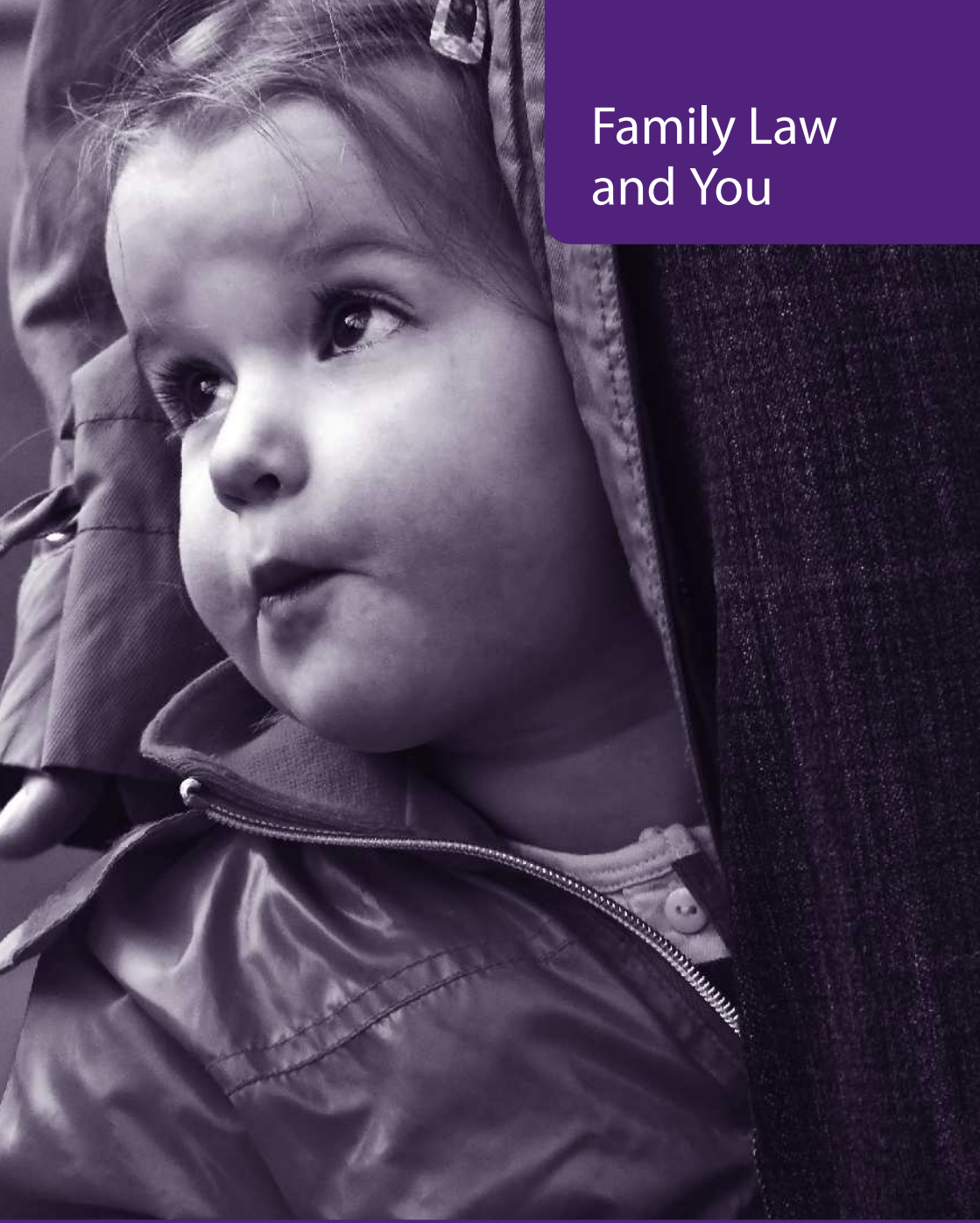
Family Law and You



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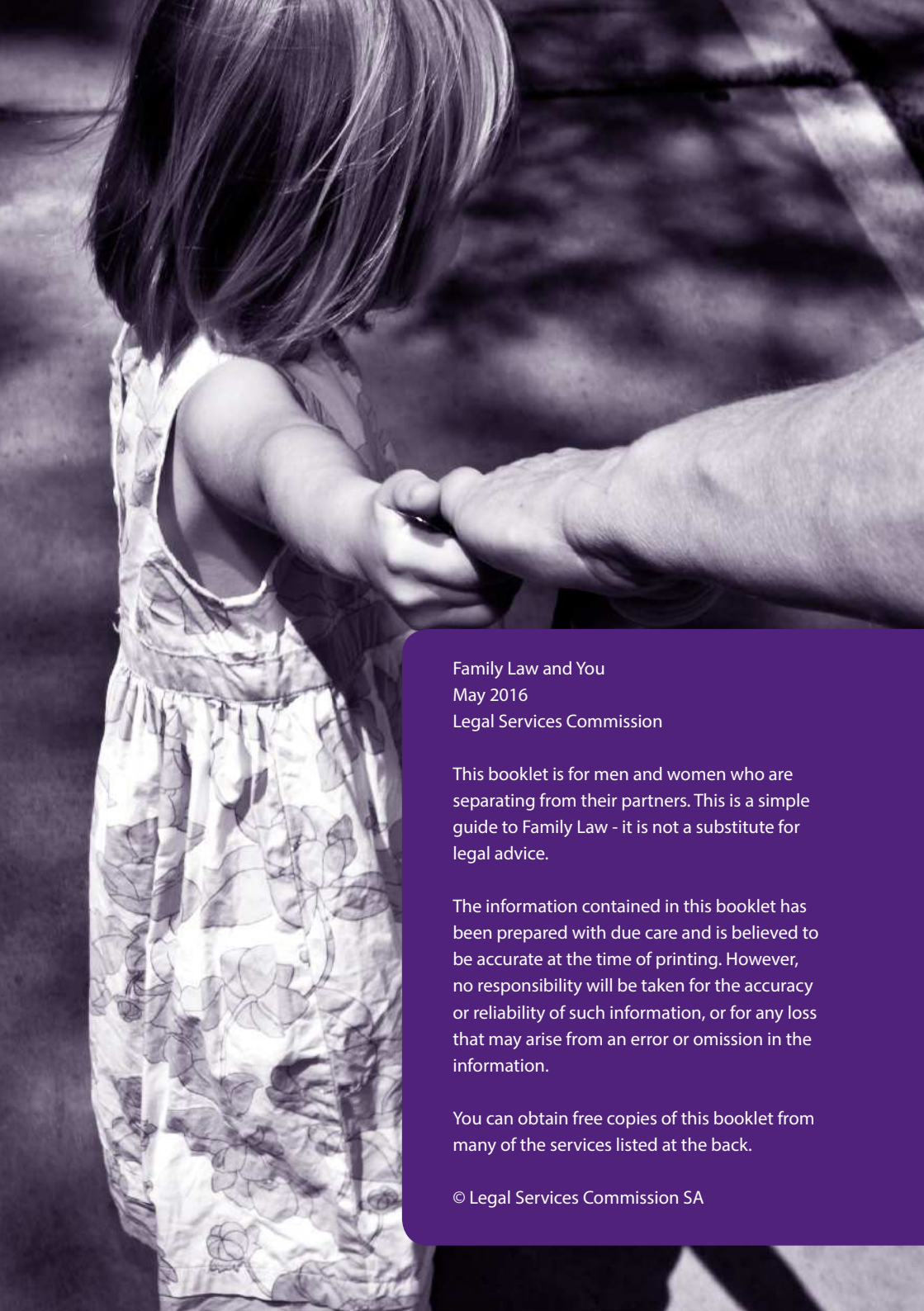


Family Law and You
May 2016
Legal Services Commission

This booklet is for men and women who are separating from their partners. This is a simple guide to Family Law - it is not a substitute for legal advice.

The information contained in this booklet has been prepared with due care and is believed to be accurate at the time of printing. However, no responsibility will be taken for the accuracy or reliability of such information, or for any loss that may arise from an error or omission in the information.

You can obtain free copies of this booklet from many of the services listed at the back.

FAMILY LAW AND YOU

The Family Law Act is the main law that deals with divorce, disputes about children and property matters. All children are covered by the Family Law Act, no matter where in Australia they live or who their parents are. The courts that can make decisions under the Family Law Act are federal courts called Family Law Courts. These are the Federal Circuit Court and the Family Court. South Australian courts are involved in matters not covered by the Family Law Act, such as some specific property disputes, family violence, changing names and wills. Child protection cases brought by Families SA are dealt with in the Youth Court.

This booklet explains family law basics and tells you what you have to do if you need to take legal action. In many cases, you will be faced with choices and you should get legal advice before deciding what to do. A lawyer can help you understand your legal rights and responsibilities, and explain how the law applies to your case. A lawyer can also help you reach an agreement with your former partner without having to go to court. For details of where to get further information and advice, see SERVICES on page 29.

FAMILY DISPUTE RESOLUTION

Most separated parents can work out arrangements for their children without going to court. All separating parents must must make a genuine effort to resolve problems by family dispute resolution, before applying for court orders about their children. Family dispute resolution can include counselling, mediation or arbitration.

The Family Law Courts will not generally accept an application for parenting orders unless a certificate from an accredited family dispute resolution practitioner is filed with the application. The certificate is a statement that the parties have not been able to resolve their dispute through family dispute resolution. It is important to note that this requirement may not apply to cases involving family violence, child abuse or urgency.

Family dispute resolution is conducted in an informal setting and is less expensive, time consuming and confrontational than going to court. The dispute resolution process is handled by an independent person who is skilled in dealing with family problems. They aim to help you and the other parent to work through your disagreement and try to find a solution to the dispute. As both parents are involved in reaching a solution, this improves the chances that the agreement will be long lasting.

Family dispute resolution practitioners do not give advice so it is important to get legal advice beforehand. Family dispute resolution works best when both sides feel safe and are able to negotiate equally. If there is a history of family violence or allegations of child abuse, neglect or abduction, it may not be appropriate to

attend family dispute resolution and you should seek legal advice. Please note that the court may exempt you from family dispute resolution in these situations.

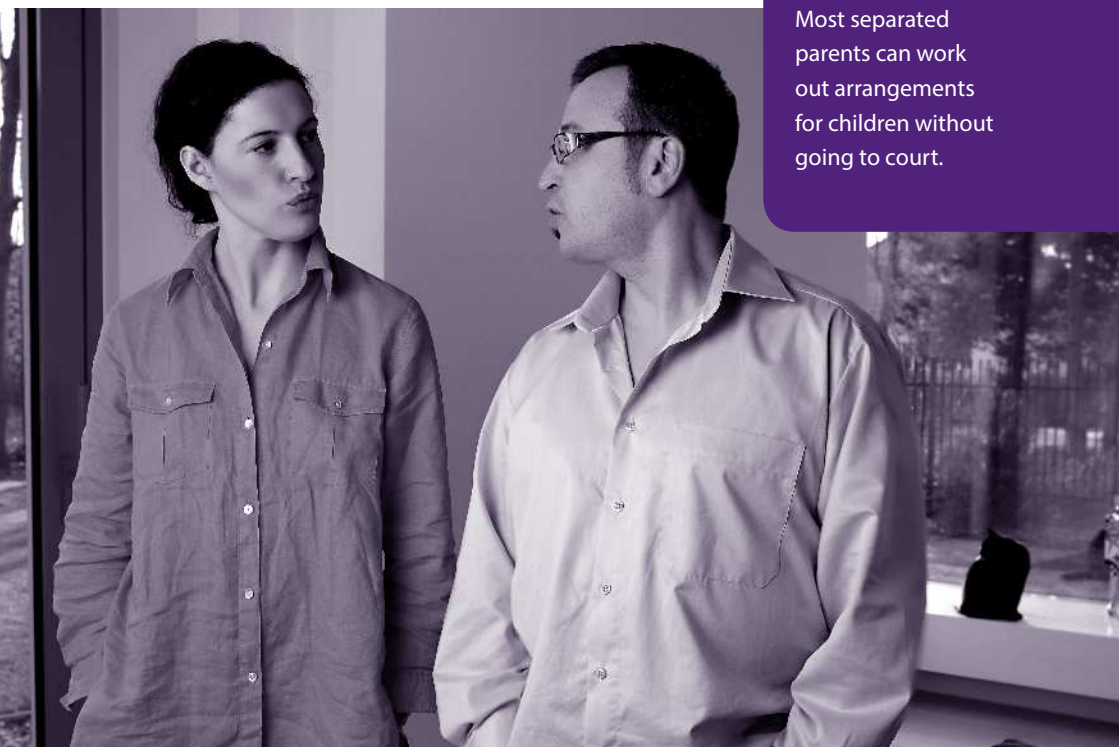
The Legal Services Commission provides family dispute resolution through its Family Law Conferencing service. To use this service, at least one parent must be eligible for legal aid. To find out more about Family Law Conferencing contact our Family Dispute Resolution Unit on tel: 8463 37360

Family counsellors also give advice and assistance to couples who are considering separation or who are finding it difficult to cope with separation.

A counsellor can help you to explore concerns you may have about your relationship and assist you to deal with separation issues and your children's needs. Counsellors can also help parents to resolve differences about parenting and negotiate contact arrangements for their children. You may see a counsellor separately or together with the other parent, whichever you prefer.

If you reach agreement, you can record the terms of your agreement in a Parenting Plan or apply to the Family Law Courts for Consent Orders.

Most separated parents can work out arrangements for children without going to court.



LAWYERS

The Family Law Act has an emphasis on resolving family problems without going to court. However, when separating, it is still wise to seek legal advice so that you know what to expect when making decisions about children, child support, or property.

When seeing a lawyer you should:

- find out how much it will cost you
- ask about legal aid
- show your lawyer any important documents such as letters from your former partner or court orders
- be sure you do not sign anything or agree to anything that you do not understand
- ask your lawyer to explain all your options and the risks involved in any legal action
- keep a record of what you agreed to.

Your lawyer should not commit you to anything that you have not discussed or agreed to. If you are not satisfied with your lawyer, you can change to another lawyer, but you should not do this without a good reason. Apart from having to start afresh and familiarise a new lawyer with your case, your existing lawyer may decline to release your file until you have paid any outstanding fees.

Legal aid

Legal aid may be available for disputes about children and for family conferencing. In some limited cases, legal aid may be available for property disputes.

You can apply for legal aid directly to the Legal Services Commission, or through a private lawyer. The Legal Services Commission will decide if you are eligible by assessing your financial situation. Your case must also have merit. This means that what you are asking for is reasonable and if you went to court, your case would have a reasonable chance of success.

Legal aid is not free. If you get legal aid, you will have to pay a contribution towards your legal costs (minimum of $20). The amount you have to pay depends on your financial circumstances.

If you own real estate but have no cash, you may have to repay your legal aid costs when you sell your property or when your financial position changes, even if this is many years later.

Even if you do not qualify for legal aid, you can still get free legal advice from the Legal Services Commission.

Representing yourself in court

You have the right to take your case to court by yourself. You should still get legal advice beforehand as you may be at a disadvantage if your former partner has a lawyer or if the case is complex.

If you are not eligible for legal aid and you cannot afford to pay a private lawyer, you may need to consider representing yourself. If you are representing yourself, it is important that you know something about the relevant law and court rules. Court staff can help you with questions about court forms and court processes, but cannot give you legal advice.

Your case, or story, must be presented to the court in writing, using the correct forms and affidavits. These must be prepared properly and this will require some skill and knowledge. You will need to know the contents of documents from the other side and how to challenge incorrect material. If your matter goes all the way to trial, you will also need to know the court rules about examination (questioning) and cross-examination of witnesses. The court is limited in the assistance it can provide you if you are representing yourself.

Duty Lawyer Service

The Legal Services Commission has a Duty Lawyer Service at the Family Law Courts for people who do not have a lawyer. The Duty Lawyer can:

- provide legal advice and referrals
- help people with adjournments (getting the hearing postponed)
- represent clients in cases where there are negotiations for consent orders (court orders that the parties agree on).

The Duty Lawyer cannot help you to complete complex documents or provide ongoing representation.

FAMILY LAW COURTS

Both the Family Court and the Federal Circuit Court are 'family law courts' and have the power to deal with Family Law Act matters. The forms you use and the processes you must follow depend on which court you apply to.

Both Family Law Courts deal with:

- all orders relating to children including where a child lives, who a child spends time with and communicates with, child support or other issues that might arise regarding a child's welfare (e.g. education, religion, medical matters)
- enforcement and contravention of court orders
- location and recovery orders as well as warrants for the apprehension or detention of a child
- determination of parentage
- applications for spousal maintenance
- property disputes between married and unmarried persons, including de facto and same sex relationships.

The views of the children can be taken into account depending on their maturity and level of understanding, as well as the reasons for the children's views.

Almost all family law cases start in the Federal Circuit Court. The Federal Circuit Court deals with less complex family law matters, child support, and all divorce applications.

The Federal Circuit Court can transfer complex matters to the Family Court. The Family Court deals with the most difficult and complex cases. There are also a few types of cases that are only heard in the Family Court, for example, international child abduction and nullity of marriage.

You should seek legal advice before making an application to the Family Court.

Family law cases begin with an application to the court. Fees are charged for lodging most applications but if you are facing financial hardship, you may be able to apply to have the fee reduced or waived. For some matters, such as an uncomplicated divorce, most people are capable of filling in the forms themselves. If there is a dispute about children or property, then it may be better to have a lawyer help with your application to the court.

FAMILY LAW TERMS

The terms residence and contact (previously known as custody and access) are no longer used and have been replaced with new terms reflecting a greater emphasis on shared parenting wherever possible.

The term 'lives with' has replaced residence and custody. Similarly, the terms 'spends time with' and 'communicates with' have replaced contact and access.

In other changes, the phrase 'long term care, welfare and development' has been replaced with 'major long term issues', a Child Representative is now called an Independent Children's Lawyer, and the 'child's wishes' are now expressed as the 'child's views'.

CHILDREN

The Family Law Act refers to parents' duties and responsibilities and the best interests of the child. It says that children generally have a right to know and be cared for by both their parents and to spend regular time with other people significant to their care, welfare and development, such as grandparents. The court may consider what the parents want, but is most concerned about the children themselves and ensuring that the best interests of the children are met. The views of the children can be taken into account depending on their maturity and level of understanding, as well as the reasons for the children's views. In certain circumstances, the court can order the appointment of an Independent Children's Lawyer to represent the interests of the children and help the court determine what is best for them. Children are not allowed inside the court room.

What happens to children after separation?

Like adults, children react in different ways to separation or divorce. How they react often depends on the child's age, temperament and the level of cooperation or conflict between the parents. For children up to 5 years old, family breakdown can be difficult to understand. Older children can also experience a time of confusion and uncertainty even though they are more able to understand what is happening.

The way parents or other family members react and adjust to the separation makes a big difference to how children feel. Continued fighting can hurt children more than the separation itself. Children need the continuing care and support of both parents. They may worry less if you can agree about what is going to happen and explain why to them. However, you should be careful not to discuss the dispute with the other parent or involve the children in adult matters.

What you need to consider

When making arrangements for children, you will need to consider:

- whether it is reasonably practical and in the best interests of the children to spend equal time or substantial and significant time with each parent (substantial and significant time can include time during weekends, school holidays and other days)
- how their time will be spent with other significant people in their lives, such as grandparents and other relatives
- who will look after them after school
- where they will spend holidays
- any other things such as choice of school, sport, health care, or religious matters, and
- the children's cultural background, and how they will continue to be involved in that culture.

Every family is different, so the arrangements that work for your family may be different from other families. Try to make arrangements that will work the best for your children.

PARENTING PLANS

A parenting plan is a written agreement that sets out parenting arrangements for children. All separated parents could consider preparing a parenting plan. Like any court order, any decision made in developing a parenting plan should be made in the best interests of the children. The plan can cover where your children will live, who they will spend time with, their schooling or specific issues such as holidays, medical and religious matters. The advantage of a parenting plan is that it can help you and the other parent to be clear about any agreed arrangements for your children. You can get help to prepare a parenting plan from a family dispute resolution practitioner, see SERVICES page 29.

Can a parenting plan be changed?

A parenting plan should be flexible enough to cover the changing needs of children and parents, and include a way of resolving disputes that may arise. A new parenting plan can be changed at any time to suit your needs, provided both parents agree. If you want to change a parenting plan and the other parent does not agree, you may wish to attend family dispute resolution to resolve the matter.

If you have attempted family dispute resolution and still cannot reach agreement, you can make an application for court orders. However, you should seek legal advice before doing so.

Is a parenting plan legally binding?

A parenting plan is not a legally enforceable agreement. It is only a record of what has been agreed to and is different to a parenting order made by a court. However, a parenting order made by the court may take into account a parenting plan that you have previously agreed to. If you want to make your parenting plan legally enforceable, you must apply to a court for consent orders.

If a court approves the consent orders they will have the same legal effect as any other order made by the court. The court must be satisfied that the orders are fair and in the best interests of the child. Consent order kits can be obtained for free from the Family Law Courts Registry or online at www.familylawcourts.gov.au.

Consent orders

A consent order is a written agreement between the parties that is approved by a court. It has the same legal force as any court order. A consent order can cover parenting arrangements for children as well as financial arrangements such as child support, property and spousal maintenance (between parents who have separated).

Both sides should seek independent legal advice before they sign their written agreement (called 'consent minutes'). If you do not have legal aid, you may have to pay a private lawyer to witness this agreement.

PARENTING ORDERS

All court orders about children are called 'parenting orders'. Any person concerned with the care, welfare or development of a child can apply for parenting orders. Parenting orders can specify people other than parents who are to spend time with and communicate with the child, including grandparents and other relatives.

The court can put special conditions in an order regarding where and when time is spent with the child. For example, it can say where the handover of the children must take place or it can make the time spent supervised if it thinks it is necessary.

While a court can order that a parent be allowed to spend time with a child, it cannot make a parent do so. Other orders can be made giving one parent responsibility for aspects of the care, welfare and development of the child, such as schooling and medical treatment.

How does the court decide?

When a court is making a parenting order, the Family Law Act requires it to regard the best interests of the child as the most important consideration. The Family Law Act says that:

- both parents are responsible for the care and welfare of their children until the children reach 18, and
- arrangements which involve shared responsibilities and cooperation between the parents are in the best interests of the child.

In deciding what is in the best interest of a child, the primary considerations of the family law courts are:

- the benefit to children of meaningful relationships with both parents, and
- the need to protect children from physical or psychological harm and from being subjected or exposed to abuse, neglect or family violence.

In applying these two considerations, the court must give greater weight to the need to protect the children from physical or psychological harm and from being subjected or exposed to abuse, neglect or family violence. In addition, it will also consider such things as:

- the views of the child, depending on the maturity and level of understanding of the child
- the child's relationship with each parent and other people, including grandparents and other relatives
- the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent
- the likely effect on the child of changed circumstances, including separation from a parent or person with whom the child has been living, including a grandparent or other relatives
- the practical difficulty and expense of a child spending time with and communicating with a parent
- each parent's ability (and that of any other person) to provide for the child's needs
- the maturity, sex, lifestyle and background of the child and of the child's parents, and any other characteristics of the child that the court thinks are relevant
- the right of an Aboriginal or Torres Strait Islander child to enjoy his or her culture and the impact a proposed parenting order may have on that right
- the attitude of each parent to the child and to the responsibilities of parenthood
- any family violence involving the child or a member of the child's family
- any family violence order that applies to the child or a member of the child's family
- whether it would be preferable to make the order that would be least likely to lead to further court applications and hearings in relation to the child, and
- any other fact or circumstance that the court thinks is relevant.

The court will not hear from the child directly, instead it will get information from other witnesses about the child's views. To help it decide what should be done, the court can ask a family consultant to prepare a family report. Sometimes, the court will order that an Independent

Children's Lawyer be appointed. This lawyer investigates what is in the child's best interests and explains it to the court.

Unless a court says that it is not in the child's best interests, both parents have equal shared parental responsibility. This means parents should consult each other about major issues such as schooling, health and religion. Equal shared parental responsibility is not the same as a child spending equal time with both parents. However, where a court order provides for equal shared parental responsibility then the court must consider whether the child should spend equal time with both parents. This depends on whether it is in the child's best interests and whether such an arrangement is reasonably practicable.

If equal time is not feasible in the particular circumstances, the court must then consider whether 'substantial and significant time' is in the child's best interests. This usually means that the time the child spends with a parent includes weekdays, weekends and holidays so that they are able to spend time together doing routine daily activities in addition to sporting events, holidays and special occasions.

In making an order, the behaviour of the parents before and after separation may be relevant. Because the court deals with every matter individually, no one can tell you exactly what the court will decide in your case. For this reason it is not much help to compare your case with others you may have heard about.

Applying for parenting orders

To apply to the court for parenting orders, you need to complete an application form and a supporting affidavit. The affidavit is your statement of what has happened and why you want the court to make the orders that you are asking for in your application. The Family Law Courts Registry can provide you with an instruction sheet about affidavits. After you have completed the application and affidavit, you need to get it witnessed by a Justice of the Peace (JP). There is usually a JP available at the court. There are strict rules about how you serve (officially deliver) documents. In most cases, copies of any application and supporting documents must be given to the other person directly.

What happens when you apply for a parenting order?

Initially, the Court will make interim (temporary) orders that will apply until final orders are made. After interim orders have been made, the Court will then put the case in the court list to prepare for trial and to determine if the case can settle.

If the matter is not capable of settlement, the Court will list the case for a final hearing (called a trial) before a Judge who will decide what is best for your children. It can take a long time to proceed from interim orders to the commencement of a trial. If your case is urgent and there are special circumstances, the court may agree to put your case before others on the waiting list.

See www.familylawcourts.gov.au for more information about court procedures.

What orders can you apply for?

A parenting order may deal with one or more of the following:

- the allocation of parental responsibility for a child and, if two or more people are to share parental responsibility for a child, how they are to consult with one another about decisions concerning the child
- the person or people with whom a child is to live
- the time a child is to spend with another person or other persons
- how the child will communicate with other persons
- child maintenance (for those children not covered by the Child Support Scheme)
- the steps to be taken before an application is made to a court for a change to the order
- the process to be used for resolving disputes about the terms or operation of the order, and
- any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

Relocation of children

Even if there is no court order in place, a parent should get legal advice before moving with a child to another region or State without the agreement of the other parent. If it is in the best interests of the child to remain where they are, the court has the power to order that a child not be removed. If a parent has already removed the child, the court can order that the child be returned.

Complying with orders about children

Court orders are not optional. You must take all reasonable steps to follow an order. For example, if there is a court order that your child spends time with the other parent, you must do everything you can to encourage the child to spend time with the other parent. If someone is not following an order, you should get legal advice about your options.

A court can only penalise someone for breaching a parenting order if another person makes a contravention application alleging the person is not complying with the order. If the parenting order is more than 12 months old, then the person alleging the contravention must first attempt to resolve the matter through family dispute resolution (unless exempt for other reasons). If a court finds a person has breached a parenting order without reasonable excuse, it may impose a penalty. Note that the court will consider whether the excuse for a contravention is reasonable according to the Family Law Act. Depending on the particulars of the case and the type of contravention, a court has the power to:

- order attendance at a post separation parenting program
- compensate for time lost with a child as a result of the contravention
- require the person to enter into a bond
- order the person to pay all or some of the legal costs of the other parties
- order that the person pay compensation for reasonable expenses lost as a result of the contravention
- require the person to participate in community service
- order that a fine be paid
- order imprisonment.

Family Consultants

A court may at any time order the parents and children to see a Family Consultant (a court counsellor). Family consultants are psychologists or social workers who specialise in child and family issues after separation. Communications with a family consultant are not confidential and may be reported back to the court.

Family consultants can:

- help you resolve your dispute
- tell the court about your case
- write a report to the court about your family, and
- advise the court about various family services.

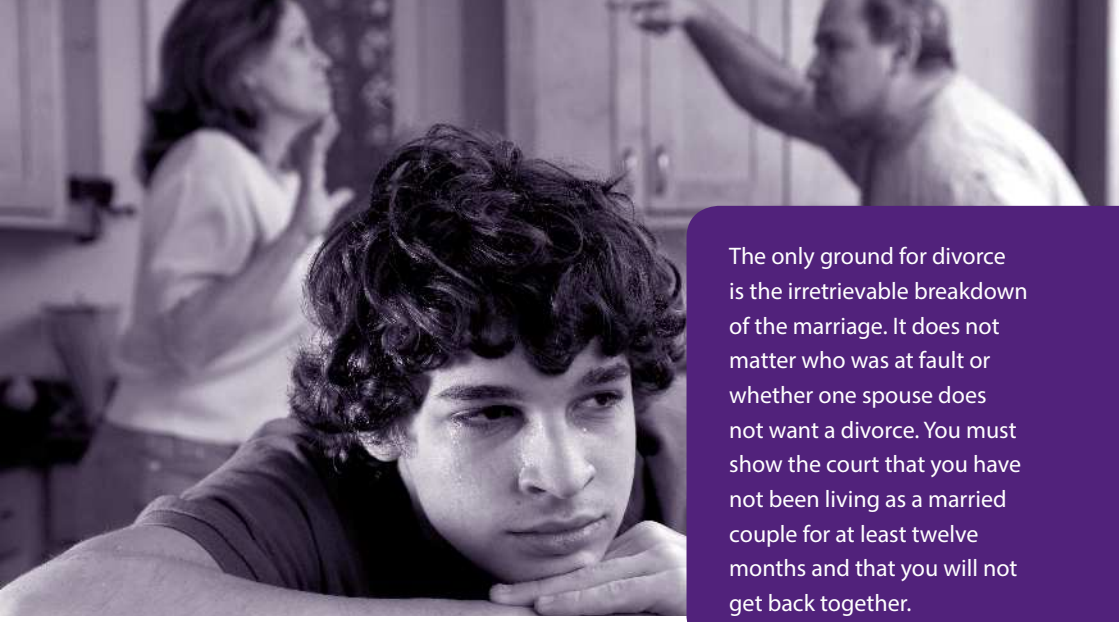
SEPARATION

A wife and husband are considered to be separated when they are leading separate lives. There are no formal procedures to show that you are separated, no forms to fill in and nobody that you have to notify. It is possible to separate, have one attempt at reconciliation which lasts less than three months, separate again, and still apply for divorce if the total period of separation adds up to twelve months.

Regardless of whose name is on the title to the family home, both spouses are entitled to live there. If there is a dispute, you cannot force your spouse to leave without a court order. If the situation is unpleasant you may prefer to leave the home, but keep in mind the importance of maintaining a relationship with your children. The court is reluctant to interrupt the children's usual living arrangements and if a long time passes without you seeing the children this may affect any application you later make about who the children should live with or spend time with. If you find yourself in this situation, seek legal advice urgently.

Separation under one roof

A married couple can be separated while living in the same house, but it must be shown that the marriage relationship has irretrievably broken down. You are not usually considered to have separated if you share the usual activities of marriage such as sleeping together, shopping and eating meals together, entertaining friends, going out together with your children, or sharing bank accounts.



The only ground for divorce is the irretrievable breakdown of the marriage. It does not matter who was at fault or whether one spouse does not want a divorce. You must show the court that you have not been living as a married couple for at least twelve months and that you will not get back together.

Spouses intending to live separately under one roof should make sure that others know about it from the beginning of the separation, as the court normally requires evidence from a friend or relative that there was a separation. There must also be good reasons why you remained together in the same house, such as caring for children or not having enough money to live separately.

DIVORCE

Divorce is the legal end of a marriage. The only ground for divorce is the irretrievable breakdown of the marriage. It does not matter who was at fault or whether one spouse does not want a divorce. You must show the court that you have not been living as a married couple for at least twelve months and that you will not get back together. The only way to stop a divorce is to show that this has not occurred. A divorce does not deal with issues such as who the children live with, child support or the division of property.

People married less than two years cannot apply for divorce unless they first get a certificate from a counsellor, stating they have attended marriage counselling and that reconciliation is unlikely, or they have other special reasons to obtain a divorce.

Applying for a divorce

You do not need a lawyer to apply for a divorce. Most people apply for a divorce simply by filling in an application form available from the Family Law Courts Registry or online at www.divorce.gov.au. Either you or your spouse, or both of you together, can make an application for a divorce. Divorce applications are made in the Federal Circuit Court with the filing fee of $845. If you cannot afford to pay the fee without financial hardship, you can apply for the fee to be reduced to $280.

The Legal Services Commission can offer advice and help you fill in the divorce forms. If there is a difficulty writing English or some other complication you may be able to get legal aid for a lawyer to make

the divorce application. If you do not know the whereabouts of your former spouse it is still possible to get a divorce but the application is more complicated and legal advice should be sought.

The divorce papers include questions about the care of any children under 18 (note: this can include any child who was living with both of you at the time of separation). The forms ask about where the children live, their time and communication with each of you, the financial support provided by each of you, their health and their education. Although the court has to approve the arrangements about the children in order to grant a divorce, they do not become orders of the court and are not binding on you.

The person applying for the divorce (or his or her lawyer) must normally appear at the court hearing if there are children under 18 years. Your spouse does not have to attend unless he or she wants to argue against a divorce. If there are no children under 18 years of age you can state on the form that you do not want to attend court. However you must attend if your spouse wants to oppose the divorce. You can take a friend or relative with you but children are not allowed inside the court room. Family Law Courts have a limited child minding service for parents attending court, which must be booked in advance.

The divorce order becomes final one month after the court makes the order. From that time you are free to remarry. The court sends out divorce order certificates after the divorce becomes final.

CHILD SUPPORT

The law says that both parents (including same sex parents) have a duty to provide financial support for their children. How much should be paid depends on the financial circumstances of each parent, the level of care each parent provides for the children, the ages of the children and whether either parent supports other children (not including step-children).

Non-parent carers of children (such as grandparents, or other carers) can also apply to receive child support from the parents for the children.

The Department of Human Services – Child Support (formerly known as the Child Support Agency) can be asked to collect and transfer periodic payments of child support, or the payments can be made by private arrangement between the parties.

Parentage

Because child support can only be claimed from a person who is a parent of a child, disputes can arise about parentage. DNA parentage testing can be used to resolve disputes in some cases. Legal advice should be sought promptly about parentage issues.

Child Support Assessment

Most child support assessments are calculated by the Department of Human Services – Child Support according to a formula. To create a formula assessment,

it is important that the Department has accurate information about the parents' taxable incomes, the amount of care each parent provides for the children, and whether either parent supports other children. Alternatively, the amount of child support to be paid can be set out in a child support agreement which has been worked out between the parents.

Child Support Formula

The child support formula takes into account the:

- parents' incomes (based on taxable incomes)
- costs of children (based on the combined income of the parents)
- level of care provided by each parent.

Parents' incomes are important because, when added together, they are used to work out the theoretical costs of children, in a family with that level of income. A 'Costs of Children' table has been created using Australian research, which also adjusts the costs for the number and ages of the children.

The costs of the children are shared between the parents:

a) in proportion to their individual incomes, and

b) after taking into account the amount of care each parent provides for the children.

Level of care

The amount of care that is provided for a child is an important part of the formula calculations. If the level of care provided for the child amounts to 14% (or more) of the time, some of the costs of the child are taken to be met through care. The amount of care is converted to a cost percentage which forms part of the formula calculations – see table below.

Nights per year and percentage of costs met through care:

Nights per year		
0-51	Less than Regular Care	= 0%
52-127	Regular Care	= 24%
128-237	Shared Care	= 25-75%
238-313	Primary Care	= 76%
314-365	Greater than Primary Care	= 100%

DHS–Child Support should be informed of any changes in care arrangements as soon as possible. Care is usually calculated using the number of nights of care, but a request can be made to calculate care based on hours. Disputes can arise about the level of care used in the assessment. Legal advice can be obtained from the Child Support Unit on 8111 5576.

How to change a Child Support Formula Assessment

There are different ways to change a formula assessment through DHS – Child Support.

Estimate of Income

If the income used in the assessment calculation has fallen by 15% or more, a parent can provide an up-to-date estimate of his or her income to the Department. An Estimate of Income only affects future payments; it cannot operate retrospectively.

However, conditions apply and penalties can be added if a person significantly underestimates their income. Caution should be exercised in using this remedy.

Changing your Assessment in Special Circumstances

Either parent can apply to change the assessment if they believe that special circumstances exist to justify a change. An application to change an assessment must be based on particular grounds. The most common reasons for changing an assessment relate to the incomes of the parents, private school fees, and costs associated with special needs of children. Changes can be made to past or future assessments, but retrospective changes are limited to the 18 months prior to the application being made. If a change is required to an assessment which is outside the 18 month limit, a court application is required. A court can grant leave (permission) to change an assessment up to 7 years in the past.

For legal advice about changing a child support assessment, contact the Child Support Help Line on 8111 5576.

Child Support Agreements

As an alternative to the child support formula, some parents are able to reach an agreement about child support payments. Child support agreements can include periodic payments, in-kind payments or lump sum payments, although only periodic payments can be collected by DHS-Child Support. The use of coercion or threats to secure an agreement can invalidate the agreement. Be sure to get legal advice before signing a child support agreement.

The law provides for two types of child support agreements -

Limited Child Support Agreements

These agreements must be in writing, signed by both parties, and provide for at least as much child support as would be payable under a child support formula assessment. Limited Agreements can be terminated by either party after 3 years (or sooner if certain circumstances are met). They can also be terminated by agreement or set aside by court order.

Binding Child Support Agreements

These agreements can be for less than, or more than, the amount payable under a child support formula assessment. Binding Child Support Agreements can also include lump sum payments, but special requirements apply. Each parent must obtain independent legal advice and the agreement must include certificates from the lawyers stating that advice has been given about the effect of the agreement on the rights of the individuals, and the advantages and disadvantages of entering the agreement.

In order to provide this advice, a lawyer would need to obtain information about the financial position of both parents, and have a sound knowledge of child support law.

Parties should also be aware that if a Binding Child Support Agreement provides for less child support than the amount

payable under a formula assessment, the amount of Family Tax Benefit (A) will still be paid at the rate payable under the formula assessment (not the amount provided for in the agreement).

Binding Child Support Agreements can only be ended by a further Binding Child Support Agreement or, in exceptional circumstances, by a court order.

Adult Children (over 18 years)

A child support assessment can be extended to the end of the school year if the child is attending secondary school when s/he turns 18. This request must be made to DHS–Child Support before the child turns 18. Failure to take this step can result in a reduction in the payment of Family Tax Benefit (A) for the child.

Adult Child Maintenance (over 18 years)

When the child support assessment ends, a court can order that maintenance continue to be paid for adult children if they are unable to fully support themselves because:
i) they are completing their education, or
ii) they have a disability.

Legal advice about Adult Child Maintenance can be obtained from the Child Support Help Line at the Legal Services Commission (8111 5576).

Collection and enforcement

DHS Collection: DHS–Child Support can collect periodic payments of child support payable under a child support assessment or a child support agreement. Court orders for adult child maintenance or spouse maintenance can also be registered for collection by the Department.

The Department has broad powers to collect child support debts including collecting from wages, intercepting tax refunds and collecting money from bank accounts. If payments are not made on time and in full, late payment penalties can be charged. Parties can also take action to personally recover an unpaid child support debt.

Private Collection: Parents can make their own private arrangements for the payment of child support if they can agree. However, private collection is only recommended in cases where the payer is likely to pay and where the child support assessments are based on reliable incomes that are not likely to change in the future. In private collection cases, Centrelink will assume that the child support amount is being paid/received in full when calculating FTB(A) entitlements. If changes are made to the assessment retrospectively, payees may have to repay FTB(A).

Non-Agency Payments

If the payment is collected by DHS–Child Support, a paying parent can seek credit for payments made to a third party, or other payments that were made in lieu of child support payments. Many payments can only be credited if the receiving parent agrees that the payment was intended to

The Child Support Help Line can give free legal advice about all child support and maintenance problems
8111 5576

be treated as a child support payment. If the payee does not agree, there are some payments that can still be credited as child support. These include some educational expenses, essential medical and dental treatment, and payments for the payee's accommodation or vehicle expenses. They are called Prescribed Non-Agency Payments and can only be credited if the case is collected by DHS–Child Support and the paying parent has less than regular care (14%) of the child.

Centrelink and Child Support

To be entitled to claim Family Tax Benefit (A) for a child, a person must be caring for the child for at least 35% of the time.

A parent who is eligible to receive more than the base rate of FTB(A) is required to obtain child support payments from the other parent. This is called 'taking reasonable maintenance action'. A parent is required to take this action within 13 weeks of separation, or from the date of birth of the child. In some circumstances a Centrelink social worker can grant an exemption from the need to take action to obtain child support from the other parent.

If a parent will still be receiving FTB(A) for the child when s/he turns 18, and the child is still attending secondary school, the parent is required to ask the Department to extend the child support assessment until the end of the school year. Failure to take this action may result in the FTB(A) being reduced to the base rate.

Entitlement to FTB(A) is calculated for each child and is influenced by family income

and child support payments, as well as the amount of care provided for the child. You can talk to Centrelink about how your FTB(A) is calculated and paid.

Court Orders for Maintenance

Orders and agreements can be made under the Family Law Act for various types of maintenance payments, including maintenance for:

- adult children (over 18) who are studying or have a mental or physical disability
- children (under 18) who are living independently and applying for maintenance in their own right
- step-children
- spouses (spousal maintenance)
- some cases where either the payee or the payer is overseas.

This is a complex area and legal advice should be sought from the Child Support Unit on 81115576.

About the Child Support Unit

The Child Support Unit of the Legal Services Commission offers free legal advice and assistance in relation to all child support and maintenance issues. Initial advice is provided through the Child Support Help Line (8111 5576), and a follow-up appointment can be arranged where necessary.

The Child Support Unit can also be contacted by email at childsupportunit@lsc.sa.gov.au or by private message on www.facebook.com/ChildSupportUnitSA.

PROPERTY

If you and your former partner cannot agree on how to divide your property, then either of you can ask the court to make a property order. Before court action is commenced in the Family Court (as opposed to the Federal Circuit Court), you must have attempted a dispute resolution process and exchanged all documents relevant to the property in your possession, unless an exemption applies.

Property can include anything of financial value, including a house, land, money, superannuation, shares, cars, furniture, and small household items. Generally, it is not worth going to court over items which have only a small value.

Under the Family Law Act you may be entitled to share in the family home or other assets even if they are in your former partner's name and you have not paid any money towards them. The court will take into account your indirect financial contributions (such as paying bills), your contributions as a homemaker and parent, and your future needs.

An application for property division or settlement to the Family Law Courts may be made any time from separation but no later than 12 months after the divorce becomes final. For de facto and same sex couples, it is 2 years after the date of separation. A late application can only be made with special permission of the court.

The family home

If there is enough other property, the court may grant one person the family home, especially if she or he is looking after the children. However, if there is no other way of giving each person their fair share, such as one person buying the other out, the house must be sold. The transfer of real estate and motor vehicles between former partners following their separation should be exempt from stamp duty. You should seek legal advice about the documents required for a stamp duty exemption. If your name is not on the title of the family home it is important that you see a lawyer quickly in order to protect your fair share in case your former partner tries to sell or otherwise dispose of the home. A caveat (a notice of claim) can be placed on the title by anyone who has an interest in that real estate.

If you leave the family home it does not mean that you lose your entitlement to a fair share of the property. However, you should bear in mind that court proceedings are an expensive and time consuming way to recover property. It is important that you obtain, if possible, financial records such as tax returns, superannuation statements and bank records, to help with the division of assets. You can leave the family home and take your fair share of the household goods if it is likely to be difficult to obtain them later.

Superannuation

Superannuation is treated as property for the purposes of property settlement. You will need to gather accurate information about the value of your superannuation fund(s) and those of your former spouse. To do this you will need to complete the Superannuation Information Form and Declaration, available from the court. Superannuation funds usually charge fees to provide the information.

Any agreement, or court order, about superannuation can split the superannuation into separate policies or it can 'flag' part of the superannuation payment to go to another person when the policy becomes payable. Superannuation can be a major asset in the division of property and the law in this area is complex. Be sure to seek legal advice.

Reaching agreement

Wherever possible, people should attempt to reach an agreement about property settlement after separation. This saves the expense, delay and worry of a court case. However, you should at least seek legal advice before signing an agreement to check that the agreement is fair. Be certain that you understand your property rights and get legal advice (from a different lawyer than the one representing your former partner) before you sign any final documents.

If you reach an agreement with your former partner about dividing the property, you should record the agreement in a consent order approved by the court or in a certificated binding financial agreement. It is a good idea to have the agreement formally approved by the court as a consent order to prevent any future claims about property.

Binding financial agreements

You and your partner can make an agreement at any time on how your property and financial resources will be divided if you separate. These agreements are evidence of your intention at the time you signed the agreement, but they may not be relevant many years later and the court may not agree with what they say. One of these agreements can also be made after you have separated. Before entering into such an agreement, you should obtain independent legal advice about the content and effect of the agreement.

To be enforceable, agreements must be in writing and signed by both partners, and each partner must have had independent legal advice and each partner's lawyer must have signed the agreement to say this.

A court may set aside or vary an agreement in very limited circumstances, for example if there has not been full disclosure, or there has been fraud or duress, or there has been a significant change in circumstances relating to a child of the relationship such that hardship would be caused if the agreement was not set aside.

How the court decides

The court has very wide powers to divide the property in whatever way it thinks is fair. No two cases are the same and each person should get independent legal advice on their case from a lawyer who specialises in family law property. In determining property disputes, the court first identifies the net value of the combined assets. Then the court considers the contributions each person has made to the property and their future needs. Finally, the court's decision must be just and equitable. There is no rule that property should be equally divided according to a 50/50 formula. A person will not necessarily get half of everything, or be able to keep those things in her or his name that she or he paid for. It all depends on each person's contribution, their needs and what is just and equitable.

Contributions

The court looks at the history of the relationship and determines how much each person has contributed to buying, maintaining and improving the property. Direct contributions include:

- money contributed during the relationship, such as wages or income
- property owned at the time the relationship began
- gifts and inheritances
- work done on the property such as building or renovating
- effort put into building up and running a business.

The efforts of a partner who worked in the home looking after the children and doing the housekeeping are considered indirect contributions to the property. A homemaker can be entitled to a share of the property even though she or he has not paid any money towards it or earned any income during the relationship. In many cases, the indirect contributions of the homemaker are equal to the direct contributions of the income earner. This may not be the case where the relationship was short or the direct contributions of one person are much larger than the contributions of the other person.

Future needs

The court can also decide whether a greater share of the property should be given to the person who has the greater need in the future. It will look at matters such as:

- the age and health of both people
- the ability of each person to support herself or himself in the future
- whether either person is supporting another person, such as a child
- whether a person is being supported by someone else, such as a new partner or parents.

If one parent has the sole responsibility for the day to day care of the children, a claim may be made for a greater share of the property, but this may be balanced by the payment of child support by the other parent. As a guide, the court is likely to award more to one person where the other has access to greater financial resources. This is a complex area of law and legal advice should be sought.

Spousal maintenance

To obtain a court order for maintenance under the Family Law Act, the applicant will generally have to prove that s/he is unable to work or cannot support herself or himself properly because of old age or sickness, the need to care for children or some other reason. In addition, they would have to show that their former partner is able to pay the maintenance. Spousal maintenance claims can be resolved formally at the same time as property settlement, either by court order or financial agreement. A payment can be made in a lump sum, or by periodic payments. An order for periodic payments of spouse maintenance can be registered for collection with the Department of Human Services – Child Support.

Time limits apply to spousal maintenance claims and legal advice should be sought at the earliest opportunity.

DE FACTO AND SAME SEX PARTNERS AND PROPERTY

Couples living in a de facto relationship (including a same-sex relationship) in South Australia who have separated after 1 July 2010, can enter into a binding financial agreement and make an application for property settlement or spousal maintenance under the Family Law Act.

An application to a Family Law Court to resolve a property dispute or for spousal maintenance can only be made if:

- the de facto relationship existed for at least two years, or
- there is a child of the partners, or
- one of the partners has made substantial financial or non-financial contributions to property as homemaker or parent and serious injustice would result if an order was not made.

An application for property settlement must be made within two years of the relationship ending, but in exceptional circumstances the court may grant leave to make an application outside of this time period. The court will decide how the property should be divided and whether spousal maintenance should be paid in the same way it does for married couples.

Domestic Partners Property Act 1996 (SA)

If a de facto relationship breaks down after 1 July 2010 and the couple had made a certified domestic partnership agreement under South Australian law that was in force before 1 July 2010 , then that agreement may be taken to be a binding financial agreement under the Family Law Act and therefore enforceable by the Family Law Courts. However, the only parts of the agreement that could be enforced by the Family Law Courts are those to do with the property and financial resources of the parties, and spousal maintenance.

If a South Australian de facto relationship broke down before 1 July 2010 then the Domestic Partners Property Act 1996 (SA) will apply to the division of property - that is, the Family Law Act will not apply. The only exception is if both parties choose to 'opt in' to the new system and agree that the Family Law Act will apply. Opting in can only be done if:

- there is no existing court order about property division
- there has been no distribution of property under a financial agreement made under South Australian law
- there is no financial agreement in effect under South Australian law
- the choice is in writing and signed by both parties

A couple living or intending to live together can draw up an agreement saying how property will be divided should the relationship end.

- each partner has had independent legal advice and each partner's lawyer has signed a statement to say this.

For relationships not covered by the Family Law Act or the Domestic Partners Property Act, rights to property on the breakdown of a relationship are governed by the common law rules of property, trusts and contract. The law in this area is complex and legal advice should be sought by anyone who wants to make a claim.

FAMILY VIOLENCE

Family violence may include physical violence, damaging property, threats, emotional and psychological abuse, financial control and social isolation. You can take action to stop it.

If there has been family violence, contact your local police. Call the police on 131 444. The police have the power to:

- arrest the offender
- search for and remove weapons
- charge the offender with a criminal offence
- immediately issue (if the offender is present or in custody) or apply to the court for an intervention order on your behalf.

Do not be afraid to call the police for protection for yourself and your children. There are special police units trained to handle family violence. If your local police are not helpful, ask to speak to a police officer from the Family Violence Investigation Section as soon as possible. You can also seek help from a domestic violence service and the Legal Services Commission, see SERVICES page 29.

Intervention Orders

If you are the victim of family violence, ask the police to apply for an Intervention Order from the Magistrates Court. You do not have to show you have been physically hurt before you can get help. An intervention order can stop a person from coming onto certain premises (even if this is a house they own or where you work), from coming within a set distance of a family member, from damaging or taking personal property, or from contacting, harassing, threatening or intimidating a family member. The court can also order the return of property or allow use of the property at certain times.

When taking out an intervention order, make sure the magistrate knows about any Family Law Court orders that may be affected, such as a parenting order which details the time a person is to spend with a child and any contact between the parties for the purpose of attending at or organising handover of the child. In some circumstances the magistrate may be able to suspend or change those orders.

If the police will not help you to obtain an order, you can prepare and file your own application or seek the help of a lawyer to do it for you.

Family Law injunction

You can apply to the Family Law Courts for an injunction as part of a family law case. An injunction is an order made by a court to stop a person from doing particular things - for example, removing children from the State, assaulting children or a former partner, going into the home, harassing the children or former partner, or selling or damaging any family property. However, a Family Law Court injunction may be difficult to obtain and enforce. An intervention order from the Magistrates Court may be more effective in protecting you from a violent situation. Local police can respond to any breaches and enforce an intervention order without delay.

VICTIMS OF CRIME

You may be able to get victims of crime compensation if you are injured as the result of a violent crime, for example, an assault, rape or robbery. This can include mental as well as physical injury. Close family members of a homicide victim can also be compensated.

You may be able to claim compensation for pain and suffering, and for past and future medical treatment. You cannot get compensation for damage to property as a result of a crime. To make a claim it is best to get legal advice from a private lawyer experienced in criminal injuries compensation, see SERVICES page 29 for details of services for victims.

CHANGING A NAME

Can I change my child's name?

A Declaration to Change the Name of a Child is available from the Births, Deaths and Marriages Registry. Normally, both parents must agree to allow a change of name for a child. The child must also consent if he or she is capable of understanding the meaning of a change of name.

If one parent does not consent, the other parent must apply for an order from the State Magistrates Court. The other parent can tell the court why the child's name should not be changed. However, the court will base its decision on whether or not a change of name will be in the child's best interests. Even where the court makes an order authorising the change of name of a child, the change must still be registered at the Births, Deaths and Marriages Registry to be effective, see SERVICES page 29.

Can I change my own name?

Generally, if you are aged over 18 you may have any name you choose so long as it is not offensive or for fraudulent or dishonest purposes. If you wish to formally change your name (other than through marriage or separation) you should contact the Registry of Births, Deaths and Marriages.

Do I need to change my name if I marry or separate?

You are not required to change your name if you marry or separate. Nor do you have to register a name change as a result of marriage or separation. If you have changed your name at marriage and wish to go back to your birth name you may have to produce your birth and marriage certificates to show that you are the same person.

WILLS

A will is a written document that sets out your wishes for the distribution of your property (called your 'estate') upon your death. If you die without a valid will your property is distributed to your family (next of kin). If there is no family (including distant relations) then your property goes to the Government.

If you marry (or remarry), this automatically cancels your will unless your will clearly shows you were planning this marriage when you made it. Normally you will need to make a new will when you divorce or remarry.

If you are making a will, it is important that you seek legal advice about your obligations to provide for your children upon your death. If your children normally live with you, you can state in your will who you would like to care for them after your death. However, you cannot guarantee that your wishes will be followed. There is no way to prevent a person from applying for a parenting order after your death. The court will consider the wishes of the deceased parent but must make an order in the best interests of the children.

If you separate from your former partner you may need to change your will so it accurately reflects your wishes. If you separate, an existing will is not automatically revoked. It is therefore a good idea to make a new will. Once you are divorced, any gift or power left to your former partner is cancelled unless your will specifically states that you do not want the divorce to make any difference.

If you are in a de facto or same-sex relationship, you should make a will if you want to make sure that your partner will receive your property upon your death. If you die without a will, your partner may be entitled to the same rights as between married couples if you have been together for three years, or for periods totalling three years over four years, or you have a child together.

If the relationship was for less than three years, either of the former partners may seek a declaration from one of the State courts that they were domestic partners, on the basis that they were living together in a close personal relationship and that the interests of justice require that a declaration be made. This application is made under the Family Relationships Act 1975 (SA), which sets out what the court must consider when making its decision.

SERVICES

There are many services available to help you in all areas of family law, separation and parenting.

LEGAL AID & LEGAL ADVICE

Legal Services Commission
Legal Help Line (free legal advice and information)
Tel: 1300 366 424 (local call)
www.lsc.sa.gov.au

Family Law Duty Lawyers at the Family Law Courts
Tel: 0434 079 387 or 0434 079 388.

Appointments for legal advice can be made at these offices:

Adelaide
159 Gawler Place
Adelaide SA 5000
Tel: 8111 5555

Elizabeth
Windsor Bldg
Elizabeth Centre
Elizabeth SA 5112
Tel: 8111 5400

Mount Barker
18 Walker Street
Mount Barker SA 5251
Tel: 8111 5320

Noarlunga
Ground Floor
Noarlunga House
Noarlunga Centre SA 5168
Tel: 8111 5340

Port Adelaide
306 St Vincent St
Port Adelaide SA 5015
Tel: 8111 5460

Port Augusta
13 Flinders Terrace
Port Augusta SA 5700
Tel: 8686 2200

Whyalla
Tenancy 7
169 Nicolson Avenue
Whyalla Norrie SA 5608
Tel: 8620 8500

COMMUNITY LEGAL CENTRES

Central Community Legal Service
Shop 2, 59 Main North Rd
Medindie Gardens SA 5081
Tel: 8342 1800

Northern Community Legal Service
26 John St
Salisbury SA 5108
Tel: 8281 6911

Riverland Community Legal Service
8 Wilson St
Berri SA 5343
Tel: 8582 2255

South East Community Legal Service
9 Penola Rd
Mount Gambier SA 5290
Tel: 8723 6236 or
1300 369 236

Southern Community Justice Centre
40 Beach Rd
Christies Beach SA 5165
Tel: 8384 5222

Welfare Rights Centre
Level 5, 97 Pirie St
Adelaide, SA 5000
Tel: 8223 1338 or
1800 246 287

Westside Community Lawyers
212 Port Road
Hindmarsh
SA 5007
Tel: 8340 9009
Port Pirie Office
Tel: 8633 3600

Women's Legal Service
151 Franklin St
Adelaide SA 5000
Advice: 8221 5553 or
1800 816 349 (toll free)
Administration: 8231 8929

OTHER LEGAL ADVICE SERVICES

Aboriginal Legal Rights Movement
321 King William St
Adelaide SA 5000
Advice: 8113 3777 or
1800 643 222

Law Society
Level 10
178 North Terrace
Adelaide SA 5000
Fees: $32
30 minute interviews by appointment
Tel: 8229 0200
www.lawsocietysa.asn.au

CHILD SUPPORT HELP

Legal Services Commission
Child Support Unit
Tel: 8111 5576 or
1300 366 424

Northern Community Legal Service
Tel: 8281 6911

Southern Community Justice Centre
Tel: 8384 5222

Department of Human Services – Child Support
Tel: 131 272
www.humanservices.gov.au/customer/information/child-support-website

FAMILY DISPUTE RESOLUTION SERVICES

Family Dispute Resolution (FDR) Unit
Legal Services Commission
159 Gawler Place
Adelaide 5000
Tel: 8111 5555

Family Relationship Centres

For full details of services in city and country areas see www.familyrelationships.gov.au

Adelaide
161 Frome St
Adelaide SA 5000
Tel: 8419 2000

Noarlunga
38 Beach Rd
Christies Beach SA 5165
Tel: 8202 5200 or
1300 735 492

Salisbury/Elizabeth
Shop 8
Salisbury Cinema Complex
Cnr James and Gawler
Street, Salisbury SA 5108
Tel: 8255 3323

Berri
9 Kay Ave
Berri SA 5343
Tel: 1300 667 382

Mt Gambier
1 Helen Rd
Mount Gambier SA 5290
Tel: 8721 3500 or
1800 880 913

Port Augusta
11 Marryatt St
Port Augusta 5700
Telephone: 8641 0432 or
1300 769 901

INFORMATION SERVICES

Family Relationship Advice Line
Tel: 1800 050 321

Family Relationships Online
www.familyrelationships.gov.au

Mensline Australia
Tel: 1300 789 978

Women's Information Service
Tel: 8303 0590
8am - 6pm weekdays,
9am - 5pm Saturday
1800 188 158 (toll free)

Other Family Services

Centacare
www.centacare.org.au

Relationshps Australia
www.rasa.org.au

Anglicare
www.anglicare-sa.org.au

CHILDREN'S HANDOVER SERVICES

Adelaide: 8419 2000

Berri: 8582 4122

Campbelltown: 8223 4566

Hindmarsh: 8340 2022

Noarlunga and Mt Barker: 8392 3180

Mount Gambier, Naracoorte and Millicent: 8721 3500

Salisbury: 8285 4499

Port Augusta: 8642 3081

Whyalla: 8649 4367

COURTS

Family Court of Australia
Roma Mitchell Bld
Commonwealth Law Courts
3 Angas St
Adelaide SA 5000
Tel: 1300 352 000
www.familylawcourts.gov.au

Federal Circuit Court
Initial enquiries to the Family Court Registry

Magistrates Court
Central Switchboard
Tel: 8204 2444

FAMILY VIOLENCE SERVICES

Police Attendance
Tel: 131 444

Police Child and Family Investigation Units
Adelaide: 8172 5890
Elizabeth: 8207 9381
Holden Hill: 8207 6150
Port Adelaide: 8207 6413
Sturt: 8207 4801
Southern: 8392 9172

Domestic Violence and Aboriginal Family Violence Gateway Service
For men and women, 24 hours
Tel: 1300 782 200 or 1800 444 455 (after hours)

Flinders Medical Centre
24 Hour Child Protection Unit
Tel: 8161 7346

Women's and Children's Hospital
24 Hour Child Protection Unit
Tel: 8204 7346

Yarrow Place Rape and Sexual Assault Service
Tel: 8226 8777 or 1800 817 421 (toll free)
AH: 8226 8787

Migrant Women's Support Service
Tel: 8346 9417

Victim Support Service
11 Halifax St
Adelaide SA 5000
Tel: 8231 5626

Aboriginal Family Violence Legal Service

Port Augusta
Tel: 1800 111 052

Ceduna
Tel: 1800 839 059

Port Lincoln
Tel: 1800 309 912

OTHER AGENCIES

Births, Deaths and Marriages
91 Grenfell St
Adelaide SA 5000
Tel: 131 882

Interpreter services
Translating and Interpreting Service (24 hour, 7 days)
Tel: 131 450