

OWEN HODGE



LAWYERS



SURVIVING YOUR SEPARATION AND DIVORCE

A guide to your rights and responsibilities

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CALL 1800 770 780

CONSULT WITH US

Family relationships are the most sensitive, rewarding and important things in our lives, but the truth is, they are not always easy.

If you find yourself at the end of your marriage, and confused and overwhelmed at the process that lies ahead then you need a family lawyer who is understanding, approachable and to whom you can turn to for comprehensive advice about your rights, obligations and options.

Our foremost goal at Owen Hodge Lawyers is to help you reach a complete and workable agreement, preferably through negotiation. We can help to minimize the trauma resulting from this difficult time. We can also help you create a legal framework to finalise your financial relationship with a former partner or husband/wife.

Call us now on 1800 770 780 to establish some certainty and direction in this stressful and unsettling time.



OWEN HODGE



LAWYERS

Owen Hodge Lawyers

Sydney Office

Level 3, 171 Clarence St
Sydney NSW 2000

Hurstville Office

Level 2, 12-14
Ormonde Parade
Hurstville NSW 2220

Postal Address

PO Box 187
Hurstville BC NSW 1481
DX Address
DX11344
Hurstville

Phone: 1800 770 780

Fax: (02) 9570 9021

Email: ohl@owenhodge.com.au

<http://www.owenhodge.com.au/>



[linkedin.com/company/owen-hodge-lawyers](https://www.linkedin.com/company/owen-hodge-lawyers)



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SURVIVING YOUR SEPARATION AND DIVORCE

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This resource contains information of a general nature only and should not be interpreted as legal advice specific to the readers circumstances. We suggest consulting with one of our family lawyers for advice specific to your case.

INTRODUCTION

Divorce rates are extremely high in Australia, in 2012 there were 49,917 divorces and these rates are growing exponentially. According to the Bureau of Statistics, nearly 40 percent of Australian marriages end in divorce.

At Owen Hodge Lawyers, our experienced family lawyers understand that marriage and relationship breakdowns comprise some of the harsher realities of life. The time you have invested in your partner is lost. If you have children, they often blame themselves. Your friends divide. And day-to-day life is swept up in a tsunami of emotion that you often cannot understand or control.

When dealing with a marriage breakdown, it is imperative to understand your legal entitlements with respect to property. It is also important to determine what is best for the children. The advice in this guide will provide an insight about the legal process of separation and divorce in Australia.

Divorce is a messy business and becomes messier the longer disputes go on. So know your rights and take steps to create a fair and amicable solution before you find yourself in court fighting a messy, emotion-fuelled dispute. Call us now on 1800 770 780 and you can begin the next chapter of your life.



SEPARATION,

What Does That Entail?



Separation is defined as the bringing to an end of your marriage or defacto relationship.

Whether you are married or you are in a de facto relationship the date you and your ex-partner separated can become very important in divorce and property settlement cases.

This is mainly due to the time limits that apply in family law proceedings. For example, married couples must be separated for at least 12 months before they can obtain a divorce and de facto couples must make an application to the court to resolve their financial matters within 2 years of the date they separate from their partner.

Separation is a time when you need help and information. Talking to friends and family can help you sort out your feelings. Seeking legal advice from Owen Hodge Lawyers may also help you understand the law relating to family disputes and help you understand your legal rights and responsibilities. Our experienced family lawyers can help people with divorce and separation related questions such as the following:



What to Think About After Your Relationship Breakdown?

It's never easy when a marriage or significant relationship ends. If you separate, you and your former partner will need to make some immediate decisions about practical issues involving your children and your assets such as the following:



CHILDREN

- 1 Where the children will live?
- 2 Who will take care of your children? What are the visitation arrangements?
- 3 What, how and when will you tell the children?
- 4 How you will financially support your children? how much will you each pay? for how long? And when should this be reviewed?



ASSETS AND LIABILITIES

- 1 Who will pay the outstanding bills?
- 2 Who will stay in the house?
- 3 How will the rent or mortgage be paid?
- 4 What will happen to any jointly held bank accounts, insurance policies, investments or a self-managed superannuation fund?
- 5 What will happen to the house, car and other property?



What to Do After Your Relationship Breaks Down?

If you separate, you and your former partner will need to consider taking the following practical steps;

- 1 Make a list of all assets and liabilities of you and your partner with current values
- 2 Gather together all of your personal paperwork and financial documents and keep these in a safe place, perhaps with a third party that you trust
- 3 Notify relevant organisations of the change in your circumstances (e.g. Centrelink)
- 4 Revise your existing will to see if you need to make changes or make a new one. If you don't have a will make sure you make an appointment with Owen Hodge Lawyers to make one.
- 5 Revise the binding nominations for your superannuation, does this need to be changed?
- 6 Think about the immediate living arrangements for you and your children if you cannot stay where you are
- 7 Close all jointly held accounts. Open a new bank account in your own name and redirect any salary or other income streams to the new account.
- 8 Securing Against Online Fraud: Change your username and passwords of your email, internet banking and any of social networking sites, which your partner is aware of, to prevent the possibility of your partner misusing your username and password.
- 9 Get legal advice from Owen Hodge Lawyers

Owen Hodge Lawyers have experienced Family Lawyers who can efficiently guide you in taking the right steps to protect your interests and to minimise the stress that stems from a separation.

Should You

MOVE OUT?

I am separating. Should I move out?

The breakdown of a marital or de facto relationship generally causes deep distress and often muddled thinking. If you are considering a separation and are questioning whether you should move out of the house, it may be helpful to keep three guiding principles in mind:

1

If there has been domestic violence or a threat of domestic violence, do whatever you need to do to protect yourself and your children, which may include moving out of home. Before doing so obtain advice from the police about a possible Apprehended Domestic Violence Order and obtain advice from one of our family law solicitors about how to move out safely or how to get your partner out of the house.

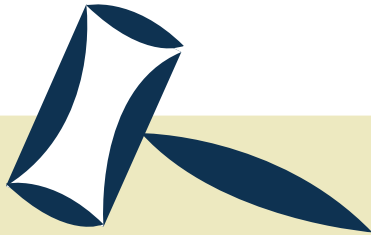
2

If you move out with your children you need to bear in mind that it may take some time to resolve your parenting and property matter on a final basis therefore you need to be able to financially support yourself and the children. If you can't do this you need to discuss with us your other options.

3

If the situation is not violent, call your solicitor first. A decision to move out of the family home does not determine the outcome of your financial or parenting matter, but there is some lingering truth to the aphorism, "if you want the house, don't leave the house; if you want the kids, don't leave the kids." It is best to negotiate as much as possible before either party moves out.





LEGAL TIP #2

What Can You Expect?

Divorce is the legal recognition of the end of your marriage.

Divorce occurs separately to property or maintenance issues.

What are the legal requirements for obtaining a divorce?

People often confuse a divorce with the process of negotiating how the parties' assets and liabilities will be divided. However, divorce is a straightforward process, and can be done either before, after or during negotiations regarding the parties' property settlement providing the following requirements are met:

1. Evidence of a valid marriage

To prove a valid marriage, you have to attach a copy of your marriage certificate to the Application for Divorce. If you were married in Australia and you have lost or misplaced your marriage certificate, you can easily obtain a copy by contacting your local Births, Deaths and Marriages registry.

2. At least one party to the marriage must be an Australian citizen or resident in Australia.

Regardless of which country you were married in, you can obtain a divorce in Australia if at least one of the parties is an Australian citizen, resident in Australia or domiciled in Australia.

3. Irretrievable breakdown of the parties' marriage evidenced by at least 12 months of separation

To prove that a marriage has irretrievably broken down, the Court must be convinced that the parties have been separated for a period of at least 12 months. It is possible to obtain a divorce even if you and your spouse have been living in the same house while separated. A written statement from the party who is making the application and an additional witness must be filed with the application, and the statements need to cover specific issues surrounding the parties' separation under the one roof.

4. Provision for Minor Children

If you are getting divorced and you have children (under the age of 18), the court needs to be satisfied that there are proper arrangements in place in respect of their care, welfare and development.

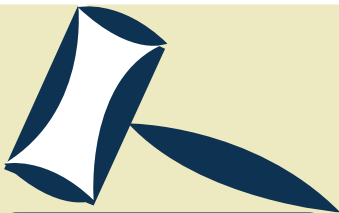
5. The party making the application must serve the other party with a copy of the application in accordance with the Family Law Rules.

The Court must be satisfied that the other party to the divorce has been served with a copy of the application at least 28 days prior to the divorce hearing, or if he or she lives overseas, service must occur at least 42 days prior to the date of the divorce hearing.

Owen Hodge Lawyers can prepare all the required Federal Circuit Court divorce documentation for you and attend your divorce hearing on your behalf. This will help ensure that the emotional and financial impact of this difficult time is minimised.

I am living with my ex-partner and I have a dispute with him or her about when we separated
What factors will the court consider to make a decision about the date of separation?

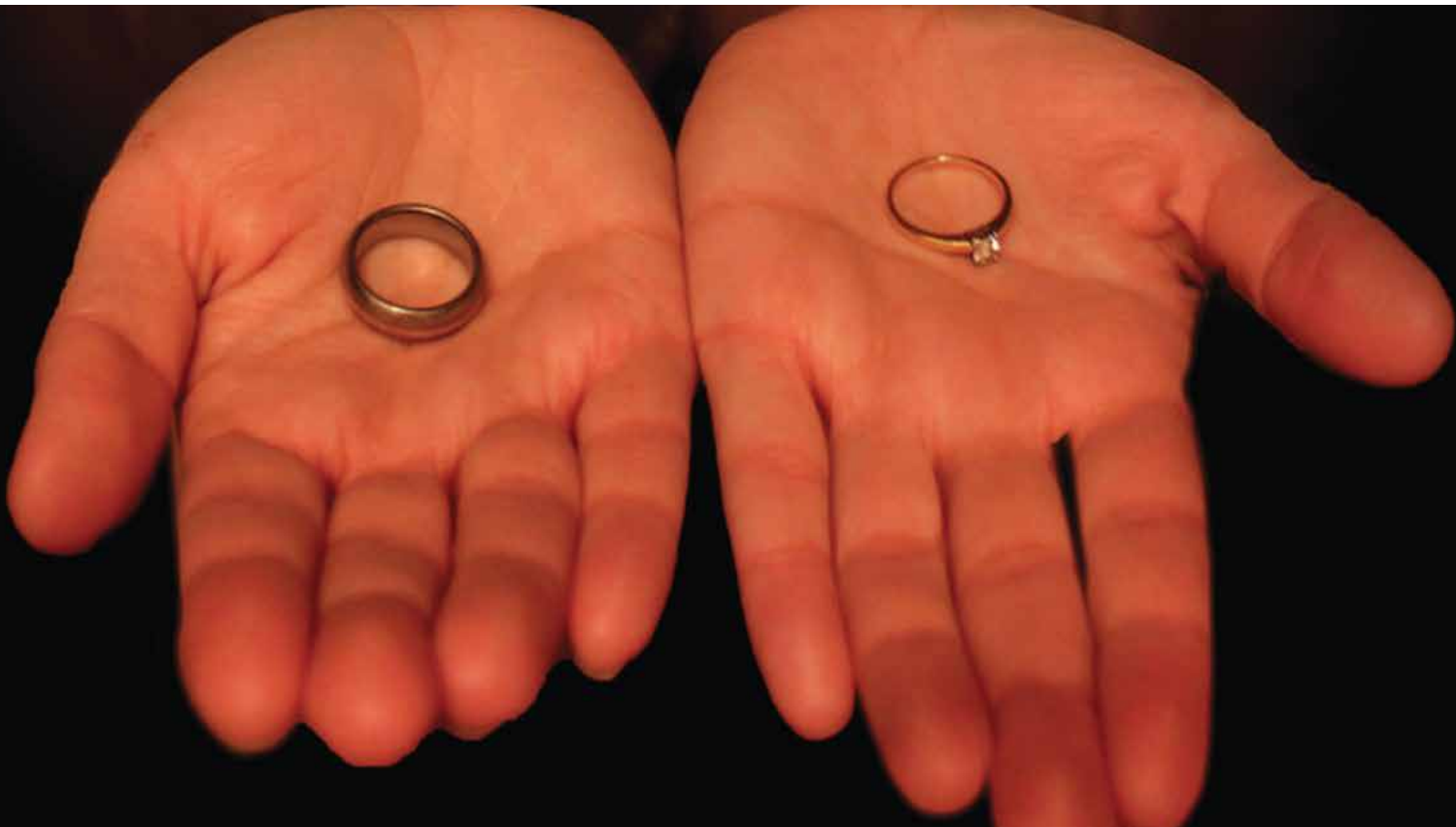
- 1 Whether you and your partner continued to sleep in the same bedroom or began sleeping in separate bed rooms after the alleged date of separation
- 2 If a sexual relationship continued between you after the alleged date of separation
- 3 Whether you continued to intermingle your finances, for example by operating joint bank accounts after the alleged date of separation
- 4 If one or both of you continued to perform domestic tasks for the other after the alleged date of separation including cooking, washing etc
- 5 If and when you made your separation public, for example did you tell other people you were separated and did you stop socialising together after the alleged date of separation?
- 6 Did either of you sign any formal documents for example Centrelink or ATO paperwork that declared you had separated on a particular date?
- 7 Any text messages, emails or other correspondence between you and your ex partner which makes reference to the separation or end of the relationship, and the date of that correspondence.



LEGAL TIP #1

It may be a good idea to send your ex partner a text message or email on the date you separate making it clear that the relationship has come to an end.

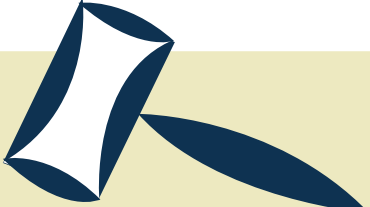
If you keep a copy of the email or text message then this is very good evidence about the date of separation if there is a dispute down the track about this.



I am seeking a divorce, I have been married for less than two years, what should I do?

If you are seeking a divorce and you have been married for less than two years then in addition to the usual requirements, both parties must participate in marriage counseling and file a certificate from the counselor with your application evidencing that the parties attempted the possibility of reconciliation.

If you are not able to attend counseling with your spouse, it may still be possible for you to obtain a divorce and we would encourage you to seek our advice in relation to your specific situation.



LEGAL TIP #3

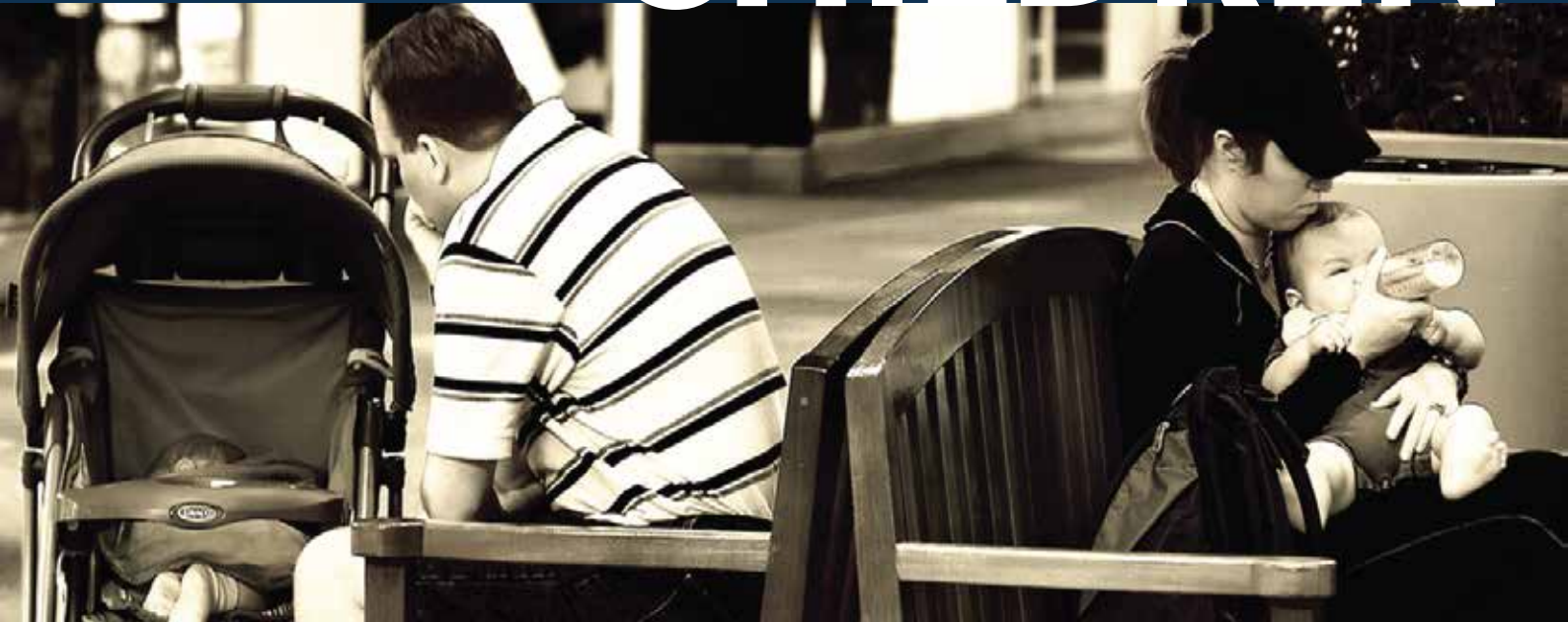
You must institute proceedings for property settlement and spousal maintenance within 12 months from the date your divorce is granted.

If you make an application after this 12 month deadline then you will need to seek the leave (permission) of the court to proceed and there is no guarantee this will be granted.



Arrangements for the

CHILDREN



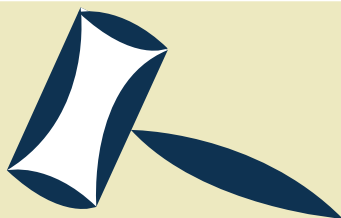
A marriage breakdown is a very stressful experience for the adults involved but it is also a very difficult time for the children of the relationship.

Can we make our own agreement without going to court?

If you and the other parent are able to reach an agreement about what arrangements will be in place for your children without going to court, then this is the best outcome for everyone involved as it will save considerable time, stress and money. Once the agreement between you and the other parent has been reached there are different options to formalise your agreement.

If you want to make your agreement final and binding you can enter into **Consent Orders** which are approved by the court.

If you want the flexibility to change arrangements easily then you may choose to enter into a Parenting Plan. Unlike Consent orders, Parenting Plans are not enforceable by the courts.



LEGAL TIP #4

In cases of separation between the parents, you can redress your disagreements and arrive to a certain agreement or arrangement in regard to your child outside the Court. If you can't reach an agreement on your own about what arrangements will be in place for your children outside of court, you can also take the recourse of mediation.

What if we can't reach an agreement outside of court?

The court has the power to deal with all issues relating to child custody including where the children live and what time they spend with each parent. Either of the parents can make an application to the court seeking orders about their children regardless of whether they are married or in a de facto or same sex relationship.

It is also not only the parents of a child who can make an application to the court. Grandparents or any other person concerned with the care of the child can make an application to the court for parenting orders. The paramount consideration for the court is determining what parenting arrangement is in the children's best interest. Set out below is a brief overview of the court process;

The Applicant files an Initiating Application (which sets out the parenting orders they want the court to make) together with a supporting Affidavit (statement). This is then served on the other party who then files a Response and supporting Affidavit in reply

When the matter comes before the court for the first time the judge will make directions about how the matter is to progress, for example whether the parties should engage in a Child Dispute Conference, whether an Independent Children's Lawyer should be appointed or whether the matter should be set down for an interim hearing.

Interim Hearing

An interim child custody hearing usually takes place within a few months after filing an Application with the court. The Judicial Officer reads the affidavits sworn by the parties, then the parties or their lawyers make submissions (arguments) about why the orders they are seeking are in the best interests of the children. This is done with specific reference to the factors set out in the Family Law Act. The judge will then make Interim (temporary) parenting orders that will be in place until a final hearing.

Family Report or Expert Report

The parties and children will attend upon a court appointed Family Consultant (who has a counselling and social work background) or an external Psychologist or Psychiatrist who interviews the family and prepares a detailed report for the court including recommendations about what final parenting orders they feel the court should make.

Final Hearing

It might take a year from the time an Application is filed before the final child custody hearing takes place. The Judge reads the parties' Affidavits, any Affidavits from other witnesses and the Family Report. Both parties and any other person who has sworn an Affidavit may also be cross examined. The parties or their lawyers then make submissions (arguments) about why the orders they are seeking are in the best interests of the children. After considering and weighing up all of this evidence, the judge then makes final parenting orders that are final and binding on both parties.

CHILD SUPPORT



According to the Child Support (Assessment) Act 1989 (the Assessment Act), the primary care giver of a child can make a claim for the other parent to financially support the child.

Most children of separated families will be covered by the Child Support (Assessment) Act 1989. The Act applies to all separated parents with dependent children regardless of the nature or length of their relationship. Parents have up to 13 weeks to privately work out child support arrangements and apply for child support after they separate, to avoid a reduction in their Family Tax Benefit payments. Parents can opt out of the Scheme and agree on their own private arrangements about how much child support should be paid from one party to the other (through a Child Support Agreement).



LEGAL TIP #5

What is Child Support?

Child support is money paid by one parent to the other parent in order to assist that parent with the financial costs of raising a child until they are 18 years old. When determining the amount a parent would be required to pay, the Agency uses an administrative formula that considers the parent's income (including any contribution from Family Tax Benefits), the parent's ability to pay, the financial needs of the child according to its age, the amount of support needed by the other parent and the level of care each parent provides (in percentage terms) etc.



What are the main categories of Child Support payment?

- **Periodic payment:** child support payments of a regular amount made on a recurring basis
- **Non-periodic payment:** where a child support agreement provides the annual rate of child support payable under the administrative assessment, which shall represent the total value of the annual child support payable under the agreement (Sections 84(1)(d) and 84(6) of the Assessment Act).
- **Lump sum provision:** a payment which is made by one parent to the other parent as a 'credit balance' to be used to meet the ongoing liabilities.

Which expenses are legitimate for calculating Child Support?

Child support in Australia can include the following:

- **Childcare:** day care service fees, babysitter costs etc
- **Education:** uniform, textbooks, materials costs etc
- **Medical expenses:** optical and dental fees etc
- **Housing expenses:** mortgage repayments, insurance, rent or repairs
- **Transportation:** daily costs for commuting and where there is a need for a vehicle, the cost of insurance, maintenance, repairs, fuel and other related expenses
- **Entertainment and extra-curricular activities:** sporting, cultural needs, outings and trips, access to games etc

Some of the above may be deemed as "prescribed expenses" made payable directly to third parties.



How are Child Support payments calculated?



STEP 1

Working out each parent's child support income for the child for a day

STEP 2

Working out the parents' combined child support income for the child for a day

STEP 3

Working out each parent's income percentage for the child for a day

STEP 4

Working out each parent's percentage of care for the child for a day

STEP 5

Working out each parent's cost percentage for the child for a day

STEP 6

Working out each parent's child support percentage for the child for a day

STEP 7

Working out the costs of the child for a day

STEP 8

If a parent has a positive child support percentage under step 6, the annual rate of child support payable by the parent for the child for a day is worked out using the following formula:

(parent's child support percentage for the child for a day) X (costs for the child for a day)

How long is a Child Support Formula Assessment Vaild?

Once an assessment is made, it continues to remain valid unless:

- The assessment is varied by a departure order from a court
- The assessment is varied by a re-assessment decision based on either parent filing a compelling case to prove a substantial change in the circumstances of the parent and/or the child
- The assessment is varied by the provisions of a subsequent Child Support Agreement signed between the parents.

If a parent is unhappy with the Agency's assessment, they have 28 days to file an objection.



For how long will Child Support Continue?



Child support remains enforceable from the date of assessment unless one of the following situations occur:

- The child turns 18 years of age (If a child becomes financially independent before reaching the age of 18, the child support payments will not automatically cease. This however can be taken into account for applying for a re-assessment based on the child's own financial stability and independence.)
- The recipient parent chooses to stop receiving child support payments
- The child passes away
- The child gets married
- The child is legally adopted
- The child is no longer resident in Australia
- The paying parent migrates to a country not included in an International Child Support Agreement
- Both parents no longer care for the child
- The separated parents reunite and stay partners for the next 6 months
- If the paying parent passes away

The Cost of Divorce:

SPOUSAL MAINTENANCE

What is Spousal Maintenance?

The financial support provided by one party to the other after the relationship has ended, irrespective of whether you have been married or in a de facto relationship, is known as 'spousal maintenance'.

Under the Family Law Act 1975 (the Act), both parties have a duty to support and maintain each other, even after they have separated or divorced. Spousal maintenance is not automatic, and it is often considered and/or included as part of an overall settlement of the financial matters, or it can be dealt with separately. Spousal maintenance can be paid under a Court Order or by an agreement between the parties, and either the Family Court or Federal Circuit Court can deal with spousal maintenance matters.

What does the court consider?

The Court will weigh up the respective financial positions of both parties in determining a spousal maintenance application.

In particular the Court will consider factors such as the following:

- a. Age and state of health of the parties;
- b. Income, property, financial resources and debt;
- c. Ability of the party to work;
- d. Suitable standard of living; and
- e. If the marriage has affected either party's ability to earn an income.
- f. If either party has the primary care of any children of the marriage or de facto relationship (under 18 years of age or adult children who are disabled).

What is the time limit for applying spousal maintenance?

Spousal maintenance is not automatic. For married couples the party seeking to be paid spousal maintenance must make an application to the court within 12 months of the date of their divorce. For de facto couples an application must be made within 2 years of the date of the breakdown of their de facto relationship. If parties do not apply within these prescribed time limits, then they will need to seek permission from the Court to make an application, and there is no guarantee that this permission will be granted.



The Cost of Divorce:

PROPERTY SETTLEMENT PROCEDURE

Do you want to do it the Easy Way or the Hard Way?

There are two alternatives, you and your ex can settle your property by consent or by going to court.

1. Settling by consent has two variations of its own. Basically, a couple can make an agreement between themselves as to how assets and debts should be divided. This must then be formalized in one of two ways: either through a Binding Financial Agreement or Consent Orders. Most separated couples find that reaching an agreement between themselves saves time, money and stress.

2. Unfortunately, however, this is not always possible. If no agreement can be reached an application for a property orders must be filed at either the Family Court or the Federal Circuit Court.

See below an overview of the procedure should you reach a property settlement agreement between yourselves or you proceed to court (the graph will be explained in more details in the following pages).

Are you going to reach a mutual agreement outside the Court or participate in various pre-action procedures?

Reach a mutual agreement outside the Court.

Reach a mutual agreement through the Court.

Binding Financial Agreements

Consent Orders

Family Court/Federal Circuit Court

Your ex-partner and you may reach a mutual agreement based on the existing binding financial agreement if you have one.

You and your ex partner can reach an agreement by consent without the need to engage in costly and lengthy court proceedings.

The general principles that the Court considers while deciding a financial dispute after the breakdown of a marriage or a de facto relationship are based upon the following:

1. Assets, debts and their values
2. Direct financial contribution to a marriage or defacto relationship such as wage
3. Indirect financial contributions such as gifts and inheritances from families
4. Non-financial contributions to a marriage or a de facto relationship such as childcare and homemaking
5. Future requirements like age, health, financial resources and earning capacity.

What happens...

When you agree on the Division of Your Property



Binding Financial Agreements

Couples may actually enter into a Binding Financial Agreement before getting married ("a prenuptial agreement"), during a marriage, as well as after separation. In any case, the hallmark of such an agreement is that, to be legally binding, it must be based on independent legal advice received by each party and it must be signed by both parties. The assurance of full disclosure and fairness, to the extent that it exists, arises from the independence of the financial advice.

Consent Orders

Consent Orders are simply a written agreement that becomes legally binding when filed and approved by the court. Neither party needs to attend court.

The court must be satisfied, on its review, that the agreement is just and equitable. Consent Orders are the preferable method of settling a family law property matter by consent. As they are approved by the court they have that extra seal of enforceability that cannot be 100% guaranteed with a binding financial agreement.

Consent Orders are final and binding and are may only be set aside by the court in exceptional circumstances.

What happens...

When you can't agree on the Division of our Property



In this situation, the court essentially takes over the task that the couple cannot complete themselves. In doing so, the court will consider four factors, which are essentially the same four that would have been considered by independent legal advisors to formulate an agreement by consent.

The four factors the court considers are as follows;

STEP 1 Assess the value of the parties' net matrimonial asset pool by determining the total value of all assets and superannuation owned by either or both parties and subtracting any liabilities.

STEP 2 Assess each party's respective contributions to the assets and liabilities, including non-financial contributions and contributions as a homemaker or parent.

STEP 3 Assess the future needs of each party based on factors including age, health, care of children of the relationship under 18 years, financial resources and capacity for employment, the standard of living that is reasonable under the circumstances and the financial implications of new relationships.

STEP 4 Assess the overarching practical implications of the contemplated division and assess whether it is just and equitable, which of course, implies that it may not always be an equal division.

Adjustments may be made in favour of either party at each of the above-listed stages depending on the finding of the court in respect of each stage.

OUR TEAM



Owen Hodge commenced providing legal services to the St George and Sutherland communities in 1951. Since then the firm has grown considerably, developing a reputation for quality legal services, value for money and a strong commitment. Today, Owen Hodge Lawyers provide expert legal services to a diverse range of individual and commercial clients across the Sydney metropolitan and surrounding areas with offices in Sydney and Hurstville.

We work to ensure that an experience with our firm is as positive as possible. Our objective is to be a leader amongst our peers by offering:

- Expertise in services offered and superior service delivery
- Constant improvement of human resource policies and practices
- Constant technology improvement and development
- Convenient office locations

We have a team of experienced family lawyers who have expertise in complicated property matters, parenting disputes, divorce and financial agreements (pre-nuptial, post-nuptial and de facto matters). We also have considerable knowledge and experience in drafting binding child support agreements and binding financial agreements dealing with both the division of matrimonial property and/or spouse maintenance. If you would like to speak to one of our family law experts, please contact us today at 1800 770 780 or contact us via email at ohl@owenhodge.com.au.

We are client focused and believe in obtaining the best possible outcome at minimum cost. We can assist you with negotiations and, if necessary, court proceedings in relation to any family law issue.

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INDIVIDUAL AND COMMERCIAL LAW SPECIALISTS

Enhancing the lives of our clients by providing for their financial and legal requirements in the acquisition of wealth, protection and management of assets and the transfer of wealth throughout generations.

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VISIT

Sydney Office

Level 3, 171 Clarence Street, Sydney NSW 2000

Hurstville Office

Level 2, 12-14 Ormonde Parade, Hurstville nsw 2220