

YOUR NEXT STEP



TRANTER
LAWYERS



341 High Street
Maitland NSW 2320
Phone: 4934 2600

Email: admin@tranterlawyers.com.au

Website: www.tranterlawyers.com.au

Your Next Step

At Tranter Lawyers we understand that family law clients are often experiencing the worst time of their lives.

You may be leaving the family home, no longer with your children or facing financial insecurity.

Our team has prepared this information guide to point you in the right direction so you can take your next step with confidence.

**We can't protect your heart,
but we can protect your
legal interests.**

Your Next Step

Divorce	4
Quick facts about divorce	4
De facto and same sex relationships	5
Parenting	6
Quick facts about Family Law and parenting	6
Parenting applications	6
Specific issue applications	7
Best interests of the child	7
Family dispute resolution	8
Some practical hints	9
Property	11
Quick facts about Family Law and your property	11
What is property?	11
How is property divided?	12
What if we agree?	13
Maintenance	14
Child support	14
Some practical hints	15
Our Approach	16

Divorce

Here are some quick facts about divorce:

- 1) In 1975 the introduction of The Family Law Act established “no-fault divorce” in Australia. This means that **the only ground for divorce is the irretrievable break down of the marriage**; that is, there is no likelihood that you will get back together.
- 2) Before either of you can file for divorce you must be **separated for at least 12 months and one day**. During this time you can live under one roof – as long as you are not living as husband and wife. This essentially means that while you may be sharing property you are leading separate lives.
- 3) A divorce application can only be opposed where there has not been 12 months since separation or where the Court does not have jurisdiction (for example, in some overseas marriages).
- 4) If there are children you will need to advise the Court in your Application that “proper arrangements” are in place for them.
- 5) An application can be brought by either of you (“sole application”) or by both of you (“joint application”). If you make a sole application and there are children you will need to attend Court on the day your application is heard. If it is a joint application that attendance is not necessary.
- 6) After a divorce is granted the parties have only 12 months to apply to the Court in relation to property matters. Parenting matters can be commenced at any time.

The term “divorce” refers to the ending of the marriage – matters in relation to your property and children are dealt with separately.

De facto & same sex relationships

Rapid social change in Australia, with higher divorce rates, fewer marriages and a greater acceptance of same sex relationships, has resulted in an increasingly diverse range of family forms existing outside the traditional nuclear family model. The law's response in Australia to defining the construct of the "family" to accommodate relationships in all their diversity has, similarly, been varied in its approach.

De facto relationships

Since its inception the Family Law Act has had jurisdiction to deal with all parenting matters; whether the children have been born during a marriage, during a de facto relationship or otherwise.

De facto property matters are now dealt with under the Family Law Act which now has jurisdiction in relation to matters concerning the division of property acquired during both marriages and de facto relationships.

Same sex relationships

The Family Law Act also encompasses the division of property upon the breakdown of same sex relationships.

In addition the definition of parental responsibility under the Family Law Act has been extended to better cater to children born during a same sex relationship. This has been done by adjusting the presumption of parentage in same sex relationships and thus recognising each partner's role as a parent.

Parenting

Some quick facts about the Family Law Act and parenting:

“Parenting matters” is the term given to those issues relating to parental responsibility.

In general that is where a mother and father are disputing the care of their child. However, it is important to note that the Act extends to same sex parents, step parents, aunts and uncles, grandparents, and any other person sufficiently concerned with the care, welfare and development of the child.

Parenting applications

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

- 1) **The allocation of parental responsibility** – this is generally in relation to parents who are fighting over who will determine which school the children go to or the religion they should practice etc;
- 2) **The person or people with whom a child is to live** – used to be referred to as “residence” or “custody”;
- 3) **The time a child is to spend with another person or other persons** – used to be referred to as “contact” or “access”;
- 4) **How the child will communicate with another person or other persons;**
- 5) **Child maintenance** (for a child who is not subject to the Child Support Assessment Act);
- 6) **Any aspect of the care, welfare or development of the child;**
- 7) **Contravention** of any of the above orders; and
- 8) **The process to be used for resolving disputes** about the terms or operation of the order.

Specific issue applications

The Family Law Act also covers some more specific issues including:

- 1) **Parentage** - this is the declaration of who is a parent and can include issues in relation to applications for orders for DNA testing, same-sex parents, surrogacy situations, or where one party is denying parentage;
- 2) **Relocation** – which is where one parent wishes to move away and that will impact on the right of the child to spend time with them or any other person;
- 3) **Recovery** – which is where a child is taken away from either the parent with whom they live or spend time with – this includes where the child is taken to another residence, out of the state and even out of the country;
- 4) **International travel** – where the court can allow or stop a parent from obtaining a passport or taking a child out of the country; and
- 5) **Adoption of a child by a step parent** – this is to be distinguished from adoption of child by someone who is not a step-parent which is covered by the State.

Best interests of the child

When negotiating or applying for a parenting order it is important to make sure the proposal is workable for you and the other party. But, it is more important that the orders are in the best interests of the child. The Family Law Act dictates what matters will be considered in determining what is in the best interests of the child and they include:

- the child's views and factors that might affect those views, such as the child's maturity and level of understanding

- 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 to provide for the child's needs
- the right of an Aboriginal and 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

Family dispute resolution

In most matters a genuine effort to resolve the issues by attending family dispute resolution must be made.

Usually, a certificate reflecting that the parties have attended dispute resolution must be obtained before any application for parenting orders is made with a Court.

There are a few exceptions to this rule in cases of violence; child sexual abuse or in certain urgent matters (such as a recovery of children application).

Some practical hints on parenting and family law

By Bill Eddy, LCSW, Esq. © 2007 High Conflict Institute

1. There's Hope

Divorce itself has not been shown to cause long-term negative effects on children. It is the way that people handle the divorce which makes a difference. Most (about 80%) of children have basically adjusted to the divorce within one to two years after the initial separation. While feelings and issues remain, basic healing and stability usually occur.

2. Nobody's perfect

People are not trained in how to get divorced or how to be a parent. We live in a changing world and there is no one right answer for what to do, such that many ways work and each situation is unique.

3. The level of conflict is usually the biggest problem

Research has shown that a high level of conflict between the parents is more disruptive to children's development than whether their parents divorced. This research shows that a high-conflict marriage is harder on children than a low-conflict divorce. A high-conflict divorce is even worse.

4. Stability is a key factor for children of any age

To the extent possible, parents should try to keep or create routines that the children can count on. Children need consistency on which to base their growth. Therefore, firm rules, regular activities, special time with the child, etc. are very helpful.

5. Explain changes ahead of time, if possible

Children and adults adjust to change more easily if we can prepare first in our minds. No one likes surprises of the upsetting kind.

6. Make time to listen to your child

Children need to process feelings and worries much like adults do. Listening with interest and without judgment is important. Avoid reacting to what the child says with your own issues or conclusions.

7. Avoid criticisms of the other parent in front of the child

This is easy to say and hard to do, but very important. Your child needs to have a relationship with the other parent and children do better when they are not caught in the middle.

8. Move slowly introducing children to your new relationships

Your child already has a lot to cope with. The more pressure to like someone new, the more negative their reaction.

9. Get adult support for yourself

While you want to inform the child of what is going on, don't rely on the child for support. You need to talk, so find many people to talk to.

10. Do fun activities with your child

By enjoying time with your child, you will both feel better and be healthier for it. These suggestions won't make all pain go away. They might just help make the decision to divorce manageable for you and your children. If you have more detailed questions or concerns, continue reading on the subject; ask for resources from your child's school counselor or teacher; or seek the help of a trained mental health professional. You might be surprised at how much help you can get to give you direction and quiet your worries.

Property

Here are some quick facts about the Family Law Act and your assets and property:

When a relationship or marriage ends a party's interest in the property owned by the couple can be adjusted in circumstances where the Court finds it is just and equitable to do so.

For instance, a husband may have purchased the matrimonial home as the sole registered proprietor and he may have been the sole financial contributor towards the payment of that home for twenty years. However, the wife may have stayed at home, raised the children and made the house a home –allowing the husband the time to make the money to pay the mortgage. Under the Family Law Act these circumstances may lead to an order for the adjustment of the property interests so that both the wife and the husband will have a share in the equity of the matrimonial home.

What is property?

Property includes assets (things you own) and liabilities (things you owe money on). These can be owned individually, jointly (with another person or persons), or by a family trust or family company. Property includes:

Assets:

- 1) **Real estate**, including the family home;
- 2) **Money**;
- 3) **Investments**;
- 4) **Insurance policies**;
- 5) **Inheritances**;
- 6) **Shares**;
- 7) **Superannuation**; and
- 8) Any other assets, such as **cars, furniture or jewellery**.

Liabilities:

- 1) **Mortgages;**
- 2) **Loans;**
- 3) **Credit cards;** and
- 4) **Personal debts.**

All property of the relationship may be considered in the property settlement.

It does not matter:

- 1) Whose name is on the documents;
- 2) Who bought an item; or
- 3) Who made the debt?

Property can also include things the parties had before their relationship started or after it ended.

How is property divided?

There is no automatic 50/50 split of property. Any division should be based on the Family Law Act which sets out a four step process to work out what is fair:

- 1) **Identify and value the property** to work out how much there is.
- 2) **Consider the contributions** made by both sides, including:
 - a. **Financial contributions:**
 - i. Earnings, savings, gifts and inheritances
 - b. **Non Financial contributions:**
 - i. Home improvements
 - c. **Contributions as a homemaker and care provider for children.**

- 3) Consider other factors set out by law, including “future needs”:
 - a. How much each person could earn in future
 - b. The age and health of each person
 - c. The care and financial support of children
 - d. Responsibility for supporting other people
 - e. The length of relationship.

- 4) Check that the property division is ‘just and equitable’ – that is, fair to both people.

What if we agree how to divide our property?

It is not necessary to make an application with the court in order to divide your assets and liabilities.

Instead you can enter into a Binding Financial Agreement with each other which reflects an arrangement that you are both come to.

This can be done at any point after you have separated.

You can also enter into an agreement at the beginning of a relationship or even during the relationship – this is Australia’s version of “pre-nuptial agreements”.

There two other areas which fall under “property”, namely maintenance and child support.

Maintenance

A husband or wife may be entitled to claim maintenance from his or her spouse after separation.

The Act requires the weighing up of the needs of each of you to live at a reasonable standard of living. It balances the need of one party with the ability of the other party to pay. This is referenced to the standard of living experienced by the parties prior to separation.

In our region the payment of spousal maintenance is usually only made as a stop gap measure by the Court while a party, who has maybe been out of the workforce for some time and has nil earnings at the time of separation, is able to get back on their feet.

Child support

Every parent is responsible for the financial support of their children. The Child Support Act sets out the processes for parents who are separated. Essentially, the legislation looks at:

- 1) The cost of children;
- 2) The income of both parents;
- 3) The care of children whom the child support is payable;
- 4) Whether the parents have any relevant dependent children living with them; and
- 5) Whether the parents have any children in other child support cases.

You are able to enter into an agreement with each other in relation to child support. This allows you to determine the rate of payment.

Some practical hints on property and Family Law

- Firstly, make a list of all of the assets both individually owned and jointly owned. Do your homework and make sure you have values for all items.
- For example, if it is property, obtain at least three market appraisals.
- If it is a motor vehicle use the Redbook values on the internet at <http://www.redbook.com.au/> so you have an idea of the value of the motor vehicle, caravan or boat.
- Know what is in your bank accounts and have copies of the most recent statements.
- Have a copy of your Superannuation member statement for the June before the commencement of your relationship and the June after the separation date.
- Get a second hand furniture dealer to value the contents of your house such as antiques and furniture and whitegoods and plasmas and the like.
- Get your jewellery properly valued.
- Be prepared to share this information with each other as you are required to make this full disclosure in any event.
- Secondly make a list of all debts and liabilities and have copies of your latest loan statements including those relating to your mortgage and credit cards and hire purchase arrangements available at the Mediation process.
- Again be prepared to share this information with each other.

Our approach

Hopefully, you will have noticed that the above information refers to what the Family Law Act sets out – there was little or no reference to the Court or litigation.

This is because our focus is different – it is about keeping you in the driver's seat so that you remain in control.

In other words or to use more formal language – we view our role as giving you advice in relation to what the law says and how the law applies to particular situations but to do so in such a way that allows you to make the final decisions in relation to any conflict you may be having with your ex partner regarding your property and your children.

Our advice is dictated by the Family Law Act – for example:

1) In relation to parenting –

- a. It is compulsory in most cases for parties to attend mediation (or Family Dispute Resolution as it is known in family law) to try and resolve their issues before they can apply to the Court.
- b. There are also “pre-action procedures” which require putting a full proposal to the other party before any Court proceedings can be commenced.
- c. Each of these procedures, as well as general negotiations between the parties, can result in the matter being finalised by way of a “parenting plan” (written document reflecting the agreement between the parties but which is not enforceable in the Court) or “consent orders” (orders of the Court that reflect the agreement between the parties – can be enforced by the Court should a party not comply)

2) In relation to property –

- a. There are extensive “pre-action procedures” which require not only a full proposal being put to the other party but also the provision of documents to them as well – that includes such things as valuations for houses, bank account statements and company or partnership financial papers.
- b. There are also at least two opportunities once the matter is before the Court for formal “conciliation” before a Registrar of the Court who is there to help the parties resolve the issue.
- c. At any point in the negotiations between the parties the matter can be resolved by way of “Binding Financial Agreement” (a written document reflecting the agreement between the parties which is binding on the parties) or “consent orders” (orders of the Court that reflect the agreement between the parties – can be enforced by the Court should a party not comply).

Our approach doesn't just dismiss these pre- court options as being motions to go through before the LONG, DRAWN OUT AND COSTLY fight in Court.

We recognise that the earlier a matter settles the cheaper the legal costs and the more a party may be able to offer to their ex-partner which, where there are children involved, are all important considerations.

This kind of approach can often assist you to reduce the level of conflict and build goodwill between you and your ex partner in situations where good will is most needed as you jointly move on to jointly parent your children.

Our approach is focused on common sense and practical considerations.

Call our Family Law Team on 02 4934 2600 for a confidential meeting to discuss your situation and the options available to you.