

FAMILY, SEPARATION AND SETTLEMENTS



Jane Miller
Partner
Tindall Gask
Bentley
Lawyers

Accredited family law specialist Jane Miller answers some frequently asked questions about the complicated laws associated with divorce.

What are the laws relating to custody?

The *Family Law Act* tells us that a court should always consider the best interests of the children, as the permanent consideration.

The law emphasizes that parents should always try to reach an agreement before resorting to the court system, so many separating couples become involved in family dispute resolution, involving a mediator.

If they still cannot reach an agreement, only then do the parties end up going to court. The court will then consider whether the children should live equally between both parents, if there's no family violence.

However, that might not be practical, meaning the children might live with one parent and be ordered to spend substantial and significant time with the other, such as weekends, some week days, school holidays and special occasions.

Is my partner responsible for 50 per cent of my expenses?

There are two concepts by which an individual would make regular payments to a former partner.

First, there's child support. This is dictated by child support legislation and assessed by the Child Support Agency. It is based on the understanding that the parent living away from his or her children still has an obligation to support the family to some extent.

It's not necessarily 50 per cent of expenses but is assessed according to what the incomes are of both parents,

how old the children are and how much time they spend with each parent. The Child Support Agency has a useful payment estimator on its website (www.csa.gov.au).

Second, there's spousal maintenance. This depends on whether the claimant has a need for the extra income and whether the other person has a capacity to pay. This is more common when there is a large income disparity between the parties, otherwise it doesn't often happen.

Are property and assets split 50/50?

There's no presumption of a 50/50 division of assets. The *Family Law Act* sets out a process with a series of steps that the court considers in determining a fair split. The process includes:

- Assessing the assets and debts, and their values.
- Evaluation of the contributions made.
- Addressing the future needs of both parties.
- Assessing whether the overall settlement is fair.

Other considerations include how much each person had at the start of the relationship or any lump-sum amounts he or she had received, as well as whether an individual needs more owing to income disparity or primary care of the children.

It is also often forgotten that superannuation is considered to be an asset. The court will divide the super in a way that is fair.

Sometimes people agree to a 50/50 split, only for one of the parties to discover later he or she had been short-changed. Each case involves different circumstances and everyone needs specific legal advice to determine a fair result.

My partner and I have separated. Do I have to leave the house?

If the house is under joint names, you cannot be forced from the home unless

there is a restraining order made in the Magistrates Court, or by the Family Law Courts, for sole use and occupation. This is quite rare.

Sometimes couples are left in limbo, separated but still living under the same roof until the property settlement. This is often because they do not have enough money to go around, or an individual is stubborn and refuses to move.

If the house is in the name of one person only, the other party can be excluded until there is a property settlement.

Do I have to agree to a divorce?

No, but the divorce will still go ahead anyway regardless of consent.

Once a couple has separated for at least 12 months, and the relationship is irretrievably broken down, either one of the people involved can apply for a divorce.

"Divorce" is the act of becoming unmarried. It doesn't resolve property or parenting matters.

There doesn't need to be a mutual agreement from the separating couple. An individual can make the application for divorce at the court and it is served to the other side. As long as the couple has been separated for at least a year, there are unlikely to be grounds for objection.

I have come to an agreement with my former partner. Do I still need a lawyer?

It is still highly recommended to get legal advice, even if an informal agreement has been reached. First, the purpose of that advice is to check that it is a fair deal, and that people aren't unknowingly accepting less than the law would give them.

Second, they should also get legal advice to ensure that their agreement is final and binding, which ensures that the matter is resolved once and for all.

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"We were just saying how awful it must have been trapped on a train carriage when something like this happens. You can't walk away. You can't leave."

That night, as I walked to the train station, my mobile rang.

"Hi Kate, this is Senior Constable Shaun Holland. Are you catching the train home tonight?" he asked. "I just wanted to let you know that we'll be there on the train looking for the man who assaulted you."

"We won't be in uniform, so you won't know where we are. But we'll be there."

He gave me a mobile number and told me to call if I needed anything.

The following day, he called again.

They would be on the train again. They would also be at the station where the man had disembarked.

By the fourth day, their news was different.

"We found him!" Snr Const Holland told me. "We decided to drop into the markets on Gouger St and we walked past him."

Sergeant Greg Thompson was one of the officers who had spotted the man.

The Transit police had kept me informed every step of the way and would continue to do so right up until the matter made it to court.

When the man's lawyer tried to negotiate a plea deal months later, they rang to see what I thought about agreeing to a lesser charge.

"They don't really care what I think, do

they?" I said to a prosecutor friend.

"Of course they do," he assured me.

And, when he was given a suspended sentence of five months (after serving more than three for breaching bail), the police were on the phone again to let me know.

People are always quick to complain when they think they've been slighted.

Which is why I want to say thank you to the Transit police who listened to me cry my way through a statement, who rang me every day to let me know they were still looking and who had their eyes open enough to spot the right man in a crowded market.

And I also want to thank those in SAPOL's media unit who, after countless annoying "media inquiries" from me over the years, all rang to see if I was okay.

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Otherwise, informal agreements have no effect, and former partners can later claim more money through a property settlement.

How long do I have to live with my partner before our relationship is classed as "de facto"?

Since amendments were made to the law in July 2010, couples must now live together for either two years or have a child from the relationship.

After qualifying, de facto partnerships have the same rights and entitlements

as married couples. They have access to the *Family Law Act* to sort out property settlement entitlements, spousal maintenance and superannuation.

How can I protect my assets before getting married?

It is possible for couples to enter into a pre-nuptial agreement, or "pre-nup", whether they are about to get married or enter a de facto relationship.

The law is very specific about the requirements that must be satisfied for those documents to be binding. Both parties must have had independent legal

advice, give full disclosure about all assets and debts, and must agree.

- Tindall Gask Bentley lawyers Jane Miller, Wendy Barry and Peter Heuzenroeder are three of a small number of accredited family law specialists practising in South Australia. They provide expert legal advice certified by the Law Society of South Australia.
- TGB provides a free legal advice service to Police Association members and their families, and retired members. To make an appointment to receive free preliminary legal advice covering all areas of law, particularly families and wills, members should contact the Police Association (8212 3055).

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