Separating? Know your rights

FAMILY LAW

Specialising in Matrimonial and De Facto Relationship Law

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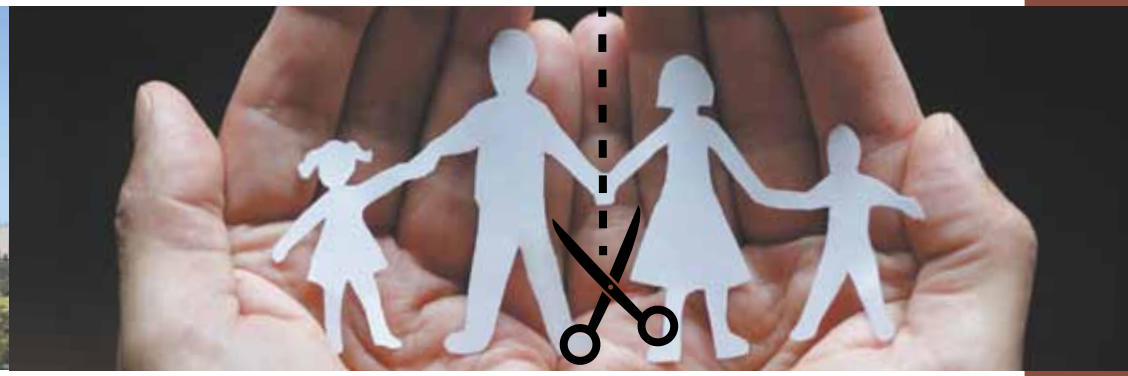
DS FAMILY LAW

PERTH



Foreword

DS Family Law is a boutique legal firm practising exclusively in matrimonial and de facto relationship law. Our Directors and Staff are aware just how traumatic the circumstances surrounding separation can be, and have experience in dealing with all issues arising from relationship breakdown, whether it be property settlement, child welfare issues or child support.

We hope that the information contained within this booklet may assist you or someone you know in dealing with the difficult decisions which may lie ahead. It is not, however, intended to be a summary of family law or a substitute for proper legal advice. When creating this booklet, our aim was to ensure that the contents were in plain English and "easily digestible" language. We have used our years of experience to ascertain what information would be most useful, whilst remaining aware of clients' most commonly asked questions.

If you are contemplating separation or, indeed, are separated already, we cannot over-emphasise the importance of being aware of your rights and entitlements under family law. Moreover, any delay in obtaining proper advice may have adverse and far-reaching consequences.

We would welcome the opportunity of providing you with comprehensive family law advice by way of an initial consultation at one of our offices. For your convenience, we have listed our contact details, including the locations of our regional offices, on the back page of this booklet.

We wish you well for the future.

Ross Dunlop Milos Supljeglav

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Ross
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DS Family Law - Our Directors

Ross Dunlop spent most of his life in Glasgow, Scotland, before migrating to Australia in 1997. He holds both an Honours degree in Law and a Post Graduate Diploma in Legal Practice from the University of Strathclyde. He was admitted as a solicitor in Scotland in 1992 where he spent 5 years in practice, principally in the areas of criminal law, family law, and domestic and commercial conveyancing. Since relocating to WA, Ross has practised exclusively in family law, and now spends his time between our Perth and Darwin offices. When not being a lawyer, Ross' interests include soccer, squash and generally keeping fit. He has worked and travelled throughout Europe, North and Central America and the Middle East.

Milos Supljeglav's interest as a barrister and solicitor has always been in the practise of family law. He has a strong academic background, having won the Butterworths Prize for best academic performance in Jurisprudence. He has an Arts degree, Law degree and Graduate Diploma in Legal Practice with Merit, and is an Accredited Family Law Specialist. Milos has a wealth of practical experience, having acted as In-House Counsel with a specialist family law practice, a role which continues with this firm. Milos has appeared and conducted matters in the Family Court's Appellate Jurisdiction. He has won a Lexis Nexis prize in his particular field of interest, advocacy. Milos has also completed the Advocacy Module of the Bar Readers' Course, and accredited training in mediation, arbitration, conciliation and family dispute resolution. He has a dry sense of humour and enjoys "anything theatrical." Milos is also a fiercely loyal supporter of the West Coast Eagles.

Property Matters

"I'm thinking of separating...."

Separation takes place when one party communicates to the other that the relationship has broken down, and the parties are no longer living together as a marital or de facto relationship unit.

There is no formal legal process or document necessary to establish a separation: it is a matter of fact.

Separation can occur even if the parties are still residing in the same property, so long as they are not living together as husband and wife.

The date of separation can be important, particularly in considering how to treat assets acquired or liabilities incurred after that date.

It's preferable that you get legal advice at an early stage, so that you're aware of your rights. Legal advice is confidential, meaning that the other party does not need to know that you have seen a lawyer. In many cases, getting early advice and knowing your rights can save you both time and money at a later stage.

Crucial Documents

"What can I do before we separate….?"

You should obtain copies of all significant paperwork and store them with someone you trust – not at home. In particular, obtain copies of:

- Taxation returns and group certificates;
- Superannuation statements and associated documentation;
- Bank and credit card statements;
- Evidence of salaries, bonuses, dividends and all other sources of income;
- Receipts to prove any payments made in cash;
- Investment documentation such as share portfolios and certificates;
- Important Deeds, such as Family Trust Deeds, Wills etc;
- Business records, including annual financial returns;
- Any applications for loans;
- Insurance documents or other paperwork evidencing values;
- All relevant correspondence from banks, financial planners, employers, stockbrokers etc;
- All cheque and deposit books;
- Computer discs containing financial information.

You must also ensure that you have evidence of any:

- Significant financial contributions you have made, either by way of gift or inheritance from a third party, or through assets owned at the outset of the relationship; and

- Significant contributions you have made to the acquisition or improvement of property during the relationship.

If necessary, take photographs of furniture and contents of significance, especially antiques or artwork.

If you fear the other party will apply financial pressure, access sufficient funds (if possible) for your reasonable maintenance and to cover the cost of any urgent legal work until you can obtain an order for spousal maintenance or Centrelink benefits.

Leaving the Home

"Should I leave the home….?"

Generally speaking, you should try to avoid leaving the relationship home unless you have no alternative, as:

- The costs, stress and inconvenience of moving out are usually substantial;

- The pressure on the other party to negotiate a prompt settlement is reduced;

- Access to mail and other important documents can be restricted;

- Contact with your children can be substantially reduced, particularly if the proposed alternative accommodation is too small or otherwise unsuitable for overnight accommodation.

You can consider the possibility of obtaining an order for exclusive occupation of the property. It makes no difference whether you are the legal owner of the property or not.

Domestic Violence

"What about domestic violence….?"

Domestic violence is not confined to a particular class or income group. Nor, indeed, is it exclusively perpetrated by males. You may be entitled to either a misconduct restraining order ("MRO") or a violence restraining order ("VRO") preventing the other party from:

- Communicating with you (except through lawyers);
- Approaching within a specified distance of you; or
- Attending at certain locations, such as the matrimonial home or your place of work.

Firstly, call the police if you are under immediate threat. Keep the local police station's number readily available, e.g. on the fridge, or program it into your home and mobile phones.

Keep a trusted neighbour informed about your situation.

Report all incidents to the police and ensure your medical practitioner documents any injuries, no matter how superficial you think they are.

See a family lawyer about obtaining a restraining order.

When to Settle

"When should I settle….?"

You should endeavour to resolve property issues at the earliest opportunity, and litigation should be avoided unless:

- The other party is refusing to cooperate;
- Despite repeated requests, the other party is failing to disclose relevant information and / or documents;
- Your reasonable proposals for settlement have been rejected.

Remember, any determination by the court may, in some cases, be no more beneficial (including allowance for significant legal costs) than the other party's offer. The quicker you settle, the less costly and acrimonious negotiations or proceedings are likely to be. This benefits everyone, particularly children.

Valuations

"What is it all worth….?"

The first step in determining property settlement is to identify the assets of the relationship and establish their values. Remember:

- Licenced valuations will be admitted as expert evidence in proceedings, whereas market appraisals will not;
- As a general rule, market appraisals will be higher than valuations carried out by a licensed valuer or financial institution.

If you are retaining the home as part of the property settlement you should probably obtain a licensed valuation. On an average, these cost around $800 - $1,200 (plus GST).

Furniture and contents are valued at second-hand auction prices, in most cases likely to be many times less than replacement cost. Therefore, try to retain as many of these items as possible.

If you cannot agree on the value of furniture and chattels, do not incur more legal fees arguing – obtain a proper valuation ($500 - $800) and suggest the other party pay half the costs.

All assets are valued at the date of settlement (whether by consent or by trial), not at separation.

A genuine, bona fide sale of property, be it a house, car or shares will be the final word in determining that item's value.

Ensure you take any family heirlooms, photographs, or items of sentimental value with you at separation – or keep them safe elsewhere. These items usually have high intrinsic value but very little monetary value, almost always less than the legal fees incurred in disputing them.

Generally, do not fight over the toaster and kettle! Always keep the bigger picture in mind.

Undertakings and Injunctions

"Can I stop the home being sold until settlement….?"

If the property is jointly owned, your signature will be required on any documents of sale. Seek legal advice before signing anything.

If the property is owned exclusively by the other party you should seek a written undertaking that it will not be sold, rented, used as security for additional borrowing or dealt with in any way pending settlement being finalised.

If no written undertaking is forthcoming, seek an injunction at the Family Court at the earliest opportunity. This will prevent the other party from dealing with the asset in question.

Such injunctions can apply to any item of matrimonial property, including family businesses, subject to the business being able to carry out its day-to-day activities. Legal ownership of the asset is irrelevant.

Non-Disclosure of Assets

"I think he/she is hiding assets…."

Both parties are under a strict obligation to disclose all assets, liabilities, and financial resources of which they are aware. The obligation is ongoing until settlement. Non-cooperation with this rule can have disastrous consequences if the matter proceeds to trial.

Disclosure of information should occur before the commencement of any proceedings.

Your lawyer can request an authority from the other party to make specific enquiries of banks, employers, health professionals and other relevant third parties.

If necessary, a court order for the disclosure of specific information can be sought.

Assets located overseas will be taken into account in determining a fair and reasonable outcome, but the Family Court cannot make specific orders in relation to such property.

Gifts and Inheritances

"But I inherited the house from my parents…."

As a general rule, all assets (including cash) acquired by one party through a gift or inheritance will be regarded as part of the overall asset pool for distribution, if received before the final property settlement. They may also be included if they are received after the parties separate. This can have a major impact on settlement, although the inheriting party may, of course, be considered as having made a greater financial contribution to the assets.

A future or potential inheritance will not form part of the asset pool for distribution, but if it is both imminent and guaranteed (e.g. if a Will cannot be changed due to the testator's lack of capacity) then this factor may be taken into account.

Superannuation

"What about the super….?"

Since December 2002, it has been possible to "split" either party's superannuation entitlements on marital breakdown (Note that this does not yet apply to de facto relationships).

Previously a financial resource, super is now characterised as a matrimonial asset.

Expert advice is required in assessing your options as to whether or not the superannuation should be split; the issues can be highly complex.

The existence of children, and the preservation of businesses, farms or other entities can have an impact on whether superannuation splitting is appropriate.

Taxation and financial planning advice are essential in this process; you should not endeavour to prepare a super splitting order without the appropriate professional guidance.

Spousal Maintenance

"How will I get by until property settlement….?"

In some cases, a party may be entitled to regular payments of spousal maintenance from the other, depending upon:

- That party's reasonable financial needs;
- The other party's capacity to pay from his or her income.

Spousal maintenance is not assessed on the extent or value of the matrimonial assets, but on the proposed payer's income.

You may be entitled to Centrelink benefits, even if you work part time. Before you separate, take sufficient funds with you to "see you through" if you feel the other party will not cooperate.

In some circumstances, it is possible to obtain a Court Order enabling you to receive a lump sum payment towards your legal fees. Such lump sum may come from existing bank accounts, or from the sale of assets. Further, there may be grounds for a "dollar for dollar" Order, whereby the other party is required to pay your legal fees as and when they fall due. The intention of such Orders is to "level the playing field", by ensuring that both parties have equal access to legal representation.

Consent Orders Applications

"We've agreed everything between us. Now what do we do….?"

If all the outstanding issues between you have been agreed, and no proceedings have yet been filed at Court, it is vital that you embody your agreement in an Application for Consent Orders. Unless you do so, any agreement you reach will not be binding and cannot be enforced. Nor can you take advantage of the stamp duty concession for transferring property between spouses if the agreement is not ratified by the Family Court.

Most solicitors will charge a fixed cost for preparing Consent Orders Applications, usually between $3,000 to $5,000 (plus GST) depending on the complexity and the level of work required.

An alternative to Consent Orders is to enter into a financial agreement, which is a private, written contract between the parties. A financial agreement will not be filed in the Court, unless either party seeks to enforce its terms. There are very strict legal requirements that must be met before a financial agreement is binding, most importantly that each party must first obtain comprehensive, independent legal advice. Financial agreements are more expensive than Consent Orders, because of the substantial amount of work involved to ensure the document is binding and compliant with the relevant law.

'Pre-Nuptial' Agreements

"Now I have finalised my settlement, how can I protect it if my new relationship breaks down….?"

Married and de facto couples can enter into financial agreements, certain categories of which may be referred to colloquially as "pre-nuptial" agreements. The intention and function of these agreements is to exclude the power of the Family Court to interfere in property settlement and maintenance provisions after separation. Your initial financial contribution to the relationship can therefore be "quarantined" and retained exclusively by you, notwithstanding any future breakdown of the relationship. Such agreements are especially attractive in the following situations:

- Protection of the assets of one party where there is a substantial disparity in wealth;
- To preserve one party's assets for the purpose of future inheritance;
- In long-established family farms or businesses where the intention is to preserve the asset for future generations;
- On second marriages, where both parties seek to protect previously acquired assets.

A "pre-nuptial" agreement may be set aside in some circumstances, in particular, where inadequate provision has been made for a child or children of the parties, or there has been non-disclosure of a material matter. It is extremely important that each party receives comprehensive, independent legal advice prior to signing the proposed agreement, otherwise the document may not be enforceable at a later date.

De Facto Settlements

"But we never actually got married…."

Couples who have lived together as if they were married for a period of two years or more, or who have children together, can apply to the Family Court for property settlement. To be eligible, separation must have occurred on or after 1 December 2002 and at least two thirds of the cohabitation must have taken place in WA. This also applies to same sex-couples.

Parties will be deemed to have lived in a de facto relationship if they are a couple living together on a "genuine domestic basis". In determining whether or not parties were in a de facto relationship for family law purposes, the Court will consider a multitude of circumstances, including:-

- The duration of the relationship;
- The nature and extent of their common residence;
- Whether a sexual relationship exists;
- The degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- The ownership, use and acquisition of their property;
- The degree of mutual commitment to a shared life;
- The care and support of children;
- The reputation and public aspects of the relationship.

Children's Issues

The fundamental principle which determines the outcome of disputes relating to children is that the best interests of the children are the paramount consideration. The primary considerations in this regard are:

- Ensuring the child has a meaningful relationship with both parents; and
- The need to protect the child against physical and / or psychological harm.

The court must consider a number of factors when determining what is in the child's best interests, including:

- Any view or wishes expressed by the child (depending on age);
- The nature of the relationship of the child with each parent and other persons;
- The likely effect of any change in the circumstances of the child, including separation from siblings and each parent.

The Court must apply the presumption that is in the best interests of the child for its parents to have equal shared parental responsibility with respect to the child's welfare, unless there are reasonable grounds to believe that one parent has engaged in family violence or abuse of the child. It is important to note that this presumption relates solely to the sharing of parental responsibility, not the amount of time a child spends with each parent.

Assuming the presumption is not rebutted, the Court must then consider whether the child spending equal time with his or her parents is both in the child's best interests and reasonably practicable. If so, the Court must consider making an order for the child to spend equal time with its parents.

Child Support

Parents are able to deal with child support in one of four ways:

- Most commonly, the primary caregiver of the children may apply for an administrative assessment based on a statutory formula through the Child Support Agency ("CSA");
- They may agree to a binding child support agreement. However, before doing so each party must receive independent legal advice. Such agreements are intended to provide finality about child support arrangement between parents, and may include a lump sum payment;
- They may agree to a limited child support agreement. An administrative assessment must be in place before a limited child support agreement can be accepted by the CSA, and the annual rate of child support payable under the agreement must be at least equivalent to the assessed annual rate of child support; or
- They may come to an informal, private arrangement between themselves as to the nature and extent of the child support payments.

Child support is calculated with reference to a statutory formula, taking into account both parties' taxable incomes; the number and ages of the children; the extent to which the liable parent ("the payer") spends time with the children; and the obligation to maintain any children of a new relationship, amongst other factors. The formula and other relevant considerations can be accessed through the CSA website: www.csa.gov.au

Generally speaking, the Family Court has no jurisdiction in child support matters unless the Review and Appeal procedures available through the Child Support Agency itself have been exhausted. Since January 2008, the Social Security Appeals Tribunal has had the jurisdiction to determine disputes relating to child support.

In certain circumstances, financial support for children over the age of 18 (or who have completed secondary education) can be obtained by way of an application to the Family Court, particularly if that child has for example, significant education expenses or specific needs.

Depending on the country involved, payment of child support can be enforced abroad, most notably in New Zealand and the UK.

Sometimes, the paying party may be able to offset their child support liability against other payments made to the parent who is the primary caregiver, e.g. mortgage payments, school fees or air fares to facilitate spending time with the child. These are known as "prescribed agency payments."

Avoid making child support payments by cash - you should always be able to prove payments through bank accounts and receipts.

Persons who are in default of their child support obligations may, through a departure prohibition order, be prevented from leaving Australia until the arrears have been paid or alternative arrangements made.

Relocation

Where one party wishes to relocate with the child to another town or city or even interstate, it will usually be impossible, or at least, impracticable, for the child to spend equal time with both parents. You should obtain a Court Order prior to relocating with your child. In most cases, where a parent unilaterally relocates with a child (ie: without the other parent's consent), the Court will require that parent to return to their original location until final Orders can be made either by consent, or at a Trial.

If the Court does not make an order for the child to spend equal time with each parent, the Court must then consider whether an order that the child spend substantial and significant time with the other parent is in the child's best interests and reasonably practicable. Generally, this will involve spending overnight stays both on weekends as well as during the school week. Alternate weekends and half school holidays are, generally, no longer considered as being sufficient "contact" time.

If not reasonably practicable, the Court must consider making an order for the child to spend time with the parent who is not the primary caregiver for the child.

In determining "reasonable practicability", the Court will have regard to how far apart the parents live, the impact the arrangement would have on the individual child and any other matters the Court considers relevant, eg. long working hours or roster schedules.

Bear in mind that, except in certain specific circumstances (including sexual/physical abuse or family violence, for example) all parties are required to attend and obtain a certificate from a family dispute resolution practitioner before bringing any applications for parenting orders to the Family Court.

Costs in Family Law Matters

Costs in family law matters can be very high indeed, so never close your mind to the variety of settlement options available. The quicker your case settles, the quicker your legal fees will cease. Conversely, the greater your solicitor's involvement, the more expensive the process will be.

Average hourly rates for experienced solicitors practising in family law average between $300 and $500 per hour (excluding GST). Try to achieve a balance between keeping costs reasonable and obtaining a high quality service from a solution-focused solicitor.

Do not waste your lawyer's time and your money on the "small stuff". Generally, an extra half hour's contact, or the final destination of the microwave oven is neither here nor there. Always focus on the end result.

As a general rule, there are seldom outright "wins" in family law disputes, only varying degrees of loss.

Magistrates or judges seldom see issues as "black and white", even if you do.

Always consider your current and anticipated future legal costs when assessing the attractiveness of any settlement proposals.

Do not be afraid to consider "creative" settlements if they will work for you. Child Maintenance Trusts, deferred or staged settlements or payments to super funds can open up new settlement options.

It is virtually impossible to predict exactly how much a family law matter will cost. Generally, this depends upon how much time it has taken your solicitor to do the necessary work. Obviously this varies significantly from case to case depending on a number of factors, including:

- The complexity of the case;
- The attitudes and willingness to cooperate of the other party and, just as importantly, their legal representative;
- Whether any interim issues have to be dealt with by way of argument before the court;
- Family dynamics, including the involvement of adult children and / or new partners.

Unlike other jurisdictions, costs orders against the other party are not common – the presumption is that each party will pay his or her own legal costs.

Do your utmost to comply with all court orders and deadlines – do not leave yourself open to allegations of non-compliance, which might justify the making of a costs order against you.

Finally, remember that costs are not just financial – the emotional and physical costs of court proceedings should not be underestimated.

If Court is Unavoidable

- Continue to explore the possibilities of settlement on an ongoing basis – on average, your matter will not reach trial stage for the best part of 18 months from the date of filing documents;
- Comply fully with any orders made by the court and provide the other party with full and frank disclosure at the earliest opportunity;
- Avoid time consuming and expensive interim applications, if at all possible;
- Always keep your desired outcome in mind and do not let minor or side issues distract you from your ultimate goal;
- Seek areas of agreement as soon as possible so as to narrow down the issues for trial;
- Maintain your integrity throughout, and be honest.

Useful Telephone Numbers

Anglicare / Kinway	08 9263 2050
Anglicare / Kinway (counselling service)	1800 812 511
Centrelink	132 307
Child Support Agency	131 272
Crisis Care	08 9223 1111
Crisis care (country callers)	1800 199 008
Daisy House	08 9247 1960
Department for Child Protection	08 9222 2555
Domestic Violence Helpline - Women	08 9223 1188
Domestic Violence Helpline - Women (country callers)	1800 007 339
Domestic Violence Helpline – Men	08 9223 1199
Domestic Violence Helpline – Men (country callers)	1800 000 599
Esperance Courthouse	08 9071 2444
Family Court Counselling Service	08 9224 8248
Family Court of Western Australia	08 9224 8222
Geraldton Courthouse	08 9921 3722
Karratha Courthouse	08 9185 2922
Kalgoorlie Courthouse	08 9093 5300
Law Society of Western Australia	08 9324 8600
Legal Aid of Western Australia	08 9261 6222
Legal Aid of Western Australia (country callers)	1300 650 579
Mandurah Courthouse	08 9583 1100
Relationships Australia	1300 364 277
South Hedland Courthouse	08 9172 9300

Notes

Disclaimer

The information provided within this booklet should be considered as general background information only. It is not intended as legal advice or a substitute for legal advice. You should seek specific legal advice from a solicitor knowledgeable in the field of family law. DS Family Law accepts no liability for any economic or other loss occasioned by any purported reliance upon the contents of this booklet. Information correct as at August 2013.

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