
SEPARATION AND RELATIONSHIP PROPERTY (MARRIED OR DE FACTO)

These notes are a very basic guideline on the main issues many people encounter when separating and dealing with the future care of their children and division of their property. They are not tailored to your own individual situation which needs to be looked at in detail before our advice can be given.

DIARY

It is often a good idea to keep a diary during this period to record any significant events, conversations, agreements, information, or the like.

CHILDREN

Both parents are the natural legal guardians of the children and continue in that role, even if one of them leaves the family home. Being a child's guardian means that you have the right to participate with the other guardian in making major life decisions for the children, such as what school or church they attend.

The question of who cares for the children on a daily basis is a completely separate issue to that of guardianship. The day to day care of the children is often called custody.

It is by far preferable that parents reach agreement on the care of their children. If the parents can agree on the arrangements as to where the children are going to live, go to school, and what time they will spend with each parent, then there is absolutely no need for the Court or anyone else to get involved. As long as the parents are managing to agree with each other and with the children, where that is appropriate, in respect of these matters, then there is no need for the terms of the agreement to even be recorded in a legal document. There is certainly nothing to stop you recording it in a legal document but it is not a necessary step unless there is a significant dispute involved and a hard won resolution needs to be permanently recorded. In any event, the Court always has power to review the terms of any such written agreement if circumstances change.

Both parents have a continuing obligation to maintain their children. If you can amicably reach agreement as to the amount that you will each contribute to the care of your children then you can simply do that. It is certainly important to keep the record of all payments you are each making in that respect. To get an idea of the minimum maintenance amounts which are usually expected I refer you to the web site www.ird.govt.nz/childsupport/ which gives you some basic information about child support. It also details how formal child support payments are calculated and provides a method for estimating child support deductions that would be due based on your earnings.

There are also booklets in relation to child support, the domestic purposes benefit, and additional benefit supplements available from Work and Income New Zealand.

If the person caring for the children goes on the domestic purposes benefit then it is a term of the benefit that they make application to the Inland Revenue Department for the other parent to be assessed for child support. In that case, the person caring for the children receives the benefit and the other parent has to pay their child support to the government. They do it this way to

ensure that the person receiving the benefit is not left short if the person paying the benefit is late with their payments or doesn't make them at all.

You are perfectly free to pay more than the basic child support assessed if you want to do so.

You need to be aware that you cannot contract out of your obligation to pay maintenance and that if you make a lump sum payment in exchange for having to pay maintenance then that will probably not be enforceable. All that may happen is that you would pay over your lump sum and then still have to pay maintenance as well.

The effect of division of property and your relationship with your children

It is worth remembering that children cannot be protected fully from the outfall of your separation. To protect them as fully as possible, it is not generally appropriate that they are told the details of the division of relationship property, nor for the negotiations to be discussed with them. They should not be used to convey information between you.

If your negotiations become bitter it is extremely difficult to keep that from the children. Despite your best endeavours they will naturally pick up if either of you is feeling sad or angry, even if they don't know the details. They are quite likely to respond by trying to protect one of you and that may mean they turn against the other, however unfair and unjust that may be. They are only children and that is a natural response.

To preserve the relationship the children have with you both, which is important for them and for you, it is best to try to negotiate as amicably as possible, to be generous in your approach to the division of property, and to keep the needs of the children in mind.

OCCUPATION OF FAMILY HOME

If you are separating then at some point you actually need to do that, and one of you needs to leave the family home.

If you own your home, the person who leaves it has a right to return to it because he or she is still a part owner. As time goes on, though, that becomes progressively less realistic. The person in occupation gains an increasing "colour of right" which means that if they applied to the Court for an Occupation Order they become increasingly likely to receive it. An Occupation Order gives a person the right to occupy a property. It is usually accompanied by an order that they are also allowed to use the chattels and furniture. An occupation order is usually given on a temporary basis in the first instance but these days the Court expects separating couples, even where children are involved, to sort out their Relationship Property reasonably quickly and it is accordingly unlikely that an Occupation Order would be granted for anything longer than about a year.

It would be normal for the person who remains in the family home to pay what is called an "occupation rental". This is the equivalent of a market rent. It may not actually be paid in cash in the manner of a true rent but when it comes time to divide up the assets between you then the fact that an occupation rent should have been paid is likely to be taken into account. The rationale behind an occupation rental is that the person who leaves the home has to pay rent for wherever they are living and it is only fair that the person who remains in the home should also pay rent.

Usually the person who remains in the home will pay the rates and insurance and minor maintenance and these payments should of course be offset against the occupation rental.

Someone also has to continue mortgage payments. It is usually advisable, while you sort things out, to ask the bank to put your mortgage onto an interest only basis. The person who stays in the home could then pay the interest on the mortgage, along with the rates, insurance and maintenance, and all of those payments can then be offset against the occupation rental.

If you have a fixed interest or fixed payment mortgage, it may not be possible to alter that, in which case some principal reductions will also be coming off the mortgage. When the assets are divided up between you, the person who made the principal reductions will be given a credit for them. It is therefore important that you get a statement from the bank as close to the day you separate as possible showing how much principal is outstanding on the mortgage that day. That then gives you the starting point to calculate how much has been paid off the mortgage by the time the assets are divided between you.

If the house is to be sold the person who remains in occupation of the family home will obviously have more control over the sale process. They will be in control of how the house is presented and the times at which it is going to be available for inspection by prospective purchasers. But the price is established between you, by agreement if possible, sometimes with registered valuation advice. The proceeds of sale are not usually paid out until after you have signed a Relationship Property agreement sorting out ownership of all your property.

"RELATIONSHIP PROPERTY" OR "SEPARATE PROPERTY"

The Property (Relationships) Act 1976 defines Relationship Property by listing certain types of property and bringing in other property depending on how it is used by you as a couple or the circumstances in which it was acquired. Separate Property is everything else.

Generally on a division of property after separation you share Relationship Property equally but do not share Separate Property.

How to establish whether something falls within the definition of Relationship Property or Separate Property is sometimes simple and sometimes extremely complex. Determining the proportion in which you share Relationship Property or whether you have any claim on Separate Property is not always straight forward. The purpose of these notes is just to give you an overview of the basic principles without going into complexities.

Family Home and Chattels

The Relationship Property Act provides that the family home and chattels are Relationship Property which are therefore split equally between the two relationship partners. There are some exceptions to this - for example, if your relationship has been of short duration or if either party has made a hugely greater contribution to the relationship than the other.

Family chattels include your household furniture and artwork, your car, boat, caravan, and any other item that was generally used for family purposes. If you have a family bach the same rules tend to apply. Trade tools or other items in the family home used principally for business purposes are not automatically treated as Relationship Property.

If you both had a house when your relationship started and one of you was able to sell your house and keep the proceeds for separate investment, then an adjustment is available to offset what would otherwise be quite an unfair situation. If there was no family home at all the court can make an order to compensate for that lack against other Relationship Property.

If the family home is in the sole name of just one of you then a notice of claim may be lodged by the other partner against the title. That would prevent the registered owner dealing with the home without consulting the other partner.

Relationship of short duration

The Property (Relationships) Act 1976 rules about the division of property apply to marriages from the date of marriage but tend not to apply for relationships of short duration, that is, usually less than three years. Any de facto relationship period that occurred before you married is counted as part of the length of the marriage.

The rules don't usually apply to de facto couples until they have been together for three years although if a child is living with you as part of the family, even someone else's child, that can bring application of the rules forward.

In calculating the length of any marriage or de facto relationship any period of reconciliation up to three months in total can usually be discounted.

It is important to get the dates as accurate as possible as to when the relationship started, when you married, any periods of separation or reconciliation, and the date you finally separate.

Greater Contribution or Special Circumstances

If either partner has made a clearly greater contribution to the relationship or there is some other special factor that would make the normal sharing provisions seriously unjust, we need to know that because adjustments can sometimes be made in the division of property.

Life Insurance and Superannuation

The rule is now that the value of life insurance or superannuation that existed before the relationship started is the Separate Property of the owner. The value of life insurance and superannuation that is built up during the relationship is Relationship Property to be divided equally between you.

Your insurance company will usually be able to send you a letter outlining these values if you contact them and ask for it. For complex or high value policies a valuation is required from a professional valuer (at a cost of several hundred dollars at least).

Inheritances and Gifts

Inheritances, gifts and trust property received from third parties are usually the Separate Property of the person who received them unless they have mixed them in with other Relationship Property and it is unreasonable or impracticable to treat them as separate. If you have received money and used it to pay off the mortgage on your house then you may have lost that as Separate Property and it might have become part of the Relationship Property which is to be divided between you.

If you put any inheritance or gift into a trust which then lent the money to you and your partner to pay off then mortgage then that is probably still recoverable by the trust as a debt and would not have become Relationship Property.

If you have made gifts between you, such as engagement rings, those are generally the Separate Property of the person receiving them unless they have been used for your mutual benefit.

Taonga, and Family Heirlooms

Taonga (treasures) and family heirlooms may well be the Separate Property of the person who brought them into the relationship. The rules are complex in this regard and each asset would need to be looked at individually.

Heirlooms almost certainly need to come through several generations. Taonga may be something that has been acquired fairly recently but clearly needs to be of exceptional character to qualify as Taonga.

Businesses and Separate Investments

If one of you owned a business before your relationship began then it is possible that it has continued as Separate Property. However, if the other party has made any contribution to that business, or in some cases a contribution to the relationship that enabled you to make a greater contribution yourself to the business, then it is possible they will have a claim on it.

Having a claim on the business does not mean that they are entitled to half of it. It means that they may have a claim on anything from a very small amount up to a half in some circumstances. Their claim may be limited to just the increase in value of the business from the time of their first contribution. Again, it is a case of looking very carefully at the detail of the history and amounts involved before any determination could be made on the value of any such claim.

The same rules apply to other separate investments such as rental property or shares.

Salary or Wages

Earnings from your personal endeavour, such as wages or salary, is Relationship Property. So bank balances and share investments or rental property bought out of salary or wages earned after your relationship began have actually been acquired out of Relationship Property. And if any of your salary or wages have been spent on your separate business or other Separate Property then it is possible that your partner will have a claim on the business or other Separate Property because they have allowed their Relationship Property to be contributed towards it.

Debts

Debts can either be separate debt or a relationship debt. Debts that have been incurred for family purposes are relationship debts which need to be paid by you both equally. Debts that have been incurred for the individual purposes of one of the parties, such as student loans in most cases, are the separate debt of that particular party.

It is important when you are separating to get bank statements, credit card statements, shop credit account statements, hire purchase statements, etc showing the amount and details of any debts as at the date of separation. It would also be advisable to cancel any joint credit accounts as soon as possible so that debts incurred after the date of separation are incurred in your own individual names.

Power, telephone, rates, and insurance should possibly also be put into the sole name of the person who is responsible for it.

Bank Accounts

It is important to get bank statements that show the amounts and details of the sums involved as at the date of separation.

It is usually wise to talk to the bank after separation to arrange for any overdraft facilities and revolving credit facilities to be frozen at their existing upper limit. This simply avoids either party increasing the debt after separation to cover private expenses.

It would also be sensible to place any large credit amounts in an account which you both need to sign on to access to avoid any suggestion that either party could "clear out" the account for their own purposes.

You do need to be careful about automatic payments and especially mortgage payments to ensure that they are covered or that alternative arrangements are made for their payment.

Guarantees

As part of the separation process is important to cancel any guarantees you have given in favour of your partner. This needs to be carefully managed because a sudden withdrawal of a guarantee for seasonal or business overdraft purposes could stop finance needed for a business which is supplying the family with money.

UNEQUAL FUTURE LIVING STANDARDS OR INCOME

If the future standard of living or income of the two partners is likely to be significantly different because of the division of functions within the relationship we need to know that because there may be a lump sum compensation claimable.

THE ACT APPLIES FROM THE TIME OF A CLAIM

You should be aware that that the Relationship Property Act does not affect your property rights until a claim under the Act is made. So before separation you are legally free to deal with property in your own name just as though your partner has no claim on it. The court may make a compensatory award to your partner if they lose the benefit of property because of anything you have done.

HOW TO ESTABLISH IF A DE FACTO RELATIONSHIP EXISTS

The Property (Relationships) Act 1976 tells us how to establish whether a de facto relationship exists. The people involved have to be (i) 2 people of either sex who (ii) live together as a couple and (iii) who are both over the age of 18 years

The difficulty comes in determining whether people are "living together as a couple". The Act provides that all the circumstances of the relationship are to be taken into account, including (so other matters may also be taken into account) any of the following matters which are relevant in a particular case:

- The duration of the relationship
- The nature and extent of common residence (i.e. do you reside together all the time or part time or not at all?)
- Whether or not a sexual relationship exists
- The degree of financial dependence or interdependence, and any arrangements for financial support between them
- The ownership, use and acquisition of property (e.g. do you share use of cars, furniture, a house, a bach?)
- The degree of mutual commitment to a shared life (e.g. do you always holiday together?)
- The care and support of children (any children, not necessarily your own)
- The performance of household duties
- The reputation and public aspects of the relationship (e.g. do your friends, relatives or workmates see you "as a couple").

None of the above factors or any combination is necessary (so it/they can be absent) and the court can attach any weight they consider appropriate to any of the factors.

You will appreciate that it is often impossible to say whether a de facto relationship exists. The law is also so new that we do not have the benefit of case law setting out more detailed guidelines from the judges. In those circumstances we suggest that a conservative approach is taken and when in doubt take steps as though a de facto relationship exists.

WRITTEN AGREEMENT & COST

The need for a written agreement and independent legal advice

Most people with assets do get a written separation and Relationship Property agreement completed. For one thing it provides written evidence of the date of separation which is later needed to obtain a dissolution of marriage.

It also gives finality to your agreement on property because once it has been signed with independent legal advice given to both sides then it is very hard to have it amended or put aside by the Court. This leaves both parties free to make a fresh start knowing exactly what their position is and that they will not have to re-litigate the agreement in the future.

In the absence of a written agreement either side can make fresh claims on the other for up to a year after the date of dissolution of marriage and for several years after the end of a de facto relationship.

There is also a risk with a verbal agreement in the event of anything happening to your ex-partner (accident, death, or illness) that would mean that knowledge of your verbal agreement was lost except to you. The personal representatives of your ex-partner (trustees or attorneys) might not accept your word on what the agreement was and might have a very different approach to that taken by your ex-partner. Those representatives may well bring claims that your ex-partner might not have brought or might have agreed not to bring.

Likely cost

In general it is likely to cost about \$1,500.00 all up including the expenses of both solicitors to complete a separation and Relationship Property agreement IF ALL GOES SMOOTHLY. Unfortunately it is not within our control whether things go smoothly or not. That is largely up to you and your ex-partner.

If you can reach a basic agreement between you and provide us with all the information we need fairly promptly then matters should go well. Costs rise quickly and steeply if arguments arise between you or it is difficult to establish the extent of assets and debts or if their structure or ownership are complex.

We find it is often possible to keep the costs down by getting a draft agreement to a point where you are both happy with it and only then having it taken to another solicitor for your ex-partner to be given independent advice. This is only appropriate where your respective interests in your property are reasonably clear and / or you have reached amicable agreement on their division.

HOW CAN YOU PREPARE FOR THE LEGALITIES?

Do not delay coming to see us in order to get this information but do gather as much of it together as you can before your first appointment.

In due course we will need:

- The full names of you, your partner, and your children including any middle names.
- The residential and postal address (if different) of you and your partner including place and address of work and contact phone numbers.
- Dates of birth of children, the date of your separation, and the date of marriage or approximate date of the commencement of your de facto relationship.
- For government statistical purposes we need the ethnicity of you and your partner.
- A brief outline of the care arrangements you have agreed for the children - who they will live with, what schools they will attend, maintenance payments etc.
- Copies of bank statements, insurance and superannuation policy statements etc as at the date of separation.
- A note of car make and model etc.
- Any particular items of furniture each of you will take or a note that you have agreed on an equal division of furniture and are happy with that.
- A brief history of how you acquired your major assets.
- Copies of debt statements and a note of any personal spending included in the debt (assuming that all the other spending is for family purposes and so is a joint liability).

This is the basic starting information we need. Once we have this outline there may be further information required clarifying such things as the source of assets or debts and their value at the start of the relationship.

FAMILY COURT COUNSELLING

The Family Court is able to refer you for up to 6 hours of free counselling.

It is highly recommended that you take this opportunity because the approach of the counsellors is to help you to work through all the issues you will have with regard to your relationship, the division of assets, your children (if any), and how you deal with your separation as regards your workplace, friends and family. The counsellors will not necessarily try to get you to reconcile if that is not appropriate.

To assist you to arrange that counselling there is a reference form attached which one or both of you can complete and send to the Family Court to request a counselling referral.

FORM F.P.1

Rule 9 (1)

REQUEST FOR COUNSELLING IN RESPECT OF A MARRIAGE

Section 9 (1), Family Proceedings Act 1980

To: The Registrar
Family Court
85 Armagh Street
Private Bag 4618
CHRISTCHURCH

Fax: 9624303

This request relates to a marriage between--

Full name:
First Name *Middle*
Last (Surname)

Full residential address:

Contact telephone numbers: Home Business

AND

Full name:
First Name *Middle*
Last (Surname)

Full residential address:

Contact telephone numbers: Home Business

I (We) request you to arrange counselling in respect of my (our) marriage.

Signature(s):

Date: