The Family Law Handbook

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Chapter 2 Marriage, de facto relationships, separation and divorce

LAWBOOK CO.

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Marriage, de facto relationships, separation and divorce

[2.10] People have very different ideas about what constitutes a proper marriage, a de facto relationship, or separation in a relationship. For the sake of certainty and consistency, the law lays down its own definitions. This chapter examines the legal concepts of marriage, de facto relationship, separation, and divorce, and investigates how these definitions influence outcomes for people involved in family law processes.

It also examines some of the practicalities of separation and divorce, being issues of major concern to people involved in relationship breakdown.

The law of marriage

What is marriage?

[2.20] A marriage in Australia is legal if it is in accordance with the *Marriage Act 1961*. This Act contains details about how a marriage may be solemnised, marriageable age and the marriage of minors, the formalities of making a legal marriage, who can marry people, void marriages, and marriages made overseas.

In 2004, the *Marriage Act* was amended to define marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". The amendment was inserted by the government of the day to end speculation that the Act allowed for marriage between same-sex partners.

The obligation to support your spouse

[2.30] The obligation on spouses to support each other financially comes into the *Family Law Act* (section 72) from the common law. The basic responsibility for maintaining a spouse differs from the old law in that it applies:

- to both spouses, not just the husband; and
- only when the supported spouse is experiencing some kind of inability to support him or herself.

This obligation exists for all spouses. In practice, however, it usually only becomes relevant on marriage breakdown.

Ownership of property

[2.40] The law long ago established that men and women can own property separately after marriage. They can also hold it together if they wish, either as joint tenants or tenants in common, but co-ownership never arises from the simple fact of marriage, as it once did. This is in contrast to the concept of "community property" which applies in Europe and some US States.

Nevertheless, in proceedings relating to property, the Family Court may "make such orders as it considers just and equitable" in respect of all the property of the parties, whether owned jointly or separately: *Family Law Act* section 79. See chapter 7 for a detailed discussion of property issues.

Marriage also remains relevant to property distribution on the holder's death. For example, a marriage automatically revokes a person's will; and if someone dies without a valid will, their property passes under the laws of intestacy to their spouse.

Advantages of marriage at relationship breakdown

[2.50] Leaving aside questions of personal preference and religion, considerable legal advantages flowed from the status of marriage until the landmark changes in relation to the status of de facto relationships under the Commonwealth's family law legislation that came into effect in 2009. These changes are described in detail at [2.100] – [2.220].

Under the pre-2009 system, only the States and Territories had jurisdiction, under their domestic relationship laws, to settle property and financial disputes between former de facto partners, while married partners could turn to the quicker, cheaper and altogether more accessible processes under the federal *Family Law Act*.

The advantages of the federal system were even greater if you were supported by your partner, and continued to be the principal carer for your children after separation. The old *Family Law Act* required the courts, in dividing marital property, to consider the future needs and resources of the separating partners in relation to income, and such matters as the cost of raising children. The various State and Territory laws providing for property distribution between former de facto partners did not consider such factors.

Notwithstanding the 2009 changes to the law relating to property settlements, it remains the case that under many insurance policies and workers' compensation schemes only a "surviving spouse" – that is, a marriage partner – can recover death benefits or compensation for wrongful death.

Marriages made overseas

[2.60] Most marriages validly made in another country are recognised in Australia – although not same-sex marriages. You can also obtain a divorce for an overseas marriage, as long as:

- at least one of the parties lives in Australia, and
- the validity of the marriage can be formally proved by a marriage certificate or other document (with a translation if it is not in English).

Marriage under Aboriginal customary law

[2.70] A marriage in accordance with traditional Aboriginal law is not recognised as valid under Australian general law.

The legitimacy of children

[2.80] The concept of illegitimate children has been dead in Australia since 1987. The parents' relationship is irrelevant to the legal status of the children.

The legal status of de facto relationships

[2.90] The following section addresses only the legal status and eligibility requirements for de facto couples under the law in Australia. For the *content* of de facto property law provisions, that is, for the entitlements, obligations and processes now available to de facto couples for property matters under the *Family Law Act*, see chapter 7.

Developing legal status

[2.100] Unlike some jurisdictions throughout the world, Australian law does not recognise "common law marriage" (otherwise known as de facto relationships) as a form of legal union that gives rise to fundamental legal rights and obligations at common law *upon its formation*. For many years in Australia, there was no legal recognition at all of even long-term de facto relationships.

In recent years, however, the States, Territories and the Commonwealth have enacted legislation that gives the parties to a de facto relationship certain rights and duties.

The Commonwealth's *Family Law Amendment (De Facto Financial Matters and other Measures) Act 2008*, which came into effect in 2009, gave people in de facto relationships access to Commonwealth family law on property and maintenance matters, being access equivalent to that enjoyed by people in marriage relationships. Importantly, also, the 2009 changes recognised same-sex de facto relationships on the same basis as heterosexual de facto relationships.

The 2009 changes don't refer to parenting issues because Australian family law on parenting matters already covered unmarried parents. All the child-related provisions in the *Family Law Act*, and everything in this book about parenting responsibilities, arrangements, and issues, as well as the rights, welfare and development of children, applies equally to children from both de facto and marriage relationships (although not necessarily with equal treatment to same-sex and heterosexual parents).

The 2008 Commonwealth de facto property amendment was a very important change in Australian family law; some say the most significant ever. It removed an area of fundamental discrimination as between de facto and married couples, and as between same-sex and heterosexual couples. It has also made for much cheaper and more convenient court-based dispute resolution for many people. Previously, separating de facto couples needed to start a case in the Commonwealth court to resolve a parenting dispute, and another case in the State court if there were property or maintenance issues. Now all matters can be resolved, if necessary, by the one court.

Different family property laws for de factos depending on geography

[2.110] The de facto family property provisions apply to any relationship with the requisite geographical connection with a "participating jurisdiction" (State or Territory involved in the scheme). Since South Australia came on board in 2010, the participating jurisdictions now include all of the States and Territories of Australia, except Western Australia.

In Western Australia, de facto relationships have been covered by that State's special State-based *Family Court Act* since 2002. Unless it decides to join the Commonwealth scheme, court-based dispute resolution on property and financial matters for people separating from a de facto relationship in Western Australia will continue to be based on that State law.

Notwithstanding this, under the provisions of section 90SD, a person now living anywhere in Australia can make an application to the court under the new Commonwealth de facto property law if they can show EITHER THAT:

- when the de facto relationship broke down, they were "ordinarily resident" in one of the participating jurisdictions; OR THAT
- at least one of the parties is *currently* "ordinarily resident" in a participating jurisdiction, AND EITHER:
  - the couple were ordinarily resident in a participating jurisdiction during at least one-third of their de facto relationship, OR
  - the party applying for the order made substantial financial or non-financial contributions to property or as a homemaker or parent in one or more of those States or Territories.

Different de facto property laws apply depending on timing

[2.120] Provided the geographical and other eligibility requirements are met, parties will be able to rely on the de facto property provisions in the *Family Law Act* if they separate after 1 March 2009 (or 1 July 2010 in South Australia) *and, usually, if* one of them makes an application under the *Family Law Act* within two years of their separation: sub-section 44(5). If there has been more than two years since separation, the court may still grant permission for an application in certain hardship situations: sub-section 44(6).

If separation has occurred earlier than 1 March 2009 (or 1 July 2010 in South Australia) *and if* special permission to apply after expiry of the usual two-year separation period is granted, parties may still be able to "opt in" to the Commonwealth scheme, subject to certain conditions. To "opt in" to the Commonwealth de facto scheme:

- there must not have already been any distribution of property, payment of maintenance, or final orders made under State or Territory law;
- both parties must agree in writing that they want to make an unconditional choice to have their dispute dealt with in court under the Commonwealth law; and
- both parties need a signed statement from a lawyer that the advantages and disadvantages of moving to the Commonwealth scheme have been explained to them.

See section 85A of Schedule 1 of the 2008 amendment Act for further details.

What is an eligible de facto relationship?

The basic definition

[2.130] A de facto relationship is defined at section 4AA of the 2008 de facto property law amendments as a relationship where the parties:

- are not legally married to each other;
- are not related by family; and
- have a relationship as a couple, living together on a "genuine domestic basis".

What is a genuine de facto couple?

[2.140] The Act sets out some of the factors that a court will consider in deciding whether two people have a "couple" relationship exists at sub-section 4AA(2). These include:

- the length of the relationship;
- the nature and extent of their living together;
- whether there was a sexual relationship;
- financial arrangements between the parties;
- property arrangements between the parties;
- the degree of mutual commitment to a shared life;
- whether the relationship is registered under a State or Territory law;
- the care and support of children; and
- the reputation and public aspects of the relationship.

It is not necessary to "prove" any one of these factors to establish that the de facto relationship actually exists: sub-section 4AA(3). They will be considered by the court, all together, and along with other circumstances of the individual case: sub-section 4AA(4). It's notable that neither arrangements for housework nor having children together forms part of the list. As the list is not closed, however, such factors could be and have been taken into account in deciding whether a de facto relationship exists. As noted in *Keaton v Aldridge* (2009), the task of the court is to identify:

> the point at which relationships cross an invisible line to become one recognised by law …Without the "solemnities and formalities" by which some heterosexual couples declare that relationship in marriage, same-sex relationships are fluid in the sense that it is difficult for them to discern what, if any, circumstances will carry them across an invisible threshold to be a relationship recognised by law.

Importantly, in *Keaton*, it was held that the fact of separate households is no particular bar to the existence of a de facto relationship under the law.

In *Jonah & White* (2011), the court was asked to make a declaration of de facto status about a relationship of 17 years, which existed outside the marriage of one of the parties to the relationship. The parties met secretly for only a couple of days every two or three weeks, had separate households and the children of the married party had no established relations with the other party. Though the relationship was long and stable and there had been some financial dependence, the court decided against declaring de facto status because of the absence of an essential "couple-dom" – being the "merger of two lives into one" on a "genuine domestic basis".

The requisite couple-dom, however, need not be well known. It was recognised in *Baker & Landon* (2010) that a same-sex de facto couple may not be "public" about their relationship because of concerns about discrimination.

Similar to case law about separation?

[2.150] It may be recognised that the checklist of factors indicating de facto status at sub-section 4AA(2) is similar in many (but not all) respects to characteristics *the cessation of which* have been regarded, in earlier case law, as indicative of separation in a married relationship (see [2.140]). The courts have warned against the application of the earlier separation case law to decisions about whether a de facto relationship exists or not as the legal contexts are really not comparable. As noted in *S & B* (2009), in a separation situation a party has the onus of proving that a (married) relationship is no longer on foot by demonstrating the *absence* of certain factors. In de facto relationship jurisdiction cases, by contrast, onus is on the party attempting to prove the *existence* of a de facto relationship by positively establishing certain characteristics.

Additional "gateway" requirements

[2.160] Though there may be no doubt about the existence of the couple relationship, for a property or maintenance application under the new de facto laws to succeed, it is necessary that one of the following qualifying factors are satisfied:

- the relationship has lasted at least two years; or
- there is a child of the relationship; or
- the party applying to the court made substantial contributions to the relationship; or
- a serious injustice would result if the court did not make the order or declaration that the party has applied for; or
- the relationship is registered under State or Territory law.

Multiple relationships

[2.170] The new Act specifically notes that a de facto relationship can exist despite the fact that one or both of the persons is legally married to someone else, or is in another de facto relationship at the same time: sub-section 4AA(5).

Same-sex relationships

[2.180] The new Act expressly states that it covers both heterosexual and same sex relationships: para (a) of sub-section 4AA(5).

Close personal relationships (that are not de facto)

[2.190] People in certain close personal relationships, such as carer relationships, that have elements of domestic support and personal care, and yet are not de facto relationships, have rights under law in some States and Territories. The new Commonwealth de facto property law does not apply to close personal relationships that are not covered by the definition of de facto relationship at section 4AA of the *Family Law Act*.

Separation for de facto couples

[2.200] It will be clear that the actual date of separation can be an important fact in deciding property and financial entitlements. The de facto relationship provisions in the *Family Law Act*

do not explicitly describe how the court should decide whether and when separation has actually taken place. Unlike a marriage, which exists as a separate union under common law, a de facto relationship does not exist at law outside the particular pieces of legislation that define it for different purposes. This means that, for de facto property law purposes, a de facto couple will be separated when the de facto relationship, as defined in the Act, no longer exists. Therefore, the time of separation will be determined by a reverse of the process described for deciding the existence of the couple relationship above. Using the same factors, the time at which a couple became "not a couple" may be identified.

Court declaration about de facto status

[2.210] The law provides for early resolution of the many possible legal issues that could arise around these complex eligibility requirements. Under section 90RD, at the same time as, or after, a party applies to the court for other financial orders, they can also apply for a declaration of the court that decides such matters as:

- the period of the de facto relationship;
- when it ended;
- where the parties "ordinarily resided";
- whether there is a "child of the de facto relationship"; and
- whether a party has made "substantial contributions".

After a declaration is made, it takes effect as an order of the court. This means that the "facts" it refers to are decided, and no longer form part of the dispute between the parties (subject to appeals).

If you are not eligible ...

[2.220] If your relationship does not meet the timing, geographical or other "gateway requirements" for coverage under the *Family Law Act* or you cannot, or do not wish to, opt in to the Commonwealth scheme, it is quite possible that the relevant State or Territory property laws may apply instead. See [2.160] for a list of these.

Defining separation for married couples

"Irretrievable breakdown of the marriage"

[2.230] Since 1975, the only ground for a divorce in Australia is "irretrievable breakdown of a marriage". The only way to prove "irretrievable breakdown" is by separation for at least 12 months: *Family Law Act* section 48. This separation must be proved by evidence that the marital relationship has been severed. A court will not consider a marriage to be "over" by reason of temporary or trial separation, or even of physical separation, without evidence of the severance of the relationship.

Why the date of separation matters

[2.240] The date of the formal, legal separation affects many important matters, including:

- when a person can file for divorce;
- when child support becomes payable;
- when new Centrelink benefits become payable; and
- how the court will calculate the property settlement.

Constant fighting, extramarital sex and loss of love do not prove the end of a marriage ...

[2.250] Peaceful coexistence and monogamous sexual relations are not part of the legal profile of a marriage. Many people have workable marriages that do not include these characteristics. Thus, the date that "he started his affair" or from which "we never stopped fighting" is not in itself very useful.

As many poets have more than adequately described, love is neither observable nor classifiable. The contrary applies, however, for the legal indicators of a marital relationship – they are generally observable, and about practical matters. The death of love itself is not provable in court and thus is not an indicator of the end of a marital relationship.

The natural indicators of a marital relationship

[2.260] Because people live their married lives together in so many different ways, the law does not try to define, in practical terms, what final separation must look like. Instead, the severance of the marital relationship is proved by evidence of *change in the overall character of the relationship*.

If there is a dispute about the date, or about whether there has been a final separation at all, the court will look at the total circumstances of the relationship both before and after the alleged separation. It will look at whether the parties live together, have sexual relations, cook or clean for each other, go about together as a couple, jointly care for children, spend time together, or support and protect each other. These are some of the natural indicators of a marital relationship. But the absence of one or another of them won't, in itself, be conclusive – there is no magic about deciding not to cook for someone that will prove final separation.

It is in a significant change in the pattern of the natural indicators of a marital relationship – from before the alleged separation to after it – that the court will find evidence of final separation.

Must both parties want to separate?

[2.270] If the marital relationship has been "severed" (according to the law), separation is established even if only one party wants it.

On the other hand, it is not possible to finally separate – that is, to sever a marital relationship – either accidentally, or without telling your spouse. One party at least must form an intention to sever the relationship and then communicate that intention to the other.

The intention does not have to be made explicit if your words and actions clearly point to only one conclusion – that the marriage is over.

Separation under one roof

[2.280] If the marital relationship is effectively severed and you have either communicated your intention to finally separate, or agreed with your spouse that the marriage is over, there is no requirement that one party must move out of the marital home. After all, "separation really means a departure from the state of things rather than from a particular place": *In the Marriage of Falk* (1977). Continuing to live under one roof could, in fact, be the most sensible decision in the short term.

If, however, you later wish to count the period of separation under one roof towards the 12-month separation period demonstrating irretrievable breakdown of the marriage, you will have to prove that you actually separated on a specific day some time before you finally lived apart.

You should try to collect observable evidence of the change in the status of your relationship from the date you want to establish as the date of separation. It is easier to do this at the time rather than retrospectively later on. This evidence can be included in or attached to an *affidavit* (a sworn statement – see [2.290]) when you apply for divorce.

Evidence of separation under one roof

[2.290] Items to be used in evidence of separation under one roof might include:

- moving into another bedroom and telling someone outside the marriage that you have done so;
- telling friends that you and your partner have separated;
- recording the fact of the separation and/or future arrangements in writing (preferably signed and dated by both of you);
- a diary entry;
- a revised will;
- social media relationship status changes; or
- letters informing other parties about the separation, such as the school, bank or insurance company.

Case study: separation under one roof

[2.300] After the wife discovered her husband's affair, the parties slept and ate in separate rooms, rarely communicated directly with each other, and led separate social lives. At one point the wife applied for and obtained an order for maintenance against her husband. On the other hand, she continued to do his washing and cleaning, and occasionally prepared his food.

The original decision of the trial judge that the parties were not properly separated for the required period was overruled on appeal. The Full Court stated that the "evidence must examine and contrast the state of the marital relationship before and after the alleged separation", and show that there has been a "change in the relationship" constituting the separation: *In the Marriage of Pavey* (1976).

Getting back together (briefly)

[2.310] Section 50 of the Act allows that the necessary period of 12 months' separation will not require re-starting if the parties resume a marital relationship but then split up again within three months. The three months' cohabitation won't count towards the 12 months' separation, however, and this allowance can only be made once.

Should I stay or should I go?

[2.320] It can be difficult to stay mentally clear during this stressful time. It is important, however, to try to "think first", and then to take the necessary and appropriate action that minimises negative fall-out in subsequent interactions with the other party

Weighing up the pros and cons

[2.330] It is not necessary for one party to physically leave the home once separation is established. Both parties are entitled to continue to live there for as long as they choose. But most people, once they decide to separate, feel an enormous pressure to put physical distance between their own and their former partner's lives.

There are a number of other considerations to bear in mind about whether, or when, to leave the family home.

- *Safety issues* Leaving may be the best option for you if you are feeling unsafe or your partner refuses to leave.
- *Stability for children* Leaving might be in the best interests of your children if it means that they can stay in their own home.
- *Exposure of children to conflict* Leaving, either with or without your children, may be in their best interests if it would mean removing them from exposure to continual parental conflict (the most damaging aspect of relationship breakdown for children).

- *Setting up a "status quo" for parenting arrangements*. If you leave your children behind, you may endanger your prospects for achieving equal or substantial time with them in the future. A court may not be prepared to order a change to settled arrangements for their care.
- *The cost of two households* You need to do your sums carefully before rushing out to rent a flat. Community services such as refuges and support groups may be able to connect you with some cheaper, temporary accommodation. You might also consider sharing for a time.
- *Property issues* The partner remaining in possession of the home may have little motivation to facilitate its sale to finalise a settlement.

If you do decide to leave

[2.340] The small details of personal possessions, documents, furniture and household effects tend to get lost in the "big picture" approach – percentages and dollar values and the like – that characterises property negotiations. You should try to take everything personal to you, and a fair share of joint household gear, when you first leave.

But my partner owns the house ...

[2.350] The decision about who goes or stays should not turn on who has built or bought the house or whose name is, or is not, on the title. It is a question of:

- what is financially feasible;
- what is fair;
- most particularly, any needs of children;
- the parties' needs; and
- the personal safety of one or both of the parties.

Exclusive sole occupancy orders

[2.360] Sometimes one party becomes fixed in their determination to remain in the home. It may be necessary for the other party, in the interests of fairness and safety, to obtain a court order for *exclusive sole occupancy*, particularly if there is violence or the threat of violence, or if the interests of children are at stake.

All the courts exercising jurisdiction under the *Family Law Act* can make an interim exclusive sole occupancy order for the home on the application of one of the parties (for more details see [7.920] – [7.930]). This now applies both to married and de facto couples. An exclusive occupation order has the effect of forcing one partner to leave their own home to the sole occupation of the other, and will not ordinarily be made unless there is family violence.

State or Territory domestic/family violence legislation provides another possible avenue of obtaining sole occupancy of a residence.

Can I come back if I wish?

[2.370] Even though you have the right to continue living in the home after separation, once you move your possessions, and apparently agree to the other party's sole occupancy, it will be hard to move back in without your partner's consent. It may even be difficult to enter the property.

If you move out, your partner acquires a form of tenancy. Generally speaking, a tenant has the right to decide who may enter the property, and when, and the right to privacy. It does not matter if your name is on the title jointly with your partner's – or even if it is the only name on the title.

On the other hand, your partner should give you a reasonable opportunity to remove your possessions from the house around the date of separation. You may be able to obtain an interim order if your partner will not allow you access to obtain things you need.

It is best to be sure about your decision to leave before you go, and when you do go, take with you everything you ever plan to take.

A right to change the locks?

[2.380] The legal basis of the right of the partner in possession to change the locks at the former joint residence is not very clear. Usually, lock changes will be considered justifiable once:

- the separation is clearly accepted by both parties;
- another residence for the departing partner is fully established; and
- all the possessions of the departing partner have been removed from the joint residence.

On the other hand, the action of changing locks may inflame feelings in a most unhelpful manner. It need not occur at all unless there is a reasonable fear that the other partner will enter uninvited or cause trouble by removing disputed items, damaging property or abusing or harassing occupants.

Be aware that a locksmith will usually agree to help a person to get into an unoccupied house where the person doesn't have a key, if they can show ownership rights and also some evidence of recent occupation.

Assistance with the costs of relocating

[2.390] If physical separation is desired and a sole occupancy order is not appropriate, but an earning partner refuses to leave the house, a court can require that partner to assist with the costs of relocating the dependent party – for example, by paying the rental bond and the initial set-up costs. See [7.1680] for details about applying for urgent maintenance.

Financial and property matters

Assessing your situation

[2.400] To make sensible decisions now and to prepare for future negotiation, you need a reasonably accurate understanding of the full extent of your assets, liabilities, expenses and income. You will need to make some lists.

Do not try to use these preliminary lists and figures to negotiate a final settlement. The most pressing task at separation is to understand the scope of what has to be done to disentangle your joint lives and begin to create two sustainable, separate lives. There are usually major emotional issues to deal with too. Apart from the fact that you are unlikely to have all the information you need, this is not a time when most people are capable of finely-tuned negotiations about a fair and final property distribution.

Do try to use the lists to work out:

- what you can both afford to pay for a second household;
- what you can agree to sell if necessary to finance the separation;
- what you should take from the house when you leave; and
- what records you need to take or copy before you leave.

Both parties need to do this for their own sake. The task for the person who is leaving is to find out as much as possible while there is still an opportunity for informal, and possibly cooperative, information gathering. The task for both is to begin to grapple with the business of taking separate responsibility for personal affairs and finances.

Assets list

[2.410] A court will eventually make final orders in relation to all the parties' property, whether it is recorded as being in one or both names, or whether it came into the relationship from one side or the other. It's all up for distribution, though different considerations apply to different assets and liabilities.

Make an inventory (a list) of all the assets you consider yours personally, and yours jointly with your partner, including real estate, shares and other investments, bank accounts, superannuation, collections, art and antiques, tools, boats, cars, business assets and interests, and so on. Make a separate list for furniture and household effects.

Try to put a value on each item. Get some up-to-date account statements at least. For personal possessions, the relevant value is the garage sale value, or the price you could get from a dealer – not the "best price" (for more about asset valuations, see chapter 7).

Note carefully what you *don't* know about the existence or value of assets that form part of the property of the marriage, including your partner's business assets. You need to understand everything you can about your partner's true financial position.

Liabilities list

[2.420] You will soon be taking action to minimise the number of joint liabilities (debts) you share with your former partner. Until this happens, however, you will continue to be responsible for regular payments on all liabilities that are in both names, including loans, accounts, joint

credit cards and the mortgage. Make a list of them all, noting both the amount of the total liability to date and the amount of regular payments.

Expenses list

[2.430] Your properly prepared household expenses list should provide valuable information on the true cost of your present lifestyle. It will help both of you work out where savings might be made, and understand the full cost of establishing the second household. Ensure you include food, services, education, clothing, gifts, holidays and running a car.

Income list

[2.440] If your partner kept separate savings and investment accounts during your marriage, ask to be given, or otherwise try to obtain, details or copies of statements that show income from any source. Find out details of the source, if possible – particularly if the income was kept secret from you, or was unknown to you for another reason.

If your own income is low or non-existent, and you will have the children living with you most of the time, you will probably be entitled to new Centrelink benefits from the date of separation. If possible, you should attend Centrelink for an interview before separation. If you will not have the children living with you most of the time, you will probably be making child support payments at some level from the date of separation.

Financial and other records

[2.450] If you are leaving, take with you:

- all your personal documentation – diaries, letters, tax returns and other records of your own financial affairs;
- copies of all records pertaining to joint financial or property dealings;
- either the original or several certified copies of your marriage certificate and the children's birth certificates (if relevant); and
- your children's passports, if there is a risk that the children will be taken overseas without your consent.

Furthermore, and particularly if your partner is self-employed, you should ask to be provided with, or otherwise try to obtain, records of all of their assets and liabilities, including tax returns and computer-based accounts. Once you leave the house you may lose the opportunity to obtain an accurate profile of your former partner's financial interests.

You should also ensure you have the contact details of your partner's business partners and financial advisers.

Unfairness at separation

"Freeze and starve"

[2.460] Sometimes, either out of spite or as a tactic (to force the other person to settle, for example), one party will refuse the other access to important assets (such as the car, or tools of trade) or sources of income.

The courts will not allow the major earning partner to cut off their partner from income support or from vital assets provided in the course of the relationship. There will be an especially strong case if the quality of the parties' lifestyles after separation is manifestly unequal.

"Freeze and starve" may now be family violence or child abuse

[2.470] Under the 2009 changes to the law, the set of examples of "family violence" now specifically includes:

- unreasonably denying a family member "financial autonomy"; and
- unreasonably denying support for the reasonable living expenses of the family member and his or her children.

See sub-section 4AB(2) of the *Family Law Act* for important details.

By extension, and as the definition of "abuse" in relation to a child, at sub-section 4(1) of the *Family Law Act* includes the child being subjected to or exposed to family violence as defined under the Act, it is possible that financial deprivation affecting a child may also be held to be child abuse.

How to respond to deliberate deprivation at separation

[2.480] If your partner is denying you access to important assets, don't suffer quietly! Instead:

- Immediately open negotiations, either by writing a letter or by a face-to-face approach, in which you:
  - explain your perception of the unfairness in relation to particular assets or income, stating what you need specifically;
  - inform your partner of their maintenance obligations (see Maintenance at [7.1590]); and
  - tell your partner that you may pursue an interim court order to get a fair result if you can't agree on one together.
- Make an appointment for family dispute resolution to:
  - discuss your short-term financial arrangements; and
  - seek an agreement about the disputed asset or income, recorded in writing and signed by both parties. This may be filed at court as consent orders for the interim period (the period until your property settlement) if both parties agree and want the authority of the court behind their temporary agreement (see chapter 3).
- If these other methods fail, apply to the court for an interim order in relation to property or maintenance. If you have clearly communicated to your partner your right to make this application and the likelihood that you will be successful, you may never need to go this far.

Urgent court orders

[2.490] The relevant legal principles for obtaining an urgent court order about property or financial arrangements at separation are:

- that a party may be liable to support the other party to the extent that they are able (*Family Law Act* section 72 for married couples and section 90SF for de facto couples); and
- that a court may order short-term arrangements if a party is "in immediate need of financial assistance" (section 77 for married couples and section 90SG for de facto couples). Depending

on the problem, the actual legal remedy for unfairness at separation might be a property injunction or an urgent maintenance order. These are discussed in detail in chapter 7.

Disposal of property by one party

[2.500] Some partners start disposing of the assets of a relationship at, or even before, separation, to avoid sharing the benefits of the sale with their former partner. (To make matters worse, a new partner of one of the parties may sometimes be the beneficiary of these arrangements.)

On other occasions, the disposal (sale or transfer) is arranged so that the benefit or ownership of the asset can revert to the disposing partner at a later date.

Property injunctions

[2.510] You can apply for an injunction under section 114 or 90SS(1) of the *Family Law Act* to prevent your partner from disposing of property and spending the proceeds prior to the property settlement or final orders. See Injunctions preventing dealings with property at [7.990] for information about this.

If the asset is already gone

[2.520] Don't panic if the asset is already gone and it's too late to get an injunction – or if the value of the asset is such that it doesn't warrant the cost and trouble. Do collect as much information about the asset and the circumstances of its disposal as you can. If you can produce enough evidence that it was the property of the relationship, as well as evidence of the terms of its disposal, the proceeds of its sale may be accounted for as property (or value) already in the possession of the disposing partner, and deducted from their entitlement in the final settlement.

Dividing household goods

[2.530] It is a painful process to divide a joint life – perhaps harder for every year that the parties were together. Many people say that walking around and gathering up possessions – removing odd pieces of furniture from rooms and so forth – is the absolute low point of the separation experience. It is usually a good idea to do the physical removal at one go and just get past it – without argument if at all possible.

Try to avoid treating lampshades and mattress protectors as symbols of your time together, of the extent of your financial contribution to the household, or of your rights as against your partner. Remember that even photographs can be replicated.

Don't forget to list the pictures on the wall, important photographs, collections of various sorts, pot plants and the items in the garage, the shed and the laundry.

Share your list with your partner. If you can, work through it together. Alternatively, indicate in writing on the list the items you would like either to keep in the house or take with you, and ask your partner to consider it and get back to you.

It may be difficult to agree on the value of items. If this happens you might agree to have the item valued professionally, or use the average between your value and your partner's value. You

could also try the "two-list" or the "silent auction" methods (see below). If one party appears to be taking more value in the goods than the other, an additional cash payment (to even up the deal) may be agreed.

Try to be fair. Consult your children about the fate of their possessions. Remember that the cost of setting up two workable households will be regarded by a court as a legitimate expenditure of any joint funds.

Two ways of dividing household goods

The two-list method

[2.540] One party divides the full list of household goods and furniture into two separate lists, then gives both lists to the other and invites that person to choose which one they want.

Under this simple system, the list-maker is forced by self-interest to be fair in constructing the lists – they may end up with either of them. The process is aided if the values of various major items are agreed before the two lists are made.

The silent auction method

Each party lists a value for each disputed item. The person listing the highest value for an item gets it. The value of all items taken by each party is totalled. The person with the highest overall value makes a cash payment to the other to even up the deal.

Money in joint accounts

[2.550] Sometimes an angry separating partner withdraws all the funds in a joint account. There is no need to consider that these funds are "lost forever" (although their absence in the short term can be very inconvenient). If the matter goes to court (or is settled with a view to the likely result in court), and the amount taken is significant, that partner's possession of the cash may be factored against them in the final settlement.

There is no doubt, however, that denial of access to financial resources can hurt one partner enormously in the short term. If the situation is clearly unfair and has created hardship, the disadvantaged party can apply to the court for an urgent maintenance order requiring the return of needed funds.

As soon as you know you are separating, and after considering both partners' needs for, and rights to, any available cash, and unless you agree otherwise with your partner, you should withdraw up to, say, half the balance of any joint accounts (unless you can seriously justify taking more) and deposit it into an account in your sole name.

Money in a joint account can be legitimately used by a party after separation for living expenses such as rent, bills and food (not going on a cruise, buying a yacht or presents for a new partner) without affecting the share of the property settlement that might eventually be ordered by the court.

What about the car?

[2.560] Each party usually keeps the car they drive regardless of whose name is on the registration papers. If incomes allow, responsibility for any payments should go with the car.

If there is only one car, the person with whom the children are living, or who has the greatest need, would normally keep it in the first instance. Alternatively, you could perhaps agree to sell it and split the proceeds.

If the car you plan to drive after separation is not in your name or in your joint names, you could negotiate with your partner to sign the car over to you. Ask the registration authority about a waiver of the usual stamp duty where the transfer occurs as part of a property settlement on relationship breakdown.

Electricity, telephone and other services

[2.570] Practices among utility providers differ but, generally, if your service accounts are in joint names, you will need to apply for disconnection and reconnection of the service to get the account into your name alone. Unfortunately there may be fees associated with this process, so you may wish to leave it until your cash flow improves.

On the other hand, if your partner is angry and potentially vindictive, it may be wise to have the provision of essential services to your home under your exclusive control.

Credit cards

[2.580] If you are the principal cardholder, you may not be happy for your partner to continue to have access to your credit account. If you decide that you wish the secondary access to cease, you will need to:

- make arrangements with the card issuer to cancel the secondary card; and
- inform your partner that you have done so.

Who pays the mortgage?

[2.590] If the home or any other property is mortgaged in both names, you will remain jointly liable with your partner to make payments until either:

- the mortgage can be discharged; or
- ownership of the property is transferred (with the approval of the mortgage institution) from one party to the other at settlement.

In practice, however, separating partners frequently agree that one of them will be responsible for paying the mortgage, or that they will each pay a certain proportion, until settlement is reached or the home is sold.

When one party leaves, the other is effectively renting the property from the joint estate of the marriage. Though the state of the property market, the size of the mortgage and the capacity of the parties to pay may have a considerable bearing on the deal you make in your particular situation, it is common for the mortgage payment to be deemed a fair rent in the circumstances. The mortgage often becomes the responsibility of the partner remaining in possession.

It may be useful for the person who leaves to continue to contribute to the mortgage so as to be able to argue for a higher percentage of the capital gain on the property between the date of separation and the date of settlement or hearing.

Some lending institutions will approve a short suspension of repayments (say three months) in certain circumstances of hardship, including relationship breakdown.

Banks now have detailed procedures for dealing with requests for amendments to loan arrangements. Before you agree with your former partner on any long-term change to ownership of the security or responsibility for repayment of the loan, you should discover what these are.

Other joint loans

[2.600] You will remain legally liable for any other debt in joint names, such as an overdraft, a personal loan, or a lease arrangement, until the liability is either discharged or transferred into one name – which may or may not be possible under the agreement establishing the debt, but should be possible by court order in the property settlement (see [7.1580]). You should discover the relevant policies of your lending institution before making any agreement about loan repayments with your partner.

Again, the parties can agree between themselves on payment arrangements. You will need to discuss the matter to decide what percentage each should contribute. Often loans relate to business, or to an asset in the possession of one partner. Unless there are maintenance obligations, possession and use of an asset related to the loan by one party would tend to suggest that responsibility for payment rests mainly with that person.

Life insurance

[2.610] There are important legal distinctions between being the owner of a life insurance policy, the beneficiary under the policy, and the person whose life is insured under the policy.

Many couples jointly own a policy which will benefit the surviving partner if the other dies. When you separate, you may not want to pay premiums for this possible future benefit to your former partner. But you may still wish to insure *against* that person's death. If your former partner dies, you might, for example, lose the benefit of child support, or the services of a primary carer for your children.

If you wish to insure the life of your former partner, you may be able to change the existing arrangements simply by a signed, handwritten endorsement transferring ownership on the policy. The policy document itself may provide for this. It will only be possible, of course, if your partner agrees. In any case, you should contact your insurance company to find out the options and the correct procedures.

You may also wish to insure against your own death, with your children named as beneficiaries. In this case you will need to set up a policy that you own and pay for yourself, and that benefits only you and/or your children.

Your will

[2.620] Depending on your State or Territory, a divorce (not a separation) may automatically revoke – make invalid – your entire will, or a part of it. Check with the Office of the Public Trustee in your State or Territory.

Remarriage automatically revokes a will in *all* States and Territories.

If, as a married person, you happen to die at any stage between separation and divorce, a valid will made during your relationship will remain valid. The property you bequeathed to your

former partner will go to that person on your death. Similarly, if you die without making a will, your estate will pass under the laws of intestacy to your partner, even if you are separated.

You may consider that you have more important things to do immediately after separation than changing your will. If the interval between separation and divorce or property settlement will be fairly long, however, it is wise to either make a new will or to amend your existing will.

Be aware that under the law, your interest in any property held by you and your partner as joint tenants will pass directly to your partner on your death, whatever your will says. To avoid this you could decide with your partner to amend the title to your joint property so that you each hold your interest as a tenant in common instead of a joint tenant. You could pay a lawyer to help you do this, or contact the authority responsible for land titles in your State or Territory about doing it yourself.

Centrelink

[2.630] Contact your local Centrelink office as soon as possible after you know the date of separation to:

- determine whether you are eligible for a Centrelink pension or benefit;
- apply for an assessment of your or your partner's liability to pay child support; and
- obtain information about the child support system.

Arrangements for children

[2.640] When mothers routinely worked at home, the question of "where the children will live" following separation was fairly routine. With changes in the work patterns of both men and women, however, and new appreciation of the value of shared parenting, a wider range of options has opened up for children to spend time or live with both, or either, of their parents.

The law and issues relating to post-separation parenting arrangements for children are discussed in detail in chapter 6.

Orders for personal protection

Federal personal protection orders

[2.650] A personal protection order is like a domestic violence order in that it is intended to stop someone molesting, threatening, abusing or harassing another person, including a child. Except in Western Australia, a personal protection order may be made under the *Family Law Act* to protect:

- children and their parents or carers (section 68B); and
- a party to a marriage, with or without children (section 114).

There is still no federal jurisdiction under the *Family Law Act* for making orders for the personal protection of a party to a de facto relationship (the powers specifically referred to the

Commonwealth by the States to facilitate the 2009 de facto changes to the *Family Law Act* related only to property and financial matters). It may be possible, however, for a party to a former de facto relationship to get a protection order under section 68B, if the person is a parent of a child of the relationship, a person with whom the child is to live under a parenting order, or in another of a set of relationships defined in the section in relation to the child.

Section 235 of the Western Australian *Family Court Act* is the equivalent to section 68B. There is no equivalent in Western Australia to section 114 of the *Family Law Act*.

Except in Western Australia, the power to restrain a party under section 68B or section 114 can be exercised by a court using the federal jurisdiction of the *Family Law Act* – even though the court using the power may itself may be a State-based court.

You can apply for a personal protection order under sections 68B or 114 in the same way as you would apply for any other order of the court, whether or not there is a family law case on foot. See chapter 4 for information on how to start a case and apply for orders.

If the matter is urgent, you can apply for the order to be made on an urgent, ex parte basis – that is, without notice to the other party. See [6.1130], and Injunctions for personal protection of a parent or a child at [6.1220].

State and Territory domestic violence orders

[2.660] Every State and Territory has domestic violence legislation and other legislation providing for restraining orders (see [1.250] for details of this legislation).

Which order to seek?

[2.670] If you have safety concerns for a child or for yourself you may seek a protection order in either a federal or State jurisdiction, or both, provided the federal protection order is obtained first.

The decision about which order to seek – a federal personal protection order or a State domestic violence order – may ultimately be made on the basis of convenience, in terms of which court the person is already appearing in and cost considerations flowing from that.

It is sometimes said that State police are more ready to enforce their own State-based orders (though they are bound to enforce federal orders as well).

Orders for the exclusive occupancy of the family home

[2.680] Orders for sole occupancy of a residence for personal protection can be made under both federal and State regimes and apply to both married and de facto couples. See [7.920] – [7.970] for more about this.

Divorce

[2.690] It's really not very difficult to get a divorce. Many people now manage the process without a lawyer. The courts provide extensive and high-quality information and assistance to divorce applicants.

Eligibility for divorce

[2.700] There is now little scope for argument in the divorce proceeding itself. Any dispute about property, maintenance, child support or parenting arrangements will proceed in the family law system entirely separately from the divorce.

You are eligible to divorce under Australian law if you or your spouse:

- is an Australian citizen;
- ordinarily lives in Australia;
- lived in Australia for the year immediately before the divorce application; or
- regard Australia as home and intend to live indefinitely in Australia.

Either or both of the parties can apply.

Grounds for divorce

[2.710] Australia has a no-fault system for the dissolution of marriage. The only thing to be proved in divorce proceedings is "irretrievable breakdown of marriage". The only way to prove this is to demonstrate that the parties have been legally separated for at least 12 months.

If there is no doubt about the date of separation, and the arrangements for any children are clearly appropriate, the court will probably grant the divorce on the application of one party even if the other party does not want it.

Evidence of separation under one roof

[2.720] If the applicant (or applicants) claim that there was "separation under one roof" for any part of the vital 12 months, the court will require evidence of this (see [2.860] for the kind of evidence required).

An *affidavit* must be filed from:

- the applicant, or at least one of them for a joint application; and
- at least one other person (friend, relative, neighbour) with knowledge of the couple and the circumstances of the marriage breakdown.

The affidavits must be sworn and filed in accordance with the rules about affidavit-making (see [5.740] for further details). They should also:

- identify the person making the affidavit and their relationship to, or identity as one of, the parties; and
- attest to the person's knowledge of the fact that the marriage is over and the circumstances in which they obtained this knowledge.

If you have documentary evidence of the date of separation – something signed by both of you at the time, or letters or documents detailing changed financial arrangements – certified copies should be numbered and attached to the affidavit. Make sure the affidavit identifies and refers directly to all the attachments.

There are sample affidavits at [2.860].

You will also need to attach your marriage certificate, or a certified copy of it, to your divorce application. If the certificate is not in English, you will need to obtain a translation and a short affidavit by the translator. The substance of the affidavit is contained in the divorce application form itself, but is obtainable as a separate document, called an Affidavit of Translation of Marriage Certificate, and available from http://www.familylawcourts.gov.au or a court registry.

Marriages of less than two years duration

[2.730] If a marriage has lasted for less than two years, the parties must attend counselling to investigate the prospects of reconciliation. A document known as the "Counselling certificate for applicants married for less than two years", signed by a family counsellor, should be attached to your application for divorce. The certificate states that the person has "considered" reconciliation with the assistance of a specified person, being a family counsellor or other nominee: sub-section 44(1B)(a).

The certificate is available from http://www.familycourt.gov.au or a court registry. Joint family counselling may not be advisable or practicable for a number of reasons – for example:

- the other party refuses to attend;
- the other party cannot be found; or
- there has been violence in the relationship.

In such cases, speak to registry staff who will advise you about alternatives.

Which court?

[2.740] Applications for divorce must currently be lodged in:

- the Federal Circuit Court; or
- the Family Court of Western Australia for people living in that State.

Costs

[2.750] At 1 July 2012, the fee for lodging the divorce application in the Federal Circuit Court was $577. A significant reduction in fees may be payable in cases of financial hardship or if you are otherwise eligible as described in Regulation 8 of the *Federal Circuit Court Regulations*. You will need to complete and file at court an "Application for Reduction of Court Fees" form which is available from http://www.familylawcourts.gov.au. Speak to your nearest court registry for more details.

Applications and filing

[2.760] Divorce applications are available separately or as part of a do-it-yourself kit from the court, their websites, from http://www.familylawcourts.gov.au or from http://www.divorce.gov.au.

The "Application for Divorce Kit" can be completed online and printed. You cannot, however, file your divorce application with the court, online, by this method. You must print off your completed application and file it in person at a court registry or by post.

There is a new avenue for electronic filing for individuals (and for organisations, like legal firms) who want to complete and file a divorce application online. Go to http://www.comcourts.gov.au and firstly register as an individual user. Select "Family Law e-filing", then "Application for Divorce", and then "Federal Circuit Court" (unless you have been formally advised to file in the Family Court of Australia). Using the e-filing method you can save your application and come back to it (until you lock it), as well as file it electronically. You will need access to a printer, a scanner and a valid email address. Download the "User's Guide to eFiling Divorce Applications" pdf document at http://www.divorce.gov.au for a full description of the process.

Documentation checklist: application for divorce

[2.770] To file an application for divorce you need:

- a completed Application for Divorce form;
- your marriage certificate (the original or a certified copy);
- if you've been married less than two years, a signed counsellor's certificate; and
- if you've been separated under one roof for any part of the 12-month separation period:
  - an affidavit from one or both of the applicants; and
  - an affidavit from a person associated with the couple.

Service of a divorce application

[2.780] An Australian divorce application made by a single party must be properly "served" (that is, posted or delivered) to the other party. This is not necessary if a divorce application is jointly made.

"Proof of service" of the documentation must be lodged with the court within a certain time after the application has been filed. The rules for proper service are quite technical – it may be a good idea to seek the services of a professional process server unless you can be sure that the other party will be doing their best to cooperate by returning to you the necessary signed forms to enable you to prove service. You might wish to start with the "Divorce Service Kit" downloadable from http://www.divorce.gov.au. See [4.850] for more about serving court documents.

Opposing an application

[2.790] If you disagree with the details in an application filed by your partner, you can lodge a Response to Divorce form within 28 days of being served with the Application for Divorce. This form is obtainable from court registries, from court websites, or from http://www.familylawcourts.gov.au.

If you file a response, you will need to arrange for it to be served on the other party (see [4.850]). You will also need to appear in court.

Advantages of joint applications

It's cheaper

[2.800] If you apply for a divorce by yourself, you will have to pay the full fee. If you apply jointly with your partner, the cost can be split between you.

You don't have to come to court

[2.810] If you apply jointly you can ask for the application to be heard without either of you attending, even if there are children under 18 involved. If you apply on your own, and you have a child, you must attend the hearing.

There's no requirement for service

[2.820] If you apply by yourself, you must comply with the rules for service (see "Serving documents" at [4.850]) to ensure that the other party has formal notice of the commencement of proceedings. This may involve paying a professional process server.

Working together towards closure

[2.830] It is a genuine step towards acceptance of reality, and the peaceful resolution of issues, if the parties can move together, cooperatively, in formalising the end of the relationship. By contrast, the arrival of unexpected divorce documents in the mail, or on the doorstep at dinnertime in the hands of a process server, is an unpleasant and confronting experience that tends to aggravate disagreements.

The Application for Divorce requires an outline of the arrangements made for the care of your children. Working through the application together may help you identify practical issues, and resolve uncertainties, about parenting arrangements and financial matters.

Timing

[2.840] The average time between filing an Application for Divorce and receiving the certificate of divorce varies between registries, but an undisputed joint application (with no service requirement) that is not delayed because the court requires extra information, could take perhaps

three months from filing to finish. When you lodge (file) your application, you will be allocated a hearing date – probably within four to eight weeks.

After the hearing, if the court has established that the requirement of separation has been met, it issues a decree nisi. This usually lasts for 30 days, unless:

- there are pressing reasons why the period should be shorter; or
- the court has asked for more information (about, for example, arrangements for children) which may require another court appearance and prolong the decree nisi period.

At the end of the period, and when any conditions specified in the decree nisi are satisfied, the decree absolute (divorce certificate) is issued.

For the vast majority of applications, the minimum decree nisi period applies. If this is the case, the court will send out the certificates of divorce one month and one day after the date of the decree nisi.

What about remarriage?

[2.850] An early date for re-marriage is not ordinarily considered a sufficient reason for early issue of the divorce certificate.

To marry, you must lodge a Notice of Intended Marriage with a marriage celebrant for a minimum of 30 days. Most celebrants will not accept a notice from a previously married person without a divorce certificate. You should not arrange a new marriage until you have that document in hand.

Disputes in relation to children

[2.860] The court may not grant a divorce if it is not satisfied that proper arrangements have been made for any children. If at the time of the application there is a dispute about child support, or care arrangements, the court may (but will not necessarily) adjourn the application until:

- the issues are resolved;
- further action (such as counselling) is taken; or
- further specified information is provided.

This will not, however, necessarily happen. Divorces are often granted notwithstanding outstanding parenting issues. If the court is not satisfied about arrangements for children, it may order the parties to attend an interview with a court-appointed family consultant, who will make their own investigation into the issues and make a report to the court: sub-section 55A(2).

Nullity

[2.870] If you think your marriage was invalid in the first place, you can apply to the Family Court to have your marriage declared a nullity. Your application would be for a *decree of nullity* – that is, a declaration that your marriage was void and invalid from the outset. The grounds for a decree of nullity are listed in sections 23 and 23B of the *Marriage Act*, and include that:

- at the time of the marriage one party was already married to somebody else (bigamy);
- the parties are within a prohibited relationship;
- the requisite formalities were not followed;
- one or both parties did not properly consent; or
- one or both parties was too young to marry.

Nullity cases can be difficult (and therefore expensive), while divorce, even early divorce, is relatively easy to achieve. Nullity applications are therefore now infrequent.

The decree of nullity in the family court system should not be confused, in either process or effect, with *annulment* as defined under certain church laws. The two processes have nothing to do with one another.

Polygamy and bigamous marriages

A polygamous marriage lawfully conducted outside Australia may be recognised in Australia. An attempt to create a polygamous marriage in Australia, however, will be invalid. It may also constitute the federal crime of bigamy.

"Prohibited relationships"

You cannot marry an ancestor or descendant or a brother or sister, whether the sibling is your whole or half-blood relative, or even if they (or you) are adopted: *Marriage Act* section 23B(2). In Australia, however, you can marry your (differently gendered) first cousin, aunt or uncle, niece or nephew.

Non-compliance with formalities

There are circumstances in which an allegation of insufficient compliance with the formalities for a lawful marriage will be upheld, including where the celebrant was not properly authorised and both parties knew this.

Arranged marriages

Australian law does not require that a marriage partner be known to, or chosen by, the individual. However, the Australian courts tend to uphold the rights of a person who has been forced into a marriage against their will.

Fraud and mistake

A person may be able to establish fraud or mistake as a basis for the "no consent" ground where the supposed consent was given to something other than a marriage,

or in relation to a person who was not, in the end, the person standing at the altar. It is very difficult to argue that fraud or mistake nullifies consent by reason of broken promises or the incorrectly understood attributes (such as the wealth) of one of the parties.

Incapacity

The person must be "mentally incapable of understanding the nature and effect of the marriage ceremony": *Marriage Act* section 23B(1)(d)(iii).

Sample "separation under one roof" affidavits

Affidavit 1

I, MARY ANN BLACK of 75 Risalt Street, Tadbugnall in the State of New South Wales, salesperson, make oath and say/affirm as follows:

1 I am the applicant for the dissolution of my marriage to Daniel John Black ("Daniel").

2 Daniel and I were married on 29 January 1990.

3 There are two children of our relationship: Samuel Black, born 6 June 1995 and Anna May Black, born 5 May 1997.

4 Daniel and I lived together with our children at 36 Antonen Road, Tadbugnall, New South Wales ("the marital home").

5 I am 40 years of age and am employed full-time as a jewellery salesperson at David Jones in Tadbugnall. My average weekly income is approximately $1150.00 gross. I have no other income.

6 Throughout our marriage and until our separation, my salary was deposited each fortnight into a joint account in both Daniel's and my name at the Commonwealth Bank, Tadbugnall. The mortgage and all the housekeeping expenses were paid from this account with free access to the account available to both of us.

7 Since our marriage, Daniel has not been formally employed nor earned an independent income.

8 In the course of our marriage, Daniel cooked on weeknights for the whole family and did most of the housework and laundry.

9 After experiencing difficulties within our marriage for some months previously, Daniel and I had a heated argument on 3 March 2005. At the end of it, I screamed at him: "I've had enough. We're finished."

10 At this point on 3 March 2005, I regarded my marriage to Daniel as over. We remained separated under one roof without reconciling until 12 December 2005.

11 On 4 March 2005 I moved all of my clothes and personal possessions out of our double bedroom and into the spare bedroom. I have not slept with, nor had sexual relations with Daniel since that time.

12 Daniel and I have danced as partners in ballroom dancing title competitions throughout NSW since 1992. Ballroom dancing has been a very important part of our life together.

13 On 4 March 2005 I attended at the RSL hall where our team rehearses each week and put up a notice advising that I would no longer be dancing with Daniel and asking for potential new dance partners to contact me directly. I have not danced with Daniel, competitively or otherwise, since our separation.

14 Also on 4 March 2005, I closed the joint account, and arranged for my pay to be deposited to an account in my name only. I arranged to pay the mortgage directly from my account and gave Daniel $600 in cash each payday from 10 March 2005 until my child support assessment in January 2006 for food and housekeeping expenses for himself and the children.

15 After our separation, we did not eat together as a family anymore. I prepared my own meals late in the evening or ate out and I looked after my own washing. Daniel continued to do most of the other housework.

16 Between 3 March and the end of November 2005, I tried unsuccessfully to find affordable, alternative accommodation near to the marital home so that I could continue to see the children easily.

17 In early December 2005, I found a unit at my current address in Risalt Street, Tadbugnall, which is only a few minutes drive from the marital home. I moved in on 12 December 2005.

SWORN/AFFIRMED by the Deponent at .....

On the ..... day of ..... 20..... .....
(Signature of Deponent)

Before me .....
(Signature and title of person before whom affidavit is sworn)

.....
(Print name of person before whom affidavit is sworn)

Affidavit 2

I, EVA LARSON of 24 Gidibal Street, Tadbugnall in the State of New South Wales, dance teacher, make oath and say/affirm as follows:

1 I am a friend of both Daniel Black ("Daniel") and Mary Black ("Mary"). I first met them as my next-door neighbours in Antonen Street, Tadbugnall in 1991.

2 I introduced Daniel and Mary to competitive ballroom dancing. Between 1992 and March 2005, they danced as a couple with the dance team the Tea-Trees that I founded and continue to manage.

3 On Thursday 5 March 2005 I went to the RSL hall for rehearsals as usual. Mary handed me a piece of paper. Her name and signature were at the bottom of the page. The document was headed "Public Notice" and included words to the effect: "Daniel and I will no longer be dance partners. If anyone else is interested in partnering me in the Samba section at the upcoming Regional titles, please contact me directly."

4 Neither Daniel nor Mary attended at rehearsal that night. Daniel has not attended club activities since that time. Mary found a new partner and continues to compete with the team.

5 On 15 November 2005, being the weekend after the Regional Dance Championships, I pulled up outside 36 Antonen Street to drop Mary back after a rehearsal. She hesitated before opening the car door, staring through the window at the house. The front room was clearly full of people. Mary said: "I'll have to go round the back." I said words to the effect: "Mary this is ridiculous, you can't continue to live like this." She replied: "I know – but I am looking for places all the time. Something has to come up soon."

6 On 14 January 2006, at rehearsal, Mary handed around a little card with her new address in Risalt Street on it.

7 I believe that Daniel and Mary were living separated under one roof at the Antonen Street house between early March and late December 2005.

SWORN/AFFIRMED by the Deponent at .....

On the ..... day of ..... 20..... .....
(Signature of Deponent)

Before me .....
(Signature and title of person before whom affidavit is sworn)

.....
(Print name of person before whom affidavit is sworn)