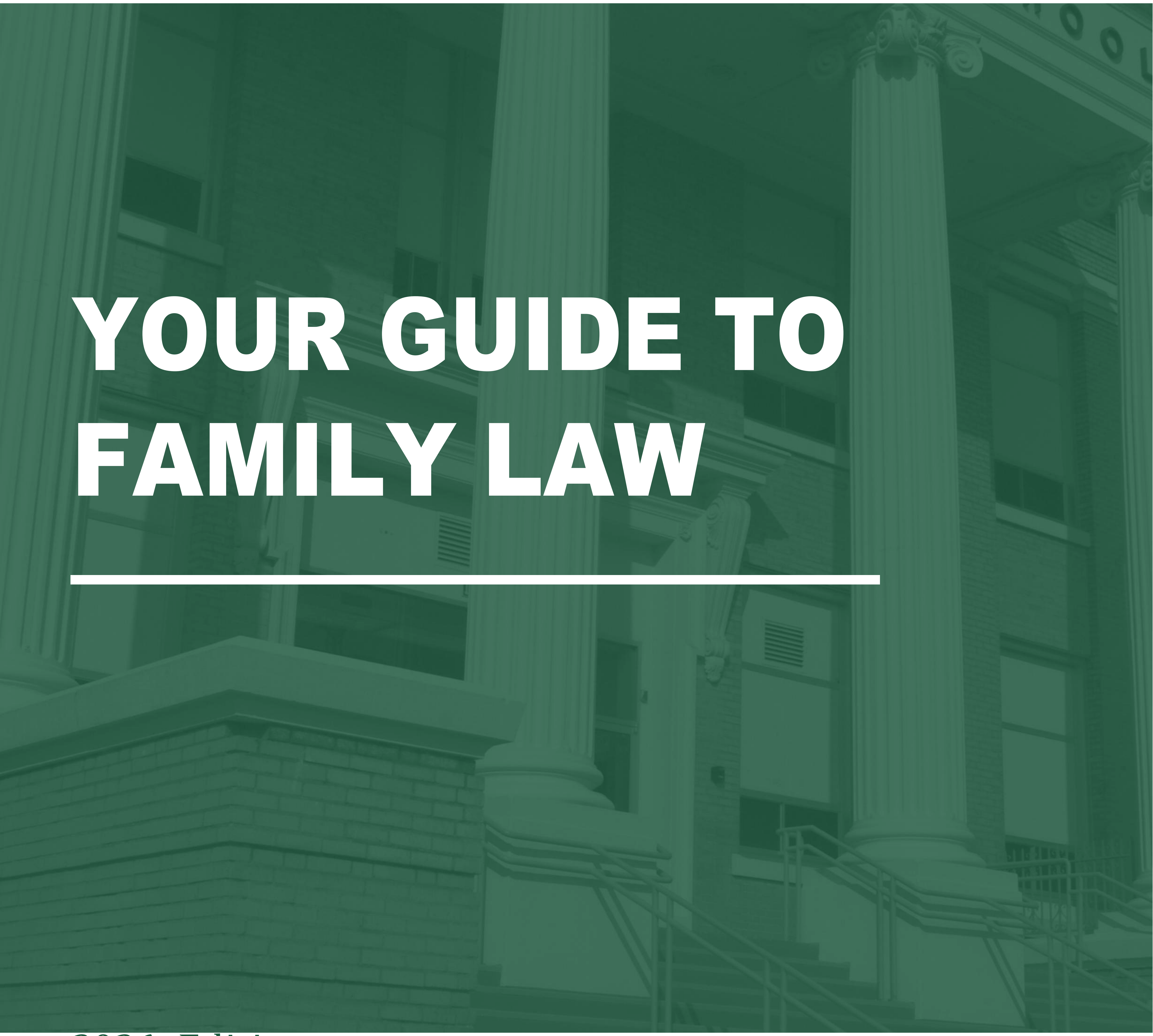
Etheringtons
Solicitors



YOUR GUIDE TO FAMILY LAW

2026 Edition

Etheringtons Solicitors

DISCLAIMER: This brochure is intended to provide general information only and should not be regarded as legal advice.

Your Guide to Family Law

Navigating a relationship breakdown and separation can often be a complex task. Our aim is to answer some of the most common questions posed by our family law clients and to provide clarity in relation to various family law issues.

Seeking legal advice early is critical when making important decisions affecting you, your family and the future.

Please contact Etheringtons Solicitors to discuss your situation and to obtain strategic legal advice. We will be happy to provide you with solutions tailored to your unique circumstances.

DIVORCE

What is the definition of 'Separation'?

Separation is relevant to an application for divorce because, in most cases, the parties must have been separated for at least 12 months before applying. There is no requirement to formally register a separation under Australian law. However, separation is a fact that must be proven if it is disputed by the other party at a later stage.

In the case of a divorce, the date of separation is recorded on the Application for Divorce and is sworn or affirmed to be true and correct by the Applicant. If you cannot demonstrate that you and your spouse were separated for at least 12 months before filing, the Federal Circuit and Family Court of Australia (the "Court") will not grant the divorce.

Therefore, it is a good idea to confirm the separation in writing, even something as simple as a text message or email can help. Many divorce matters (and cases for property settlement in de facto relationships) can ultimately turn on whether a party can prove that separation occurred on a particular date.

Am I eligible to apply for Divorce?

If there is no reasonable likelihood of you and your spouse reconciling, and you have been separated continuously for 12 months, you should consider applying for a divorce.

You can apply for a divorce in Australia if either you or your spouse:

- regard Australia as home and intend to live here indefinitely
- are an Australian citizen by birth, descent or by grant of Australian citizenship, or
- ordinarily live in Australia and have done so for 12 months immediately before filing for divorce.

Importantly, the time frame for seeking any property or financial orders in the Court is 12 months from the date that the divorce is granted.

DIVORCE

De Facto Relationships and Property Settlements

In the case of a de facto relationship, whether a property settlement is available can depend on the length of the relationship and the circumstances of the separation. The Court can only make property orders in relation to a de facto relationship if it is satisfied that at least one of the following applies:

- the relationship (or the total of more than one period of the relationship) lasted at least two years;
- there is a child of the de facto relationship;
- the party seeking property orders made substantial financial or non-financial contributions, and a serious injustice would result if an order were not made; or
- the relationship was registered under a relevant State or Territory law.

In addition, there is also a two-year limitation period (from the date of separation) within which an application for property settlement must be commenced. In such cases, again, evidence of the date of separation can be significant, and an application made outside the limitation period will generally require the Court's leave to proceed.

What if you still live together?

Separation can take place even though the parties live under the one roof and it can also happen gradually rather than on a specific identifiable date. In these cases, the Court will need to examine a number of factors to determine when, and if, separation has taken place. Those factors can include whether the parties:

- Slept in separate rooms or together after the alleged date of separation;
- Performed domestic duties such as cooking and washing for each other after the alleged date of separation;
- Separated their financial affairs to any extent after the date of separation;
- Lodged or signed any documents informing government agencies of the separation, such as Applications for Centrelink or ATO documents as a single person, as opposed to a person in a relationship;
- Continued to be intimate after the date of alleged separation; and
- Made the separation publicly known, such as by telling friends and family.

Divorce cases where children are involved

If there are any children under the age of 18, a court can only grant a Divorce if it is satisfied that proper arrangements have been made for the children. The court's paramount consideration is what is in the child's best interests.

Under section 60CC of the Family Law Act 1975 (Cth), the Court must consider the following general considerations when determining what is in a child's best interests:

- what arrangements would best promote the safety of the child, and of each person who has care of the child, including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm;
- any views expressed by the child;
- the developmental, psychological, emotional and cultural needs of the child;
- the capacity of each person who has, or is proposed to have, parental responsibility for the child to provide for those needs;

- the benefit to the child of being able to have a relationship with their parents and other significant people in their life, where it is safe to do so; and
- any other fact or circumstance the Court considers relevant to that particular child.

Where a child is Aboriginal or Torres Strait Islander, the Court must also consider the child's right to enjoy their culture, including the right to maintain a connection with, and explore the full extent of, that culture.

None of these considerations is given more weight than the others by default — the Court weighs them together in light of the individual child's circumstances, with safety a consistent priority throughout. As a result, how each parent conducts themselves, particularly in relation to a child's safety and wellbeing, can carry real weight in later proceedings.

PARENTING

Parenting Arrangements

In Australia, family law provides the framework for fair parenting arrangements between parents, however there may be many reasons why an equal division of time with each parent is not appropriate or achievable.

Parenting orders can deal with a range of matters, including where a child lives, the time a child spends with each parent, and other aspects of parental responsibility — such as who is responsible for major long-term decisions about the child's health, education and welfare.

The Family Law Act 1975 (Cth) makes clear that there are no specific "parents' rights" and no legal distinction between fathers and mothers when it comes to parenting arrangements. The Court is instead governed by, and legally obliged to consider, the best interests of the child above all else.

The Family Law Act 1975 (Cth) covers a broad range of matters including divorce and separation, parenting arrangements, property settlement and spousal maintenance.

With respect to parenting arrangements, the Act does not prioritise either parent's rights. Unless there are concerns involving family violence or abuse, the Court will generally take the view that it is in the child's best interests to maintain a meaningful relationship with both parents, to the extent that this is safe and practical.

How the Family Law Act applies to Parenting Arrangements

When parents separate, the Family Law Act 1975 (Cth) requires arrangements for children to be based on what is in the child's best interests. Both parents have a responsibility for the care of their children, including their financial support.

In practice, the Court considers matters including the safety of the child and each parent, the benefit to the child of a meaningful relationship with both parents, the child's own views (where appropriate given their age and maturity), and each parent's capacity to meet the child's needs. Time arrangements can range from equal time, to substantial periods with each parent, to more limited or supervised arrangements, depending on what best serves the child.

PARENTING

Relocation

Whilst freedom of movement is an accepted right, different principles apply where a parent wishes to relocate with a child to an area significantly distant from the other parent (the parent with whom the child does not ordinarily live). Disagreements over relocation matters can often lead to intervention of solicitors and if unresolved, that of the Court.

Relocation is not governed by a separate provision of the Family Law Act 1975 (Cth) — it is considered as part of the Court's general best-interests assessment for parenting matters.

Factors taken into consideration

The first consideration is whether the proposed relocation is in the best interests of the child. The Court will also consider whether it remains reasonably practicable for the child to maintain a meaningful relationship with each parent following the move, and how the time the child currently spends with the non-relocating parent would be affected.

It is generally advised that a child should not be relocated without the consent of the other parent. If consent cannot be obtained, then it is appropriate to seek the Court's determination before any move takes place.

Injunctions

A parent is entitled to seek an injunction from the Court to prevent their child from being taken interstate or overseas by the other parent. It is often necessary to satisfy the Court that the parent removing the child has no genuine intention of returning. Evidence that may support this includes:

- One-way tickets have been purchased for interstate or overseas travel;
- Travel arrangements being withheld from the other parent where a holiday is claimed;
- Conduct indicating no intention to return, such as selling the family home, moving belongings into storage, or ending a lease; or
- Evidence that the parent has made arrangements to establish a new life at the destination, such as making enquiries about employment or accommodation, or contacting family or friends in the area.

Travel to a country that is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, meaning the Australian Government would have limited ability to assist in securing the child's return. A solicitor can assist in presenting the strongest case to the Court where there is a genuine risk that the other parent is taking the child interstate or overseas without returning. The Court has the power to make orders that may include:

- Preventing or restraining the parent from taking the child interstate or out of Australia;
- Requiring the parent to pay an amount of money to the Court, to secure the child's return;
- Directing the parent to give contact details (including where the child will be staying); or
- Placing the child's name on the airport watch list to prevent the other parent from leaving the country with the child.

For an injunction to take effect, a copy of the order and any supporting documents filed with the Court must be served on the other parent (or relevant persons).

PROPERTY SETTLEMENT

What is Property Settlement?

Long term de facto relationships and marriages involve jointly owned assets (including properties, home contents and motor vehicles) that have accrued during the relationship or contributed by one party.

Most couples reach an agreement as to how their shared assets should be divided (this is known as a “property settlement”), and arrangements may involve the jointly owned property being sold and the proceeds divided, or the joint property being transferred into one of the parties’ sole names. Whichever approach is taken, it's advisable to formalise the agreement in a binding legal document. Doing so:

- Ensures that the agreement is clear, concise and legally binding;
- Helps prevent either party from making a future claim against the other; and
- May provide an exemption from stamp duty when transferring property between the parties

Where couples cannot agree on how assets and liabilities should be divided, it's best to obtain legal advice to understand your rights and negotiate with your former partner. If agreement cannot be reached through negotiation or alternative dispute resolution, the remaining option is to apply to the Court.

Will I get 50% of everything?

Contrary to popular belief, there is no presumption that assets should be divided 50/50, 60/40 or in any other subjective proportion. The Court has broad discretion to divide property in whatever way is just and equitable in the circumstances of each case.

People often receive well-meaning advice based on someone else's experience, but no two relationships are alike, and there is no standard percentage entitlement in a property settlement. Comparing your situation to someone else's outcome can create a misleading and potentially unhelpful expectation.

Each property settlement should be assessed individually by a family lawyer qualified to advise on your specific circumstances.

How does the Court determine the division of assets?

Under the current law, the Court's task is to decide a single question: whether it is just and equitable, in all the circumstances, to make an order altering the parties' property interests. In deciding that question, the Court has regard to a set of considerations — the parties' existing legal and equitable interests, their contributions, and their current and future circumstances (including the effect of any family violence). These considerations inform one overall assessment; they are not separate, sequential steps that mechanically produce a percentage which is then topped up or adjusted at the end.

1. Identifying the Net Asset Pool

The Court identifies the parties' existing legal and equitable interests in property and their existing liabilities, using a Balance Sheet setting out each party's assets, liabilities and superannuation. Assets include anything of value — real estate, shares, vehicles, and furniture. Before commencing proceedings, both parties must make full and frank disclosure of their financial circumstances. Failure to provide full and frank disclosure can have serious consequences, including adverse findings and costs orders.

2. The Parties' Contributions

The Court considers what each party contributed to the asset pool both financial and non-financial including what each brought into the relationship and what each provided during it.

Financial contributions include income, property acquired during the relationship, assets held before cohabitation, gifts, prize winnings, and in some cases inheritances.

Contributions to the welfare of the family are also significant and may be treated as equivalent to full-time work. For example, caring for children or an elderly relative, and homemaking duties such as parenting, cooking and household management.

Other non-financial contributions include renovations or improvements to the family home or an investment property, unpaid work in a family business, or contributions to establishing a business.

The Court will also consider the effect of any family violence, including financial or economic abuse, such as controlling shared finances, sabotaging a partner's employment, or forcing debt onto a partner on a party's ability to make contributions during the relationship.

Where the parties cannot agree, the Court will weigh these contributions as part of its overall assessment — often expressing its findings on contributions as a percentage — before going on to consider each party's current and future circumstances, discussed below.

3. The Parties' Current and Future Needs

The Court also has regard to each party's current and future circumstances. These considerations are not simply applied after contributions are weighed — both form part of the same overall assessment of what is just and equitable. These considerations are set out in sections 79(4) and 79(5) of the Family Law Act 1975 (Cth) (with equivalent provisions for de facto couples under section 90SM(4) and 90SM(5)), following the Family Law Amendment Act 2024.

In summary, a party's current and future needs may include: the costs of caring for a child, particularly where contributions in this regard have been unequal between the parties; ongoing health issues affecting either party or a child; likely income disparity between the parties; age difference between the parties; each party's housing needs; and the economic impact of any family violence — including financial or economic abuse — on a party's current and future circumstances.

4. Is It Just and Equitable?

The Court must not make a property order unless it is satisfied that, in all the circumstances, it is just and equitable to do so. This is the single question the Court is answering throughout — not a box to tick once contributions and needs have been calculated. The considerations discussed above do not need to be worked through in a fixed order, and there is no presumption that an order altering property interests will be made at all: in some cases, particularly shorter relationships where finances were kept separate, the just and equitable outcome may be little or no change to existing ownership.

FINANCIAL AGREEMENTS

What are Financial Agreements?

A Financial Agreement is a legal agreement made between two parties in a relationship which sets out how their property and financial resources will be dealt with if the relationship ends, whether by separation or divorce.

Financial Agreements can be signed before marriage. Where one party holds significantly more assets than the other, or has family business or inheritance interests they wish to protect, a Financial Agreement can help ensure those assets remain protected if the relationship ends. It is also possible to enter into a Financial Agreement after marriage, or at any stage of a de facto relationship.

Financial Agreements are rarely a comfortable topic to raise with a partner, but they offer a practical way of providing both parties with certainty and protection should the relationship not continue.

What do Financial Agreements cover?

The terms of a Financial Agreement can address a wide range of matters, including:

- Which assets are treated as relationship assets and which are kept separate — for example, the family home may be treated as a relationship asset, while property acquired by either party before the relationship may be excluded.
- How assets will be divided, and in what proportions, if the relationship ends.
- What will happen to each party's assets in the event of death. In the absence of a will, a spouse's entitlement to an estate is determined under intestacy laws, which vary by state and territory.
- How the agreement will apply if circumstances change in the future — for example, if children are born, whether or how the terms of the agreement will be affected.
- A predetermined amount of spousal maintenance.

Financial Agreements deal with property division on separation — it is not a substitute for a Will. Estate planning should be addressed separately, ideally at the same time.

Financial Agreements cannot deal with the parenting arrangements of children or child support. Other clauses — such as those concerning weight, frequency of intimacy, household cleanliness, or penalties for infidelity — are sometimes included but are generally unenforceable.

Are Financial Agreements always binding?

A financial Agreement may be legally binding once signed by both parties, provided the formal requirements of the Family Law Act 1975 (Cth) are met— including that each party receives independent legal advice before signing. A Financial Agreement remains binding unless both parties agree in writing to terminate it.

However, the Court can set aside a Financial Agreement in certain circumstances, including where:

- There has been non-disclosure of a party's assets or financial resources;
- The agreement was entered into as a result of duress, undue influence, or unconscionable conduct; or
- A material change in circumstances relating to the care, welfare or development of a child of the relationship means a party will suffer hardship if the agreement is not set aside.

CHILD SUPPORT

What is Child Support?

Child Support is a term used to describe the payment of money by one parent to the other to help meet the costs of raising children under 18 years. It is intended to help cover expenses such as food, clothing, medical costs, housing, education, and other activities. All children in Australia affected by parental separation are eligible for child support, regardless of whether their parents were married.

How is Child Support calculated?

Child support is administered by Services Australia, the Australian Government agency responsible for child support matters. In addition to the general expenses outlined above, Services Australia take into account:

- The age of the child;
- The income of both parents;
- The amount of time the child spends with each parent;
- The level of care each parent provides; and
- The costs of raising a child, based on independent research.

What if the calculation is unfair?

There may be circumstances where the standard assessment doesn't reflect your true situation — for example, where a parent has structured their affairs to minimise taxable income, has lost their job since the last assessment, or where a child has special needs.

In these circumstances, you can apply to Services Australia for a change of assessment. Services Australia will consider the specific circumstances of your case before making any adjustment.

What if the other parent doesn't pay?

Services Australia has a range of powers and methods to recover unpaid child support, including:

- Deductions from income support payments;
- Enforcement of tax return lodgment or interception of tax refunds;
- Working with third parties, such as employers or financial institutions, to assist in recovering unpaid child support;
- Deductions directly from wages or bank accounts;
- Issuing departure prohibition orders (preventing overseas travel); and
- Litigation or prosecution.

CHILD SUPPORT

Child Support Agreements

Where parties are able to reach agreement, a solicitor can prepare a formal Child Support Agreement, which must then meet Services Australia's acceptance and registration requirements. The agreement may combine cash payments with non-cash payments, such as health insurance or school fees. There are two types of Child Support Agreements available, depending on the parties' circumstances:

- **Limited Child Support Agreement**: these require a Child Support Assessment to be carried out before Services Australia will accept the agreement. The amount payable under a Limited Agreement must be equal to or greater than the amount set by the Assessment.
- **Binding Child Support Agreement:** these can be entered into with or without a prior Child Support Assessment, and for any amount the parties mutually agree upon. However, both parties must obtain independent legal advice before entering into, or terminating, a Binding Child Support Agreement.

Court ordered Child Support

A court may make a child maintenance order for children who fall outside the child support legislation — for example, where a carer is not eligible for a Child Support Assessment. The enforcement of child maintenance orders is governed by the Family Law Act 1975 (Cth).

SPOUSAL MAINTENANCE

What is Spousal Maintenance?

The Court can only order one party to pay spousal maintenance to the other where the applicant is unable to adequately meet their own reasonable needs, and the other party has the financial capacity to pay.

Maintenance for a former spouse or de facto partner involves the division of future income and/or current capital assets following the breakdown of a marriage or de facto relationship. In certain circumstances, separating couples may have an ongoing obligation to make financial payments — whether weekly or as a lump sum — to support a former spouse or de facto partner.

The duration of spousal maintenance depends on the terms of the relevant order or agreement and the parties' circumstances. It is often structured to end on a specific event — for example, when the recipient completes training or re-skilling, secures employment, or enters a new relationship — but there is no universal rule.

When to apply for a Spousal Maintenance Order

Strict time limits apply to a first application for spousal maintenance, though these do not apply once an order has already been made. A first application must be made:

- Within one year of a divorce order taking effect, for married couples; or
- Within two years of separation, for de facto couples.

An application made outside these time limits will only be permitted by the Court in limited circumstances.

What does a Court consider when making a Spousal Maintenance Order?

Spousal maintenance is not an automatic entitlement. In determining an application, the Court considers the applicant's needs and the respondent's capacity to pay, having regard to the parties':

- Age and health;
- Income, property and financial resources;
- Capacity to work;
- Earning capacity, including any impact the relationship has had on that capacity;
- Reasonable standard of living; and
- Care of children living with either party.

A court is most likely to make a spousal maintenance order where one party is at home caring for young children and is therefore unable to exercise their earning capacity.

Other common examples include where a party has been out of the workforce for an extended period raising children of the relationship and has become de-skilled, is unemployable due to age or a lengthy absence from the workforce, or is unable to work due to illness.

CONTACT US

Do any of the issues or situations discussed in this booklet affect you or your family? At Etheringtons Solicitors, we take a solution-oriented approach, working with you to address your concerns appropriately and effectively.

We understand the emotional toll that family law matters and legal proceedings can have on you and your family, and we are committed to providing compassionate, practical and personalised legal advice. Please do not hesitate to get in contact with us today by calling 02 9963 9800 or at law@etheringtons.com.au.

Etheringtons Solicitors
Ground Floor, 153 Walker St
North Sydney, NSW 2060
02 9963 9800
www.etheringtons.com.au