact you within 12 hours of consuming alcohol or illicit drugs.

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

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

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

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

However, if the defendant breaches (disobeys) the ADVO, the defendant can be charged for breaching a court order. Police will investigate the breach incident and where there is sufficient evidence, charge the defendant. If that person is found guilty of the charge, a criminal conviction can be recorded.

How do I get an ADVO?

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

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

In the application, you will be referred to as the person in need of protection (**PINOP**) and the violent person will be referred to as the defendant.

What if I need immediate protection?

If you are asking the police to apply for an ADVO for your protection, the police can apply for a provisional or interim ADVO for your protection. The police will apply for a provisional ADVO when they believe you need immediate protection. A provisional ADVO lasts until it is revoked, or when an interim or final order is made at court, or the application for a final ADVO is withdrawn or dismissed. The provisional ADVO will not be enforceable until it is served on (formally given to) the defendant by the police.

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

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

Can my children and new partner be protected too?

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

If you want your children and your new partner to be covered by all of the orders in your ADVO (other than the mandatory ones), you can also ask that your new partner and children be named separately as a protected person on your ADVO.

Generally, all ADVOs should name any child with whom you have a 'domestic relationship' as protected persons (unless the court thinks there are good reasons for not doing this), but if it does not, you should ask for them to be added.

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

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

An ADVO does not automatically mean that the defendant has to leave your home.

You can still be in a relationship and have an ADVO that orders your partner not to assault, threaten, stalk, harass, intimidate, or destroy or damage property, and other orders to suit your circumstances, while still living in the same house.

You can also get an ADVO that excludes the defendant from the home or from coming within a certain distance of the home.

➤ *Chapter 7* has information about your legal rights and options when you have an ADVO which excludes the defendant from the home.

Do I need a lawyer to help me at court?

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

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

What support can I get at court?

Many local courts have a WDVCAS where you can get help from a court support worker. At a number of courthouses, there are 'safe rooms'. These are women only rooms where you can speak to a court support worker and/or lawyer. Call your local WDVCAS or your local court to find out whether it has a WDVCAS and a free lawyer. If not, you should tell the court staff about your safety fears so the court can make arrangements to protect you while you are court.

See ➤ *Chapter 9: Referrals and Resources* for more details.

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

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

- The defendant may come to court and agree to the orders in your application. The defendant can consent to (agree to) an ADVO without admitting what is in the application is true. This is called 'consenting without admission.' If the defendant consents to the orders you are seeking, a final ADVO will be made that day.
- If the defendant does not attend court but there is proof that they have been served with (been given) the application to come to court, the Magistrate can order an ADVO in their absence. This is called an ex parte ADVO. The Magistrate can also make an interim ADVO if the defendant has not been served with the application. An ex parte or interim ADVO is not enforceable until it is served on the defendant.
- If the defendant has not been served and did not attend court, the matter will be adjourned (postponed) to a later date so the defendant

can be served. The ADVO is not enforceable until the order is formally served on (given to) the defendant. The court can make an interim ADVO for your protection which will be enforceable as soon as it is served on the defendant.

- If the defendant comes to court but disagrees with the application for an ADVO, the court will tell the parties to come back on a later date for a hearing. The court can make an interim ADVO for your protection which will protect you until the hearing. The defendant can agree to this interim order without admitting to any of the allegations or behaviour. If the defendant does not agree to an interim order for your protection, you may need to tell the Magistrate why you need the order. The Magistrate will then decide if you need an interim ADVO for your protection. The Magistrate will also make a date to exchange statements before the hearing date. If the police are applying for an ADVO for your protection, police will draft your statement. If you are applying privately for your ADVO, you should get legal advice about drafting your statement. The WDVCAS can help refer you for advice. See ➤ *Chapter 9: Referrals and Resources*.

What happens after the ADVO is made?

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

The ADVO is not enforceable unless the defendant was in court when the order was made or until the police serve the order on the defendant.

If the defendant breaches (disobeys) the order, the police can arrest and charge the person with breaching the order. If you think the defendant has breached the order, you should report it to the police. See ➤ below for more information on reporting a breach.

What happens if my ADVO application goes to a hearing?

At the hearing, the Magistrate will listen to the evidence you give about the violence and/or threats of violence that make you afraid. The Magistrate will also hear the defendant's version of events and then decide on 'the balance of probabilities' whether or not you fear the defendant and if these fears are

reasonable. If the Magistrate finds you have fears, an ADVO will be ordered for your protection.

Important Information

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

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

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

What if I am still afraid when the ADVO is about to end?

If you are still afraid that the defendant will be violent when the ADVO is about to expire, you can apply for an extension (variation) of the ADVO. You must apply before it expires. You should get legal advice about an extension 6–8 weeks before the ADVO expires.

If the police made the original application for your ADVO, you can ask them to make the application for an extension. If the police won't make the application, you can make it yourself.

If things change during the period of the ADVO, you can apply to the court to have the ADVO varied to increase or decrease the orders.

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

National Domestic Violence Order Recognition Scheme

AVOs (provisional, interim and final) made in any state or territory on or after 25 November 2017 will automatically be recognised in every other state and territory in Australia and therefore enforceable. For AVOs made prior to 25 November 2017, an application for registration can be made to a court in the state or territory in which the person is living.

5.3 ADVOs and family law

Does the Family Law Court need to know about the domestic violence?

In family law proceedings, family violence is a relevant factor for the court in deciding arrangements for children.

This means that an ADVO naming the child, or a member of the child's family, is taken into account when the court is making decisions about the

best interests of a child. This includes past and present ADVOs including interim ADVOs.

It is important to tell the Family Law Court about all family violence, even where it has not been reported to police and even where there has not been an ADVO made for anyone's protection. See ➤ *Chapter 4* for more information about this.

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

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

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

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

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

If you already have parenting orders before an application for an ADVO is made, it is important to tell the police and the local court and provide a copy.

The local court has the power to vary, suspend or discharge the parenting orders to suit the conditions in your ADVO, see section 68R of the *Family Law Act*. For example, if you hand the children over at your home or the defendant's home, you might ask to vary the parenting orders so you can hand the children over at a public place. The local court can only use this power if it has new material or fresh evidence available to it which that the court which made the parenting order did not have at the time.

Even though the court has the power to vary the parenting orders, in practice, local courts are reluctant to use this power to vary parenting

orders. What this means is that where there are inconsistencies between an AVO order and a particular order in a parenting order, the parenting order will prevail, that is, it will be the order which should be followed.

Can I get protection under the Family Law Act?

If you apply for parenting orders (whether you are married or in a **de facto relationship**) and your partner is violent, you can ask for an **injunction** under the *Family Law Act* to protect yourself and/or your children. An injunction is an order made by the court to do things like stopping or restraining your partner from being violent towards you or from coming to your house.

However, applying for an ADVO from the local court offers better and usually faster protection.

Can I get counselling or other support after my partner perpetrated domestic violence or sexual violence against me?

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

6. Child support and maintenance

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

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

You may also be eligible for spousal maintenance after you separate from your partner, whether you were married or in a de facto relationship, including a same sex relationship.

6.1 Centrelink family assistance payments

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

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

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

Depending on your circumstances, you may be eligible for other types of financial assistance from the government, such as a parenting payment.

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

- visit the Payment and Service Finder on the servicesaustralia.gov.au website to explore payments based on your circumstances;
- apply for payments online;
- contact Centrelink on 136 150; or
- visit your local Centrelink Service Centre.

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

6.2 Child support

Do both parents have to pay child support?

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

What does the law say about child support?

Child support laws provide for the assessment, collection, and enforcement of child support payments. Generally, they apply to all children in Australia.

The child support laws are administered by Services Australia. Services Australia also delivers all the services and payments for Medicare, Centrelink and Child Support. Services Australia: Child Support is referred to as Child Support.

In some limited circumstances financial support can be provided in the form of court-ordered child maintenance. See ➤ below at *6.11*.

Do I have to apply for child support?

As a parent, you have responsibilities and rights. Some parents arrange child support independently without any assistance from government departments, the courts or other government agencies.

If you do not receive any family assistance payments or only receive the base rate of Family Tax Benefit Part A you can make a private arrangement about financial support of the children without applying to Child Support or making a written child support agreement without risking any loss of Centrelink payment. However, you should get legal advice before deciding to have a private arrangement as these are unlikely to be enforceable.

See ➤ *section 6.10* below for more details about private arrangements.

If you are receiving Centrelink family assistance payment, in most cases you will need to try to get child support from the other parent by contacting Child Support otherwise it might negatively affect the amount of Family Tax Benefit you receive.

How are child support payments calculated?

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

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

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

Is there a minimum amount of child support payable?

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

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

Care arrangements

The child support formula takes into account the percentage of care that each parent has of the children. This is usually measured according to the number of nights that the child actually spends with each parent. The same care determination applies both for the child support assessment and the assessment of a carer parent's Family Tax Benefit.

6.3 Applying for child support

Who can apply for an assessment of child support?

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

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

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

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

You have 13 weeks from the date you separate from your partner to apply for child support. If you were not living with the other parent when your child was born, the 13-week period starts from your child's date of birth. If you do not apply for child support within that time, you can only receive the base rate for Family Tax Benefit Part A.

There are some exemptions to this rule, including where:

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

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

A written child support agreement that is accepted by Child Support may also meet Centrelink's requirement that you seek child support from your child's other parent. However, you should seek legal advice before signing any child support agreement, as the rules are complex. (see ➤ *section 6.10* below). It is usually quicker and easier to apply for child support immediately when you first apply for Centrelink family assistance payments.

How do I apply for a child support assessment?

You can:

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

What happens to my child support assessment application?

Before Child Support accepts an application for child support assessment, it must be satisfied that the people named as the parents of the child are in fact the parents. Acceptable proof of parentage includes:

- the person is named as a parent on the child's birth certificate;
- the child was born during the person's marriage to the child's mother;
- the person has acknowledged they are a parent in an affidavit or statutory declaration;
- the person is a man and cohabited with the child's mother during a specified period before the birth.

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

- a review of the decision (see ➤ *section 6.4*); or
- a court declaration that a person should not be assessed because they are not the parent of the child (see ➤ *section 6.4*).

6.4 Disagreeing with child support decisions

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

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

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

You can object to a child support decision after 28 days, but you need to explain why you are late.

If Child Support does not accept your late objection, you can file an appeal about their decision not to accept your late objection in the Administrative Appeals Tribunal (**AAT**). You must do this within 28 days of receiving the decision not to accept your application.

What happens after I lodge an objection?

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

The other parent can respond and provide supporting documents. Child Support will consider the evidence and may talk to you and the other parent about the objection.

Child Support has to make a decision about the objection within 60 days (120 days if a parent lives overseas) of receiving it.

Child Support must tell you in writing about the outcome of your objection and any changes made to the child support assessment.

What if I disagree with the decision Child Support makes about my objection?

If you do not agree with this decision you can apply to the AAT to review Child Support's decision. You must do this within 28 days from the date the decision was delivered to your address. If it outside of the 28 days, you must ask the AAT for an extension of time.

What if I disagree with the decision about the care percentage?

There are different rules for an objection to a decision about the care percentage used in the child support assessment. You can lodge your objection with Child Support or Centrelink on the telephone, as well as in writing.

If you do not object within 28 days of receiving notice of the decision, you do not need to request an extension of time. However, if your objection is successful, the favourable decision may only have effect from the date you lodged the objection.

What if I disagree with decision Child Support makes about my objection to the calculation of the care percentage?

The AAT can review Child Support's decision on an objection to a care decision. This application should be filed in the AAT within 28 days of the date the decision was delivered to your address.

If you apply to the AAT more than 28 days after the date the decision was delivered to your address, you do not need to apply to the AAT for an extension of time. However, if the AAT changes the decision in a way that is favourable to you, that decision may only have effect from the date you applied to the AAT.

What if I disagree with the AAT decision?

AAT decisions about a care percentage are subject to a further right of review in the AAT (called a second-tier review).

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

If Child Support has refused your application because you do not have proof that the other person is the parent of the child, you can apply to the Family Law Court for a declaration of parentage under s 106A of the *Child Support (Assessment) Act 1989*. You should seek legal advice before making a court application.

If Child Support has assessed you to pay child support and you think that you are not the parent of the child in question, you can apply to the Family Law Court for a declaration under s 107 of the *Child Support (Assessment) Act 1989*. You should seek legal advice before making a court application.

Is there a time limit on making an application for a declaration of parentage to the Family Law Court?

There is a time limit to file court applications about parentage in child support matters.

You have 56 days from the date you receive the Child Support notice of acceptance or rejection to file an application for a declaration of parentage in the Family Law Court.

The Court may order DNA testing to determine if a person is a parent.

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

Where you and the other parent are both women and where the court has to decide if the non-birth parent is a parent for child support purposes, the court will need other evidence about your relationship, such as how the child was conceived and what you and the other parent intended your parenting or family arrangements to be at the time the child was conceived.

Handy Tip

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

6.5 Collection of child support payments

How is child support collected?

If:

- Child Support issues a child support assessment; or
- you make a child support agreement for periodic payments and Child Support accepts the agreement; or

- a court order for periodic payments is registered with Child Support (see ➤ *section 6.10*),

then the person entitled to receive payments under the assessment, agreement or order can choose to collect payments privately or to apply for Child Support to collect payments for them. Child Support can only collect periodic payments of child support payable to the payee. If you have a court order or a child support agreement that provides for some or all of the child support to be paid as non-periodic amounts, or payments to a third party (e.g. school fees) you will need to enforce those amounts privately.

Private collection

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

- the assessment is based on up-to-date and reliable income information for the other parent (not an estimated income or a provisional income because they have not lodged their income tax returns);
- the other parent has made child support payments regularly in the past; and
- you are satisfied the other parent will make future payments on time and in full.

If you choose private collection, your Family Tax Benefit will be worked out on the assumption that the other parent is paying child support to you in full and on time. Centrelink will not pay you extra Family Tax Benefit if the other parent fails to pay you the correct amount of child support. If private collection arrangements break down, you can ask Child Support to take over collection for you. It is important that you do this quickly, as a delay may mean that you miss out on some or all of the unpaid child support. Child Support can only collect up to three months of overdue payments when you apply for them to take over collection (in exceptional circumstances this may be extended to nine months).

Child Support collection

If you do not have a good relationship with the other parent, especially if you there is a history of disagreements or secretiveness about money, or family violence or controlling behaviour, you should ask Child Support to collect child support payments for you.

If you choose to have Child Support collect payments for you, your Family Tax Benefit is assessed on the basis of the actual child support that you receive over a financial year. If you do not receive all of the expected child support you may be eligible for a top-up payment when your Family Tax Benefit is balanced at the end of the financial year. You should also talk to Centrelink about switching to the "disbursement" method for Family Tax Benefit if your child support payments are frequently less than the required amount (this is not available if you choose private collection).

6.6 What if the other parent's or my income changes?

The Australia Taxation Office advises Child Support whenever it issues a new tax assessment for a parent with a child support case. Child Support will then update that parent's child support amount as required.

You can ask Child Support to vary the income used for you in the child support assessment:

- by lodging an estimate if your income reduces by 15% or more from the income used in the current child support assessment; or
- subject to certain requirements, if you earn extra money (e.g. working overtime or second job) to re-establish yourself after separation. You can apply for the extra income to be excluded from the child support assessment (but only in the first three years after separation);
- by making a change of assessment application

Parents receiving Family Tax Benefit or who have a child support assessment must notify Centrelink or Child Support if their pattern of care changes so that their payments can be reviewed.

6.7 What if our parenting arrangements change?

If the change in care has occurred because one of the parents is refusing to follow a written parenting order or parenting plan (a "Disputed Care Change"), the parent who now has less care can request an Interim Care Determination.

What is an Interim Care Determination?

Child Support can make an Interim Care Determination if:

- there is a parenting order or parenting plan in place; and

- one parent has more care than they should under the parenting order or parenting plan; and
- the parent with less care disagrees with the changed care and is taking 'reasonable action to ensure compliance' with the parenting orders or parenting plan.

An Interim Care Determination means the amount of child support paid could continue as per the existing written care agreement, instead of the actual care arrangements for up to 52 weeks. The Interim Care Determination period can be cut short if the parent with less care stops taking continuous reasonable action, or if the person with increased care takes reasonable steps to participate in Family Dispute Resolution.

What is reasonable action to ensure compliance?

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

How long does an Interim Care Determination last?

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

- 52 weeks from the date the orders were made; or
- 26 weeks from the date of the change of the care date, whichever is later.

The maximum interim period for a case where the care arrangements that are not being followed are set out in a written parenting plan is 14 weeks.

There are special circumstances where an Interim Care Determination will not apply. This is likely to be circumstances relating to the welfare of the child, such as violence or neglect and evidence is required to prove the special circumstances.

Once the interim period has ended, child support is worked out on the basis of the actual care arrangements for the children.

6.8 Enforcing child support payments

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

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

- requiring the person's employer to make deductions from wages or salary;
- garnishing bank accounts;
- intercepting tax refunds; or
- issuing overseas travel bans to stop parents who have failed to pay child support from leaving the country until they pay outstanding child support.

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

Child Support will not enforce a child support debt which has accrued when registered for 'private collection'. You have to do this by starting your own enforcement proceedings against the other parent in the Family Law Court.

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

Handy Tip

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

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

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

6.9 When does a child support assessment end?

A child support assessment usually continues until the child turns 18. If the child is still in full time secondary education when they turn 18, either parent can apply to extend the assessment until the end of that school year, or the day of their last exam. The extension application needs to be made before the child turns 18, although it may be accepted later in exceptional circumstances.

A child support assessment will end before the child turns 18 if the child:

- dies;
- becomes a member of a couple (married or de facto relationship);
- is no longer in the care of either parent (unless the eligible carer is not a parent of the child, in which case it will end if the child leaves their care); or
- is adopted.

If the child and eligible carer leave Australia, the assessment can continue if they move to a country which has an agreement with Australia to collect child support and the payer remains in Australia. Otherwise, the child's departure from Australia, will end the assessment unless they continue to usually live in Australia or if they are an Australian citizen.

If the liable parent leaves Australia to live in a non-reciprocating country, the assessment will end from the date they cease to be habitually resident in Australia.

6.10 Child support agreements

Some parents might choose to make a child support agreement rather than going through Child Support.

A child support agreement may allow parents to make an agreement that better suits them and their needs and which might provide for both periodic (e.g. weekly) payments as well as non-periodic or lump sum payments (e.g. payment of school fees, medical expenses etc).

It is important to get advice before deciding to enter into a child support agreement because it may have impacts for things like Family Tax Benefits payments.

What type of child support agreements can I make?

There are two types of agreements:

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

Both types of agreements must be signed by both parents and accepted by Child Support before they are legally enforceable.

Child support agreements can cover a range of financial matters about the costs of the children. For example, they might set out how much money is to be paid on a periodic basis (e.g. weekly), non-periodic payments (e.g. school fees, children's music and sporting activities) and binding agreements might include a lump sum payment of child support.

It is important to get legal advice if you are thinking about entering into a child support agreement. Make sure you get advice about how the agreement will affect your entitlement to family assistance or other Centrelink benefits. Advice about how your Centrelink benefits might be affected is especially important if you are considering an agreement for reduced child support, or a lump sum payment, or for the other parent to pay for non-periodic expenses such as school fees, rather than periodic payments to you. You should also consider whether the agreement will still be suitable if your circumstances change in future, and whether and how the agreement can be terminated.

What is a limited agreement?

A limited agreement is a formal written child support agreement signed by both parents. It is not compulsory to get legal advice before signing a limited agreement, but it is still a good idea so you understand what you are agreeing to and if it is right for you.

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

Limited agreements are easier to end than a binding child support agreement, however, they are less flexible than a child support assessment. When negotiating with the other parent, you should consider what may change in future and whether the agreement will still be suitable. For example, you or the other parent may re-partner, have additional children, become unemployed or the care arrangements for your children may change.

A limited child support agreement can be ended:

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

What is a binding agreement?

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

- you do not need to have a child support assessment formula in place (unless the agreement makes provision for a lump sum payment);
- the agreed child support amount to be paid does not need to be at least as much as the child support amount assessed under the formula on the day that Child Support accepts the agreement;
- you both must have independent legal advice before entering into or ending the binding agreement and you each need a statement from your lawyers that legal advice has been given; and
- the binding agreement can only be ended by a new binding agreement registered with Child Support or a court order in very limited circumstances. In most cases, it will be necessary to show the court that exceptional circumstances have arisen since the agreement was made that mean a party to the agreement or the relevant child will suffer hardship if the agreement is not set aside.
- if an agreement was made before 1 September 2008 and at least one of the parties did not have legal advice before they signed it, the agreement can be set aside if the court decides it is 'just and equitable' to do so.
- a binding agreement is terminated if the parent entitled to receive payments under the agreement stops being an "eligible carer" (i.e. no longer has the child in their care for at least for at least 35% of the

nights) for a continuous period of 28 days (this can be extended to 26 weeks in exceptional circumstances).

Handy Tip

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

6.11 Child maintenance

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

- the child is under 18 but no application can be made under the *Child Support (Assessment) Act 1989* (for example because the liable parent lives overseas in a non-reciprocating jurisdiction, or because the child is seeking child maintenance in their own right, as there is no eligible carer who can apply for child support);
- the child is over 18 and requires support to complete their education; or
- the child is over 18 and has a disability and requires continued support.

6.12 Spousal maintenance

Can I get spousal maintenance from my former partner?

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

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

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

Maintenance may be ordered because:

- you have been in the relationship for a long time and have lost your work skills;
- you are caring for a child of the relationship;

- you cannot work because you have a disability or because of your age; or
- you have some other very good reason that stops you from supporting yourself.

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

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

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

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

What are the steps involved in getting maintenance?

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

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

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

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

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

You may be able to claim childbirth maintenance (called 'childbearing expenses') from the other parent of your child if you are not married. Generally, you can ask for a contribution to reasonable medical expenses related to your pregnancy and childbirth and for set up costs for the baby such as prams etc. You can also seek maintenance for the 'childbirth maintenance period' which generally starts two months before your expected date of confinement and three months after the birth. Your claim for maintenance may be for a longer period of time if, for example, you had to stop work earlier on medical advice because of a pregnancy related issue.

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

Child Support cannot register or collect orders for childbirth maintenance or childbearing expenses. If the other parent does not comply with orders to pay childbearing expenses, you will need to go back to court to enforce the orders.

Handy Tip

You can apply for legal aid for applications to court for spousal maintenance. Legal aid is not available for an application for childbearing expenses, unless you are also applying to court for proof of parentage for a child support assessment

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

7. Separation, your home and property division

This chapter provides information about your rights and options when it comes to your home and living situation when you separate, whether you rent or own your home.

This chapter also provides information about dividing up the property of your relationship – called property settlement. **It is important to note that 'property' means more than just your house.**

I've separated. What are my rights and options about my home?

7.1 I want to leave my home to stay safe

Where can I go?

If you need to leave your home to be safe from violence, there are organisations that can support you. Women's refuges provide a safe place to stay while you work out future plans. They can give you referrals for financial help. They may offer counselling services that can help you emotionally and give you a chance to talk over your options. The Domestic Violence Line can provide information and referrals to women's refuges in your area.

See ➤ *Chapter 9: Referrals and Resources* for details.

Do I lose interest in the home I own?

If you decide to leave a home you own, you do not lose interest in your home. You can come and go from the property, but we recommend you only do this if it is safe.

I rent. How to do I end my tenancy?

If you are experiencing domestic violence by someone you have, or have had, a domestic relationship with, you can end your tenancy immediately, without penalty, by giving the landlord and any other co-tenants a Domestic Violence Termination Notice. A sample Domestic Violence Termination Notice is available from the Tenant's Union NSW website.

The notice you give the landlord must attach one of the following:

- an **Apprehended Domestic Violence Order** (**ADVO**); or
- a personal protection injunction under the Family Law Act; or
- a certificate of conviction which shows the perpetrator was found guilty of a domestic violence offence; or
- a declaration by a 'competent person'.

See ➤ *Chapter 5: Protection against Violence and Harassment* for more information on ADVOs.

A 'competent person' is a:

- health practitioner registered under the Health Practitioner Regulation National Law (NSW);
- a social worker who is a member of the Australian Association of Social Workers;
- an employee of a NSW government agency that works in child protection;
- an employee of a non-government agency that receives government funding to provide services relating to domestic or sexual violence or refuge or emergency accommodation; or
- a Victims Services' approved counsellor.

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

Tenant databases

It is common for victims of domestic violence to be listed on bad tenant databases because they owed money after they had to abandon a rental

property or because the perpetrator damaged the rental property. If you terminate your tenancy by giving your landlord a Domestic Violence Termination Notice, you cannot be listed on a bad tenant database.

Damage to property

You will not be responsible for damage to a rental property if you can show that the damage was caused by a perpetrator of domestic violence during a domestic violence offence. If your landlord says you are responsible for the damage, contact your local tenancy service for advice.

7.2 I want to stay safe at home

I want the perpetrator of violence to leave

If you are a victim of domestic violence, you may want the perpetrator removed from your home.

You or a police officer can make an application for an ADVO and ask for an exclusion order preventing the defendant from entering the property.

See ➤ *Chapter 5: Protection against Violence and Harassment* for more information on ADVOs.

If you are renting and the perpetrator is named on the lease, and you have a final ADVO with an exclusion order that prevents the perpetrator from entering the property, the perpetrator's tenancy will end automatically.

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

If you do not have an ADVO, or you have an ADVO, but the ADVO does not contain an exclusion order, you can apply to the NSW Civil and Administrative Tribunal for an order ending the perpetrator's tenancy in the 'special circumstances' of the case (s 102 *Residential Tenancies Act 2010*).

Can I change the locks?

If you own the property, you can change the locks. However, it is important to know that if the perpetrator is a co-owner, they can also change the locks, so this might not be a practical solution.

If you are a tenant, you can change the locks of your rental property without the landlord's consent if you have an ADVO with exclusion order (provisional, interim, or final). You can also withhold copies of the new keys from the excluded person.

If you do not have an ADVO with an exclusion order, you should seek the landlord's permission before changing the locks.

I've separated. How do we divide all our property?

7.3 What is considered 'property' of a relationship?

Property of the relationship includes all assets (things you own) and liabilities (money owing) that are held in your sole name, your former partner's sole name, or by you and your former partner jointly. For example, this means that if a house or a car is only in your former partner's name, it is still considered property of the relationship. Sometimes it can also include assets or liabilities held by you or your former partner with a third party.

Assets can include a house, apartment, land, a business, a company, trusts, shares, cryptocurrency, bank accounts, cars, caravans, boats, household contents and superannuation.

Liabilities can include home loans, credit card debts, personal loans, tax liabilities and motor vehicle leases.

The value of the property of your relationship is calculated by adding up the total value of the assets and subtracting the total value of the liabilities at the time you and your former partner finalise the property settlement. This is known as the 'property pool'.

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

If you need or want a court to help you sort out your property, time limits apply. It's important to keep these time limits in mind in case you can't reach an agreement with your former partner about how to divide the property.

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

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

Married: If you were *married* and you later divorce, you must apply to court **within 12 months** of your divorce order becoming final.

De facto: If you were in a *de facto relationship* you must apply to court **within two years** from the date you separated.

See ➤ *section 7.6* for more information on *de facto relationships*.

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

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

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

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

1. You can have an *informal agreement*. You and your former partner do not have to go to court or have a formal written agreement about how you are dividing your property. However, it's important to know whether an informal agreement is the right option for your circumstances.

- An informal agreement is not legally binding, which means it cannot be enforced if one of you doesn't follow the agreement. It might also mean that your former partner can come back in the future and ask for a formal property settlement. Finally, if you and your former partner have agreed to transfer ownership of an asset (for example, ownership of a house, apartment, or motor vehicle), then stamp duty will be payable upon the transfer of ownership of the asset. The payment of stamp duty is only waived if you and your former partner formalise your agreement by way of consent orders or a financial agreement (see ➤ below). This means it is better to make formal orders in these circumstances, so you don't have to pay stamp duty. For all of these reasons, an informal agreement is not recommended in most circumstances.

2. You can ask the court to turn your agreement into *consent orders* by completing an Application for Consent Orders and filing it with the court.

- If the court thinks that the agreement is fair it will make the agreement into orders. When the court makes the orders, they become binding. This usually means that neither you nor your former partner can make any further claim on the property of the relationship. It is very important to get your own legal advice prior to signing consent orders. For more about consent orders, see ➤ *Chapter 2: Do I need a solicitor or barrister?*

3. You can turn your agreement into a *financial agreement*.

- You do not need the court to approve the financial agreement however, the financial agreement must comply with legal requirements for it to be valid and enforceable. Both you and your former partner must each get your own independent legal advice before signing a financial agreement and each solicitor must sign a certificate which confirms that they have provided independent legal advice about the advantages and disadvantages to you of entering into the agreement. Financial agreements are discussed later in this chapter.

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

7.6 When can the court make a decision about our property division?

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

If you were married, the court needs to see proof that:

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

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

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

- you and your partner were living permanently in a participating jurisdiction (all states and territories of Australia except WA) when your relationship broke down; or
- you and your partner live in a participating jurisdiction on the day the court application is made; and either:
  - both of you lived there for at least one third of your relationship; or
  - the applicant made a substantial contribution to the property or the finances of the relationship or the welfare of the family in a participating jurisdiction; and
- you and your partner were in a de facto relationship for at least two years; or
- you and your partner have a child together; or
- you or your partner made a significant contribution to the relationship which would mean that it would be really unfair not to consider your application for property orders.

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

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

The court will consider whether you were a couple living together on a genuine domestic basis by looking at things like:

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

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

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

Can I go straight to court?

The general rule is that before a person can apply to the court for property orders, you must comply with the court's pre-action procedures. This includes trying to reach an agreement by participating in dispute resolution (mediation) with the other person, giving the other person written notice of your intention to apply to the court and exchanging information about your finances with your former partner (providing financial documents to one another, also known as providing full and frank disclosure). The financial documents you and your former partner need to provide to one another are listed in ➤ *chapter 2.4*.

In some cases, you may not have to comply with the court's pre-action procedures before going to court, such as when:

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

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

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

1 Determine whether it is just and equitable to make property orders

This involves a judge considering whether all the circumstances of the case mean that it should make orders about how to divide the property of the relationship. For example, when a relationship is very short and there have been no significant contributions made by one party and no children involved, the court might decide it is not just and equitable to make property orders.

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

Identify and calculate the property of the relationship (see ➤ *section 7.3* of this chapter). You and your former partner must disclose to one another all the assets and liabilities in which you have an interest. You or your solicitor can make the relevant enquiries to check whether your former partner owns real estate or land in their name through the NSW Land Registry Services and whether your former partner has an interest in a company through the Australia Securities and Investment Commission. If court proceedings are commenced and you do not know whether your former partner has disclosed all their relevant financial information to you (for example, all bank accounts in which they have an interest), you can ask the court to issue a subpoena to a bank or an organisation to obtain the information you need. A subpoena requires banks, employers, or other organisations to send the information you ask for to the court for you or your lawyer to look at. See ➤ *section 7.9* for information about how to find out about your partner's superannuation.

3 Work out what contributions you both made to the relationship

The court considers the contributions you and your former partner made to the relationship. These contributions include:

- The contributions you and your former partner each made at the time the two of you started living together (that is, the assets and liabilities you each brought into the relationship).
- The contributions you each made during the relationship. These include financial contributions, non-financial contributions, parenting contributions, and homemaker contributions.
- The financial contributions, non-financial contributions, parenting contributions, and homemaker contributions you each made after you separated.

Financial contributions can include income earned, redundancies, windfalls, and gifts or inheritances provided by parents or other family members. *Non-financial contributions* can include any unpaid work you or others have done repairing, improving, or maintaining property, or work done in a business owned by your partner. Parenting and homemaker contributions include caring for the children and performing household chores.

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

significantly greater than those of the other partner. The court will weigh up all the contributions against the others to decide how the property pool should be divided between you and your former partner on a percentage out of 100%. For example, at this step, the court might decide that the property pool be divided 60% to you and 40% to your former partner. This is called your entitlements to the property pool. There is no hard and fast rule as to how the court weighs each of your contributions and decides each of your entitlements to the property pool. The court might determine that the weight of financial gifts, inheritances and redundancies received early in the relationship have diminished over the time and are offset by the other party's contributions, while financial gifts, inheritances and redundancies received shortly before separation are given greater weight.

Domestic violence can be taken into account in property cases. The violence must have significantly impacted on a person's ability to make contributions to the relationship. In these circumstances, it may be fair to increase the victim's entitlements to the property pool.

Where one party has wasted a significant sum of money on gambling, drugs or other addictions, the court might take this into account.

You should speak to a solicitor about whether domestic violence and/or addiction is relevant to your property settlement.

4 Work out your future needs

The court might then decide to adjust entitlements to the property pool based on each of your future needs. For example, if the court decides that each of your entitlements to the property pool are equal (50/50) based on each of your contributions, the court might decide that your future needs are greater than your former partner's because you have two young children who live with you most of the time and your partner makes more money than you do or can. The court will then increase your entitlements to the property pool, so that you receive, for example, 55% and your former partner receives 45% of the property pool.

Future needs factors for you and your former partner can include:

- age and health, including any disabilities;
- income;
- income earning capacity;

- entitlements to any financial resources, for example expected employment bonuses, long service leave entitlements or distributions from a trust;
- responsibility to support children or others, including how many nights children live with each parent; and
- whether or not the relationship and your role in it (for example as the primary caregiver) has affected your ability to get a job.

Again, there is no formula or rule as to how the court decides this and you should get legal advice about your likely entitlements to the property pool.

What do I need to file in court?

To start most property cases under the *Family Law Act*, you need to electronically file (called eFiling) the following documents on the Commonwealth Courts Portal (comcourts.gov.au):

- an Initiating Application form, which must state the orders that you want the court to make. You can change the orders you are asking for later on if you get new information about any assets or liabilities;
- a Financial Statement;
- an Affidavit in support;
- a Financial Questionnaire; and
- a Genuine Steps Certificate. This shows you have complied with the court's pre-action procedures or that you cannot comply with the procedures (as discussed above).

If you want the court to make interim or urgent orders you must submit a request (usually in the form of a letter) with your application, which outlines the reasons for urgency and asks the court to hear your case quickly.

There will be a filing fee unless you are eligible for an exemption or a waiver of court fees. See ➤ *Chapter 9: Referrals and Resources* for where to find current fees.

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

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

What happens after I have eFiled my Initiating Application form?

You must serve (give) a copy of all your documents on your former partner after you have eFiled them. This can be done by asking someone who is aged over 18 to hand them to your former partner. You cannot serve your former partner yourself. Alternatively, you can pay a process server to serve them for you. The person who serves the documents must sign an affidavit of service, which you eFile with the court to show you have served the court documents on your former partner. If your former partner has a solicitor, you can serve your documents on the solicitor by post or email and ask that they accept service on your former partner's behalf.

Your former partner must file and serve you with a Response to Initiating Application, Financial Statement, Affidavit, Financial Questionnaire, and a response to your Genuine Steps Certificate within 28 days of your documents being served on them. Your former partner can oppose all or part of your application and ask for different orders to be made.

What will happen at court?

Once an Initiating Application is filed, the application will be given what is called a 'first return date'. This is the first listing of the application before a Judicial Registrar. If there are no urgent issues, the first listing is usually about compliance with the court's processes and procedures.

The Judicial Registrar will check that you and your former partner have each filed the required documents and have each complied with your duty of disclosure. If not, the Judicial Registrar will make orders about how and when this is to be done.

If you and your former partner cannot agree on the value of an asset, for example the value of the home, the Judicial Registrar might order that you and your former partner jointly appoint a single expert to value the home.

The Judicial Registrar might also order that you and your former partner attend mediation with a private mediator (if the value if the property pool is significant) or a Conciliation Conference with a Registrar of the Court to attempt to reach an agreement.

There are a number of court of events which may take place after the first court event. These might include:

- An interim hearing – to determine whether to make the interim orders either you or your former partner have asked the court to make.

- Further directions hearings – to make sure the court processes and procedures are followed and to get your matter ready for trial (this is also called a final hearing).

Once court proceedings have commenced, you and your former partner can still try and negotiate an agreement and apply for Consent Orders (see ➤ below).

If you cannot reach an agreement, your matter will eventually be listed for a final hearing and a Judge will decide how to divide your property. At a final hearing, both you and your partner will give oral evidence and be cross examined. This means you may be asked to answer questions after taking an oath to tell the truth.

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

If you and your former partner reach an agreement about how to divide the net property after your court case has started, you can formalise your agreement by Consent Orders, sometimes called 'Terms of Settlement' and ask the court to approve the orders. If the court approves the orders, the Consent Orders are binding and enforceable.

For more about consent orders, see ➤ *Chapter 2.2: Do I need a solicitor or barrister?*

Can I appeal a court order?

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

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

You should get legal advice about the appeal process as it is very complex and can be very expensive. If you lose your appeal, you may have to pay your former partner's legal costs.

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

Yes. You and your partner can enter into a financial agreement before your relationship, during your relationship, after your relationship has ended, or after your divorce.

A financial agreement sets out the terms you and your former partner have agreed to about how the assets, liabilities and financial resources are to be divided upon the breakdown of your relationship. The financial agreement can also include terms about the payment of spouse maintenance.

The court is not required to approve a financial agreement, but the court can make decisions about the validity and enforceability of the agreement if a dispute arises between you and your former partner about these issues.

The requirements for a valid financial agreement include:

- The agreement must be signed by both you and your partner.
- You and your partner must each obtain independent legal advice from a solicitor before entering into a financial agreement and the solicitor must sign a certificate of independent legal advice, confirming that you were given advice about the advantages and disadvantages of entering into the financial agreement at the time that you signed the agreement.
- At least one of you must sign a separation declaration (once you have separated and want to enforce the agreement).

You will need a solicitor to prepare your financial agreement as they are complex and must satisfy many legal requirements. Financial agreements can be expensive to prepare, particularly those entered into before a relationship. A financial agreement, or some terms of the financial agreement, can only be set aside by the court in limited circumstances.

If you are in a de facto relationship and have entered into a financial agreement with your partner, you will need to enter into a new financial agreement if you and your partner marry.

7.9 Superannuation

How is superannuation dealt with under the Family Law Act?

Your superannuation and your former partner's superannuation entitlements are included in the property pool. You and your former partner can agree to transfer some of one person's superannuation entitlements to the other person as part of your property settlement. The court can also order that this be done if your property settlement is decided by a Judge at a final hearing. Under the *Family Law Act* this is called a 'superannuation split'. Superannuation can be taken from your partner's fund and put into a superannuation fund in your name (or the other way around). In some cases, the superannuation will be put in an account in your name in the same fund as your partner because of the legal requirements of the fund.

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

Your partner must disclose the current value of their superannuation entitlements. Otherwise, you can ask your partner's superannuation fund/s to tell you the value of their superannuation.

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

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

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

Handy Tip

If you can, you should keep a record of the name of your and your partner's superannuation funds and membership numbers.

How do I divide superannuation?

If you and your former partner agree to a superannuation split, you can:

- Enter into a Financial Agreement that includes terms that about a superannuation split. You and your partner must each obtain independent legal advice from a solicitor before entering into a financial agreement and the solicitor must sign a certificate of independent legal advice confirming that you were given advice about

the advantages and disadvantages of entering into the financial agreement at the time that you signed the agreement. Prior to signing the agreement, you should give the relevant superannuation fund notice of the terms of the superannuation split and ask the fund to confirm whether the terms meet their requirements.

- Set out the terms of the superannuation split in the form of consent orders to be approved by the court (see ➤ previous section about consent orders). Before submitting the consent orders to the court, you must give the relevant superannuation fund sufficient notice of the proposed superannuation split orders and ask the fund to confirm whether the terms meet their requirements. Before the court approves the proposed superannuation split orders, the court will want to see evidence that the fund has approved the orders (this is usually in the form of a letter from the fund).

If you and your former partner cannot agree about a superannuation split and you want to ask the court to make orders that you receive some (or all) of your partner's superannuation, you can apply to the court to make superannuation split orders regarding your partner's superannuation. You should give the relevant superannuation fund notice of the proposed superannuation split orders and ask the fund to approve the orders before filing your court application.

If your property settlement includes a superannuation split of your partner's superannuation entitlements that will be paid to you, you will not be able to access the superannuation entitlements until you reach retirement age. However, in some cases of severe financial hardship it may be possible to apply to the fund to have the superannuation released to you before retirement age.

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

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

7.10 What else should I think about?

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

Yes. If you are worried that your former partner may sell or give away assets or take out a loan without telling you, the court can make an urgent order (injunction) to stop this happening until a final decision is made about how to divide the net property. The court can make urgent orders in relation to assets held only in your former partner's name.

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

If you do not have any money to pay your legal fees or personal expenses, you can ask the court to make an order that you receive some of the property (for example some money from a joint bank account or your former partner's bank account) prior to a final decision being made about your property settlement.

To make such an order the court must be satisfied that the amount of money you receive upfront is money you will receive out of your settlement and that your former partner has enough money available to them to pay their own expenses.

Any money you get in advance may be included in the entitlements you receive from the property pool once a final decision is made about your property settlement. This will depend on how you spent the money you received.

The court does not make these orders often. These orders are usually only made in circumstances where your partner has a very high income compared to you, or there are assets which can be sold to provide you with money to pay your legal fees and/or personal expenses.

Can I live in the house after separation?

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

If you are living in a rental property, there are different options if you want to stay or leave the property. See ➤ *section 7.1* and *7.2* above.

If you have experienced domestic violence, you can also apply for an exclusion order as part of an application for an ADVO. For information on this see ➤ *Chapter 5: Protection against Violence and Harassment*.

What if my former partner is bankrupt?

If your former partner is bankrupt at the time of your property settlement, you are still entitled to make a claim on any property remaining after the bankruptcy. Your partner's trustee in bankruptcy is required to join as a party to the court proceedings and can make decisions for your former partner without your former partner's input, such as negotiating a property settlement with you. Your financial and non-financial contributions will be recognised equally with the rights of any other creditors making a claim to your former partner's assets. If your partner is bankrupt or looks like they might go bankrupt, you should get urgent legal advice.

What about stamp duty and capital gains tax?

Stamp duty needs to be paid when the ownership of assets such as a house, land or motor vehicle are transferred.

If assets are transferred from one party to another in your property settlement, stamp duty is waived (not payable) if the transfer occurs under a court order (including consent orders) or a financial agreement.

Capital gains tax (**CGT**) is triggered by the sale of assets such as investment properties or shares. If, for example, an investment property is to be sold under the court orders or the terms of the financial agreement, the CGT payable can be included as a liability in the net property.

If an asset where CGT is payable is transferred from one party to another pursuant to court orders or a financial agreement, the CGT will 'roll over' to the party that is receiving the asset and that party will have to pay the CGT when (or if) the asset is sold in the future.

Prior to entering into consent orders or a financial agreement, it is important to get both legal and accounting advice about any CGT you might have to pay on assets you receive in your property settlement if you sell the asset/s in the future.

What if my parents or my former partner's parents loaned us money to purchase our home?

These days it is common for parents to provide money to an adult child to assist in the purchase of a home. When couples separate, parents often want the money they have provided to be repaid to them.

If there is a dispute between you and your former partner about whether to repay the money to the parents who provided it, the court might be asked to decide whether the money was a gift or a loan. The court will make its decision based on your evidence and your former partner's evidence. In some cases, parents will join the court proceedings and ask the court to make an order that the money be repaid to them. This can be an expensive process and parents should get independent legal advice about this issue.

To determine whether the money provided was a non-repayable gift or a repayable loan, the court will look at several factors, which might include:

- Is there a signed loan agreement?
- Is there any written evidence which supports that the money provided was a non-repayable gift or a repayable loan? For example, emails, text messages or letters from financial advisors/accountants?
- Have you and/or your former partner made repayments to the parents who provided the money? Are there documents such as bank statements which provide evidence of the repayments?
- How long ago was the money provided?
- Have the parents asked for the money to be repaid at any time during the relationship? Is there written evidence of the request?

If the court determines that the money provided is a repayable loan, the court is likely to include the balance of the loan as a liability in the property pool and make an order that the balance of the loan be repaid to the parents from, for example, the sale of the home. This will reduce the total value of the property pool to be divided between you and your former partner.

If the court determines that the money provided is a non-repayable gift, the court will not make an order that the money be repaid to the parents. However, the court might regard the gift as a contribution from the party who received it and take this into consideration when assessing you and your former partner's contributions at Step 3 of the 4-Step process discussed above. For example, if your parents gave you $100,000 to assist you and your former partner to buy a home, unless there is evidence to

the contrary, the $100,000 might be considered as a financial contribution from you to the relationship which might result in the court deciding that you receive more of the property pool (or vice versa if it was your former partner's parents who provided the $100,000).

It is important to get legal advice about this issue as it can be complex.

What happens to our debts?

The only debts that you must pay are debts that are in your name, joint debts or debts guaranteed by you. Just because you are married or in a relationship does not mean that you take on all your partner's debts. However, all debts, regardless of whose name they are in, are included in the property pool unless the court agrees that there is a good reason to exclude them.

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

This means that any third parties involved with your debt must be told about the court application so they can tell the court what they think about the proposed changes. The third party will usually be joined as a party to your court proceedings to bind them to any orders that are made.

If you want to keep the family home in your property settlement and there is a mortgage on the family home in your former partner's sole name or in joint names, you will need to refinance the home loan into your sole name. It is important to get pre-approval for refinance before entering into Consent Orders or a financial agreement.

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

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

Can I get spousal maintenance from my partner?

In some circumstances, a court might order that your former partner pay you spousal maintenance. For more information on this, see ➤ *Chapter 6.12: Spousal maintenance*.

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

If your partner has forced you to sign loan documents, credit card applications, cheques, withdraw money or put your name on debts, you need to seek legal advice as soon as possible. You will usually be responsible for any debts in your name or joint names even if the debt really isn't yours.

For more information on this, see ➤ *Chapter 9: Referrals and Resources*.

Will a property agreement affect my Centrelink payments?

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

Can I get legal aid?

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

If your application for legal aid is refused and you feel that you have exceptional circumstances, then you should lodge an appeal with legal aid within 28 days of receiving that refusal.

Handy Tip

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

- Dates – when your relationship began, started living together and/or when you married, when it ended, the dates of birth of yourself, your partner, and any children;
- Valuations of assets – current valuations for your home, cars, furniture, shares, life insurance and superannuation policies and any other assets. Estimates are good enough – you don't need to get a proper valuation at this stage. Real estate agents will often give you a 'market assessment' or appraisal which is an estimate of the value of your home for free;
- Liabilities – outstanding mortgages, personal loans, credit card statements and any other debts;
- Family business – any family business liabilities and current trading statements;
- Financial contributions – any money or other assets brought into the relationship at the beginning and during the relationship, and any money or other assets, such as cash savings, investments, gifts from parents, compensation payments or any other source;
- Non-financial contributions – if you have mainly been a homemaker, it is essential that you document your contribution to the relationship in terms of home decoration, renovation or maintenance, attendance at school functions, supervising homework, entertaining business clients, etc;
- Salaries/income – for both you and your partner; and
- Superannuation entitlements – current statements for both your funds.

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

8. Legal language – what does it all mean?

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

Action

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

Adjournment

Putting off a court case until a later date.

Affidavit

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

Affirmation

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

Applicant

A person who starts a court case.

Application

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

Apprehended domestic violence order (ADVO)

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

Apprehended personal violence order (APVO)

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

Barrister

A lawyer who specialises in court work.

Binding financial agreement

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

Child support

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

Conflict of interest

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

Contravention

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

Client

A person who employs a lawyer.

Consent order

A court order based on agreed terms between parties to a dispute. It is just as enforceable as any other court order. It can be about property or children or both.

Contested or defended action

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

Department of Communities and Justice

The government agency in NSW responsible for child protection.

De facto relationship

A relationship between two adults who live together as a couple on a genuine domestic basis and who are not married or related by family. De facto relationships can be between same sex or opposite sex couples.

De facto partner

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

Defendant

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

Deponent

A person who swears or affirms an affidavit.

Dispense with service

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

Dissolution of marriage

Divorce, the legal end of marriage.

Divorce Kit

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

Domestic Relationship

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

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

Domestic Violence Liaison Officer

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

The role of the DVLO is to:

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

Early Resolution Assistance

The Legal Aid family dispute resolution service.

Error of law

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

Ex parte order

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

Family Consultant

A Family Consultant is either a psychologist or social worker who specialises in family issues arising from separation and divorce and who is employed by the Family Law Court to give their advice about a child's living arrangements. They prepare **Family Reports**.

Family Dispute Resolution (FDR)

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

Family Dispute Resolution Practitioner (FDRP)

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

Family Member

Usually refers to a person you are or were in a relationship with or have a family connection to. The *Family Law Act* defines family member to include Aboriginal and Torres Strait Islander concepts of family and for the purposes of certain sections of the Act, particularly in relation to **Family Violence**. See ➤ also **Domestic Relationship** *and* **Relative**.

Family Relationship Centre (FRC)

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

Family Report

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

Family Tax Benefit Part A

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

Family Tax Benefit Part B

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

Family violence (as defined in the *Family Law Act*)

Family Violence (as defined in the *Family Law Act*) means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful.

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

(a) an assault; or

(b) a sexual assault or other sexually abusive behaviour; or

(c) stalking; or

(d) repeated name-calling; or

(e) intentionally damaging or destroying property; or

(f) intentionally causing death or injury to an animal; or

(g) unreasonably stopping a family member from having access to and control of money; or

(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

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

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

Federal Circuit and Family Court of Australia (Family Law Court)

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

Independent children's lawyer

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

Injunction

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

Interim application/order

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

Irretrievable breakdown of marriage

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

Joint parental responsibility

A court can make an order for joint parental responsibility if they believe that it is in the child's best interests to do so. This means that both parents are obliged to consult

each other and make a genuine effort to reach an agreement about major long-term issues about the child including: the child's education, religion and culture, health, name and changes to living arrangements.

Judgment

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

Justice of the Peace

A person who has formal authority to witness legal documents.

Lawyer

A general word for solicitors and barristers.

Litigation

A court dispute.

Local Court

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

Magistrate's Court

Same as a Local Court.

Maintenance

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

Mention

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

Oath

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

Party or parties

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

Parenting order

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

Parental responsibility

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

Property

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

Provisional Order

A provisional AVO is an order made by the court or a senior police officer in response to an urgent application by the police who believe someone needs immediate protection. It will remain in place until the first time the matter goes to court.

Recovery order

An order of the court that directs a person or people (such as the police) to find, recover and deliver a child to a parent of the child, a person who has parental responsibility for the child, or a person with parenting orders that state the child must live with, spend time with or communicate with them.

Registrar

(as defined in the *Crimes (Domestic and Personal Violence) Act*). A person who works for the court and provides information, assistance with court forms and may make decisions in Court about procedural issues. In Local Courts Registrars can take applications for AVOs.

Relative

A person is a relative if they are or were:

(a) A father, mother, grandfather, grandmother, stepfather or stepmother of the person; or

(b) A son, daughter, grandson, grand-daughter, stepson or stepdaughter of the person; or

(c) A brother, sister, half-brother, half-sister, stepbrother or stepsister of the person; or

(d) An uncle or aunt of the person; or

(e) A nephew or niece of the person; or

(f) A cousin of the person; or

(g) If the person is or was married, a person who is or was a relative, of the kind described in (a) – (f), of the person's spouse; or

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

Respondent

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

Response

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

Section 60I certificate

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

Separation

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

Serve documents/Service of documents

A process where the documents filed in a court case are given to the other party. All documents in a court case must be formally given to the other party before the court will hear the case. Different rules for service apply in different cases.

Settlement

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

Solicitor

A lawyer who gives clients legal advice, helps with legal problems and who may appear in court.

Spouse

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

Stalking

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

Status quo

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

Stay of execution

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

Subpoena

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

Substantial and significant time

In family law, time that enables parents to be involved in daily routines and special occasions and includes weekends, weekdays and holiday times.

Substituted service

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

Victims Services

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

Women's Domestic Violence Court Advocacy Service

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

Witness

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

9. Referrals and resources

9.1 Referrals

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

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

TTY/Voice calls	133 677
Speak & Listen	1300 555 727
SMS Relay	0423 677 767
Internet Relay	nrschat.nrscall.gov.au/nrs/internetrelay
Captioned Internet Relay	nrscaptions.nrscall.gov.au/nrs/captionrelay (Some services may not use)
Video Relay	Choose the available NRS video relay contact on Skype Open Skype and contact NRS.VIDEORELAY (Some services may not use)

If you are unsure how to use the National Relay Service, you can contact the **National Relay Service Helpdesk**.

Hours	Monday–Friday (8am–6pm Sydney time)
Helpdesk Information	nrscaptions.nrscall.gov.au/nrs/contactus
Voice	1800 555 660
TTY	1800 555 630
Fax	1800 555 690
Email	helpdesk@relayservice.com.au
SMS	0416 001 350

For people who are non-English speakers

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

Phone	131 450
Website	tisnational.gov.au

Services Australia

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

For details of your closest Centrelink, Medicare or Child Support location, go to the Services Australia website: servicesaustralia.gov.au

Children's Contact Services

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

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

Community Legal Centres NSW

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

Phone LawAccess:	1300 888 529
Website:	findlegalhelp.clcnsw.org.au

Domestic Violence Line

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

Phone	1800 656 463
TTY	1800 671 442

Domestic Violence NSW

Phone	(02) 9698 9777
Fax	(02) 9698 9771
Email	admin@dvnsw.org.au
Website	dvnsw.org.au

NSW Department of Communities and Justice (DCJ) (formerly DoCS or FaCS)

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

Phone	132 111
TTY	1800 212 936
Enquiries, feedback & complaints	
Phone	1800 000 164

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

Website	facs.nsw.gov.au/families

Family Relationship Advice Line

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

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

Family Relationships Online

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

Website familyrelationships.gov.au

Federal Circuit and Family Court of Australia (Family Law Court)

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

Website fcfcoa.gov.au

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

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

Family Violence Prevention Legal Services (NSW)

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

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

Link2Home – Statewide Homeless Service

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

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

International Social Service (ISS) Australia

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

Phone	1300 657 843
Email	iss@iss.org.au
Website	iss.org.au

LawAccess NSW

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

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

Law Society of New South Wales

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

Phone	(02) 9926 0300
Hours	Monday–Friday, 9am–5pm
Email	lawsociety@lawsociety.com.au
Website	lawsociety.com.au

Legal Aid NSW

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

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

Legal Aid NSW Child Support Service

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

Legal Information Access Centre (LIAC)

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

Phone	(02) 9273 1414
Hours	Monday–Friday, 10am–5pm Monday–Friday, 10am–1pm (Telephone enquiries)
Location	State Library of NSW, Macquarie Street, Sydney 2000
Email	liac.library@sl.nsw.gov.au
Website	legalanswers.sl.nsw.gov.au

LGBTIQ Services

Inner City Legal Centre

ICLC is a community legal centre which provides lesbian, gay, transgender and intersex people with legal services including court assistance for people escaping domestic and family violence and a statewide legal advice service.

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

ACON

Phone	1800 063 060 or (02) 9206 2000
Hearing Impaired	(02) 9283 2088
Another Closet – Domestic and Family Violence in LGBTIQ Relationships website:	ssdv.acon.org.au
Say it Out Loud – Domestic and Family Violence information website:	sayitoutloud.org.au

Local Courts NSW

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

Website	localcourt.nsw.gov.au

NSW Office of the Legal Services Commissioner (OLSC)

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

Phone	(02) 9377 1800 or 1800 242 958
TTY	(02) 9377 1855
Email	olsc@justice.nsw.gov.au
Website	olsc.nsw.gov.au

Staying Home Leaving Violence (SHLV)

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

Albury	(02) 6058 6200 or 1800 885 355
Armidale	1800 073 388
Bathurst/Lithgow	1300 384 357
Bega	(02) 6492 6239
Blacktown	(02) 9677 1962
Blue Mountains	1300 384 357
Broken Hill	08 8088 2520
Campbelltown	1800 077 760 or (02) 4633 3777
Canterbury/Burwood	(02) 9602 7795
Coffs Harbour	(02) 6652 9944
Coonamble/Walgett	(02) 6829 4352 or (02) 6828 3570
Dubbo	(02) 6883 1561
Eurobodalla	(02) 6492 6239
Fairfield, Liverpool	(02) 9602 7795
Georges River	(02) 9319 4088
Griffith	(02) 6964 3381
Inverell	0417 858 634 or 0417 786 736
Kempsey	(02) 6562 2272
Lake Macquarie	(02) 4943 9255
Lachlan/Weddin	1800 067 067
Maitland, Cessnock	(02) 4934 2585
Mid Coast	(02) 4979 1120
Mid-Western Regional	1300 384 357
Moree	(02) 6752 8027
Muswellbrook/Upper Hunter	(02) 4934 2585
Newcastle	(02) 4926 3577
Orange	1300 384 357
Parkes/Forbes/Cowra	(02) 6850 1788

Parramatta	(02) 9636 8437
Penrith	(02) 4721 2499
Port Stephens	(02) 4987 4674
Queanbeyan/Palrang	(02) 6189 4808
Randwick/Waverley	0439 414 673
Redfern	(02) 9699 9036
Richmond Valley	(02) 6662 2898
Shoalhaven	(02) 4421 7400
Snowy Monaro Regional Council	(02) 6492 6239
Sutherland	(02) 9528 2933
Tamworth Regional	1800 073 388
Tweed/Byron	(02) 6684 4299
Wagga Wagga/Junee	(02) 6964 3381
Wollongong	(02) 4255 5333
Wyong, Gosford	(02) 4356 2600

Wirringa Baiya Aboriginal Women's Legal Centre

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

Phone	(02) 9569 3847 or 1800 686 587
Website	wirringabaiya.org.au

Women's Domestic Violence Court Advocacy Services (WDVCAS)

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

Phone	1300 888 529 (*Law Access*)

Women's Health NSW

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

Email	info@whnsw.asn.au
Phone	(02) 9560 0866
Website	whnsw.asn.au

Women's Legal Service NSW

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

Phone	(02) 8745 6900 / 1800 WLSNSW
Website	wlsnsw.org.au

Outreach Services

Please check our website for information about our outreach services

9.2 Useful resources

Organisation	Resource	Website
Attorney General's Department	Information about international child abduction.	ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/default.aspx
Australian Federal Police	Family Law Kit: Information about recovery of children and the family law (airport) watchlist.	afp.gov.au/our-services/national-policing-services/family-law-watchlist
Family Law Court	Pamphlets, fact sheets and kits about court's services, court processes, costs and a range of family law issues.	fcfcoa.gov.au
Thomson Reuters	The Law Handbook 15th edition, Sydney 2020.	legalanswers.sl.nsw.gov.au/guides/law_handbook
Legal Aid NSW	Pamphlets and fact sheets on family law, child support and domestic violence as well as other criminal and civil law issues.	legalaid.nsw.gov.au
Legal Information Access Centre (NSW State Library)	*Hot Topics*: Publications about legal issues in plain language. *Find Legal Answers*: lists useful legal resources, by topic, available on the web and in print from public libraries across NSW or in the State Library of NSW.	legalanswers.sl.nsw.gov.au
Shoalcoast Community Legal Centre	Family Law Property Settlement Workbook and other publications about children's court care matters.	shoalcoast.org.au
Victims Services	Forms for applying for Victims Support, publications and links to other resources.	victimsservices.justice.nsw.gov.au
Welfare Rights Centre	Factsheets about social security benefits and dealing with Centrelink (e.g. 'Declaring your same sex relationship to Centrelink', and 'Prosecution of social security offences').	welfarerightscentre.org.au

Organisation	Resource	Website
Wirringa Baiya	Infosheets on a number of topics including victims' support, sexual assault, domestic violence and AVOs.	wirringabaiya.org.au
Women's Legal Service NSW	Women and Family Law Booklet and brochures about domestic violence.	wlsnsw.org.au

9.3 Family Law Fees

Fees are as at 1 May 2024 subject to increase please check with the court or service for up to date fees.

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

Family Court of Australia

Application for consent orders	**$195**
Initiating application (*Parenting or financial, final only*)	**$410**
Initiating application (*Parenting or financial, final and interim*)	**$550**
Initiating application (*Parenting and financial, final only*)	**$670**
Initiating application (*Parenting and financial, final and interim*)	**$810**
Response to initiating application (*final*)	**$410**
Interim application	**$140**

Federal Circuit Court of Australia

Application for divorce	**$1060**
Application for divorce—reduced fee (*no fee waiver allowed*)	**$350**
Initiating application (*parenting or financial, final only*)	**$410**
Initiating application (*parenting or financial, final and interim*)	**$550**
Initiating application (*parenting and financial, final only*)	**$670**
Initiating application (*parenting and financial, final only and interim*)	**$810**

Multicultural NSW (was Community Relations Commission)

Translation of Standard documents—7 days	**$80**
Translation of Standard documents—*Express Service*	**$105**

NSW Registry of Births Deaths & Marriages

Marriage Certificate—Standard	**$65**
Marriage Certificate—Urgent	**$95**

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

Women and Family Law

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ISBN (epub) 978-0-9945808-7-0

Produced by Women's Legal Service NSW

Thirteenth Edition, May 2024

WOMEN'S LEGAL SERVICE NSW