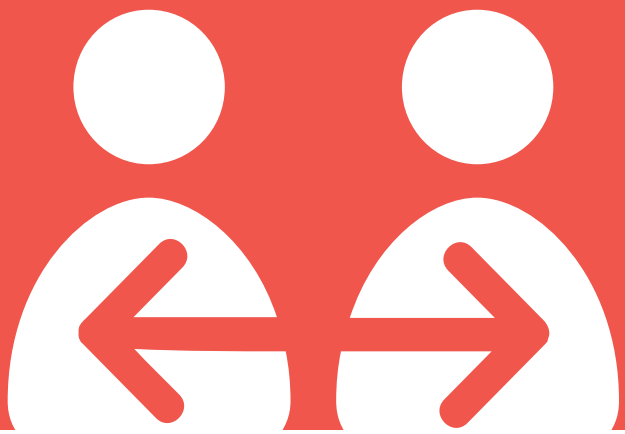
Thinking about separating?



What you should be aware of and how a Lawyer can help

Contents

Introduction

Separation does not need to be consensual

a. You do not need to reach agreement with your spouse or partner to "separate" but you do need to be clear and consistent.

b. To avoid any later dispute in relation to what date you separated, you should inform your partner formally that you wish to separate or have separated.

c. It would be better if it is done in writing such as email, text messages or even WhatsApp.

d. Your actions after separation need to be consistent with your words. Of course, you can attend counseling, but unless or until you formally "reconcile" you should be clear about the date you separated.

e. Why date of separation is important?

   i. Parties can apply for divorce two years after they separate; and

   ii. The assets and debts you have is crystallised at the date of your separation. It may be valued later, but it is important to have a moment in time when all assets and liabilities are clear.

Divorce, division of relationship property and care arrangement for children are separate process

a. You can only apply for divorce (known as Dissolution) 2 years after you have separated.

b. However, you can reach agreement or apply to the Family Court for Court Order on division of relationship property and care arrangement for your children immediately after you have separated.

c. You do not need to wait to be officially divorced to divide your relationship property and it is highly recommended that you do not as during this two-year period, either party may try to move assets away, or assets can increase or decrease in value significantly (especially vehicles).

Always try to reach agreement in private if possible

a. Reaching agreement in private for division of relationship property and care arrangement is usually less costly and less time consuming. Reaching Agreements will usually have lesser negative impact on the parties' mental health and their children's stress. it also assists to reduce conflict between you and your spouse.

b. It is recommended that parties seek legal advice on their entitlements and responsibilities, then try to reach agreement in private. They can then seek a lawyer's advice on the agreement reached.

Why seeking legal advice is important

a. Lawyers deal with many separated parties, and they can advise you on matters relating to the law. The legal principles you can find here are intended as a guide only and there are a lot of exceptions to anything printed online.

b. Each family and each couple is unique. Each unique circumstance may trigger an exception to the general rule and your entitlement may therefore be different.

Part 1

DIVISION OF RELATIONSHIP PROPERTY

1.1 What is the Property Relationships Act ("the PRA")

a. The Property (Relationships) Act ("the PRA") is the Act that governs division of relationship property between couple (of any Gender) who are married, in a civil union partnership or in a de facto relationship.

b. The PRA assumes that each partner contributes equally to their relationship, even though that may be in different ways (financially or non-financially).

c. The PRA aims to provide a just division of the relationship property when the relationship ends, considering the interest of any children involved.

d. For a relationship that is less than 3 years, different law may apply.

   i. A marriage/civil union of short duration (less than 3 years) – division is generally on the basis of contributions to the marriage or civil union rather that shared equally where one spouse's contribution has been clearly greater than the others.

   ii. A de facto relationship of short duration – in this situation, the PRA usually does not apply unless there is a child of the relationship or one party has made a substantial contribution to the relationship and the court is satisfied that failure to make a division order would result in serious injustice.

1.2 Property

a. If you are considering separating and would like to discuss how to divide your property with your spouse or partner, you should make a list of all the property you have. This should include your relationship property, as well as each party's separate property.

b. Relationship Property includes the family home, family chattels, any common or jointly owned property, all income earned, and property brought during the relationship and any value added during the relationship to superannuation and life insurance policies.

c. Separate property includes – inheritance and gifts, property acquired under a trust, some property acquired before the relationship began (but here there are some significant exceptions, and this can become a bit more complex).

d. Overseas property

   i. Overseas property is classified as either "moveable" or "immovable".

   ii. Items such as furniture, chattels or bank accounts are movable – NZ Court can make orders about movable assets overseas.

   iii. Items such as land (with or without a building) are immovable – NZ Courts cannot make orders about immovable assets overseas, unless the couple has agreed in writing that NZ law should apply to those assets.

   iv. There can be some complexities here also depending on the extent of the parties living arrangements in each country.

1.3 Debts

a. As with assets, debts may be classified as relationship debts or personal debts. The responsibility of relationship debts is shared but personal debts remain the responsibility of the person who incurred them.

b. Relationship debts includes debts that were incurred jointly (e.g. a family home loan), debts incurred to acquire, improve or maintain relationship property, and debts incurred to manage the affair of the household (e.g. a holiday or buying a car).

c. Personal debts are those incurred to acquire or improve separate property or those incurred before the relationship began or after it ended.

1.4 What is a separation agreement?

a. A separation agreement is an agreement that documents that you have decided to live apart and a record of how you wish to divide up your property.

b. How to make a separation agreement

   i. Specific sections of the PRA set out that your separation agreement should follow this format:

      A. It has to be in writing and signed by both parties

      B. Each of the party must have had independent legal advice

      C. Each of your signature must be witnessed by a lawyer

      D. The lawyer who witnesses your signature has to certify that they explained to you about the effect and implication of the agreement.

      E. If you don't have it properly certified by a lawyer, what you write down as your "agreement" may not be binding in the future and any compromises reached or property transferred may be overturned.

1.5 Division of Relationship Property through Court

a. If you cannot reach agreement on how to divide your relationship property, how to define your separation date, or whether your property is separate or relationship, you may make an application to the Family Court for a Court ruling. The Family Court is the primary court for this type of case being brought by a party to resolves these disputes.

b. Before you make any formal application to the Court, you should seek a lawyer's or mediators for assistance to help you negotiate. Sometimes, people will act more reasonably after seeking advice from their lawyers and reach an agreement in private when they cannot do it on their own.

c. If you wish to make an application to the Family Court, you must make your application within 12 months of a marriage or civil union being dissolved or three years after you stopped living together for de facto relationship.

Part 2

DIVORCE – DISSOLUTION OF MARRIAGE

2.1 What is a Dissolution of Marriage?

a. "Dissolution" is the legal term for a divorce.

b. Dissolution of Marriage is governed by the Family Proceedings Act 1980.

c. Nowadays, the only requirement that has to be satisfied to get a dissolution is the couple have to have been living apart for two years.

d. You can make the application jointly or separately (usually when one party cannot be found or refuses to cooperate).

e. You do not need a lawyer's assistance making application for dissolution – you can simply go to the Family Court or its website and get a copy of the application forms.

f. It will be easier and faster if you make your application jointly – it can be dealt with by the Family Court Registrar without a hearing and you do not have to go in to the Court.

g. If you need to make a "single application" – application by one party, then the process will be longer.

h. The application costs $211.50.

i. If you reconciled for a while during those two years – you can still satisfy the two-year separation requirement as long as your reconciliation was not for more than three months. You can even get back together more than once, as long as the total time together is not more than three months.

NOTE – the law does not assume that you have started living together again just because you have continued a casual, sexual relationship again after separating.

2.2 Joint Application

a. You need to complete the following documents and file with the Family Court:
   i. Joint application for order dissolving marriage or civil union (Form FP13)
      A. You need to put down the details of the arrangements you have made for the care and financial support of your children, if you have any.

b. Affidavit to accompany joint application for order dissolving marriage or civil union (Form FP14)
   i. An affidavit is a written statement setting out the facts that support your application, which are that you have been living apart for two years and you've made arrangements for your children.
   ii. The affidavit has to be signed and sworn (or affirmed) in front of a lawyer, justice of the peace or court registrar.
   iii. You need to attach the following documents to your affidavit:
      A. Your original marriage or civil union certificate, or a certified copy of the certificate
      B. Any separation agreement or separation order

c. Information sheet (Form G7).

2.3 Single Application

a. You need to complete the following documents and file with the Family Court:
    i. Joint application for order dissolving marriage or civil union (Form FP13)

b. You need to put down the details of the arrangements you have made for the care and financial support of your children, if you have any.
    i. Affidavit to accompany joint application for order dissolving marriage or civil union (Form FP14)
    ii. An affidavit is a written statement setting out the facts that support your application, which are that you've been living apart for two years and you've made arrangements for your children.
    iii. The affidavit has to be signed and sworn (or affirmed) in front of a lawyer, justice of the peace or court registrar.
    iv. You need to attach the following documents to your affidavit:
        A. Your original marriage or civil union certificate, or a certified copy of the certificate
        B. Any separation agreement or separation order
        C. Information sheet (Form G7).
        D. Notice to the Respondent (Form FP16)

c. Once you file the above documents to the Family Court, you must arrange for a copy to be given (legal term is "served upon") your spouse or partner ("the respondent").
    i. Service of the document cannot be done by post. It needs to be done personally on the respondent.
    ii. If you do not want to serve the documents yourself, or you cannot find the respondent, you can pay for a private investigator/process server/bailiff to serve the documents.
    iii. The person who serves the document must complete an Affidavit of Service (Form G8) stating what documents were served and on what date.

d. If the respondent disagrees with the dissolution application, they must either file a request for an appearance (Form FP19) or file a defence (Form G12).

e. It is difficult for one partner to defend an application for a dissolution order unless they can show that they and their partner have not been separated for at least two years.

f. It will not be a defence only if that one partner merely does not want the relationship to end.

Part 3

CARE ARRANGEMENT FOR CHILDREN

3.1 What is a care arrangement?

a. When the parents of a child separate, one of the most important issues to work out is how they will arrange the care of their child, including:
   i. Whether one or both parents will have day-to-day care.
   ii. If only one parent has day-to-day care, when and how the other parent will have contact with the child.
   iii. Changeover arrangements
   iv. School holiday arrangements
   v. Arrangements for special occasions – such as Christmas, Chinese New Year, the child's birthday
b. Care arrangement is governed by the Care of Children Act 2006 in New Zealand and the Act is child -focused – this means the Act focused on the following aspects:
   i. Promotion of the children's welfare and best interest
   ii. The facilitation of children's development by helping to ensure that appropriate arrangements are in place for their guardianship and care; and
   iii. The recognition of certain rights of children.
c. Parents can either
   i. Reaching their agreement in private – form a private parenting agreement, OR
   ii. Apply to the Family Court - for a parenting order.

3.2 Usual types of care arrangement

a. Sometimes parents will share the day-to-day care of their child equally, sometimes one parent may provide more of the day-to-day care, and in other situations one parent will have day-to-day care for the child and the other will have contact.

3.3 Day to day care / custody

a. A person with "day-to-day care" has responsibility for the child's daily living arrangements such as their safety, ensuring they get to school or preschool, and making sure they are properly fed and dressed while in their care.

3.4 Contact

a. Contact" refers to how and when the parent or guardian without day-to-day care spends time with the child.

3.5 Supervised contact

a. If a judge making a parenting order is deciding about contact with a particular parent and isn't satisfied that the child would be safe with that parent, the judge can order that any contact between the child and that parent must be supervised.

b. Supervised contact means that contact is overseen by an approved organisation, or by a suitable person approved by the court, such as a relative or family friend. It means that contact will happen in a safe, controlled situation. If the contact is supervised by an approved organisation, this is paid for by the government.

3.6 Care arrangement vs Guardianship

a. Parents have to distinguish "care/custody" and "guardianship" because just because you have the "day-to-day care" of a child does not mean you have the right to make all the decisions for the child.

b. Day-to-day care involves making arrangements for a child's care on a daily basis. Guardianship is about making decisions about your children. This includes making decision about their schools, healthcare, religion, culture and language and about where they live.

c. A child's parents are known as natural guardians – they are automatically guardians of their children at birth. If a couple breaks up, they remain guardians of their children and should try to make decisions together to guide their children's upbring and development.

d. Other people such as a child's grandparent or other relatives, or a parent's new partner can apply to the court to become court-appointed guardians.

e. If the guardians cannot agree on arrangement for children, such as where they will live, which school to attend, what circular activities to attend, which family doctor to go to, or whether the child need to go to a specialist, they can first try to resolve differences in private by go through Family Dispute Resolution mediation. If they have tried to reach agreement in private but failed, they may make application to the Family Court for an order to settle a dispute between guardians. Again, the Court will focus on the child's best interest and welfare.

3.7 Reaching your own agreement in private

a. It is much better if the parents can reach an agreement themselves, rather than have one imposed on them after a court hearing by a Judge.

b. Parents can make their own "parenting agreement" under the Care of Children Act (s40)

3.8 Benefits of a private agreement

a. Less costly and sometimes less time consuming

b. Less damage to the child emotionally if they can see their parents are able to work together amicably.

c. Pitfalls of a private agreement:

   i. Private parenting arrangements are not legally binding like a court granted "parenting order". This means a parenting agreement cannot be enforced in the courts like other agreements or court orders, although the Court will take note of the intention of that agreement as evidence.

   ii. However, if parents can reach a private parenting agreement, they can apply to the Family Court to formalise the parenting agreement into a court order.

   iii. This may involve some cost but will be much less than go through a formal application for a parenting order, as explained later.

3.9 Applying for a Parenting Order in the Family Court

a. If parents cannot agree on parenting arrangements in private, either parent can apply to the Family Court for a parenting order.

b. Parenting orders are made by the Family Court to decide who will have day-to-day care of a child and who can have contact with a child. They are made as a last resort when parents haven't been able to agree on these things themselves.

c. There are two type of application – "On notice" and "Without notice

3.10 On notice application for a Parenting Order

a. This is the standard process for making a parenting order application for non-urgent applications

b. Where the other parent is informed about your application before the judge makes a decision

c. The other parent gets a chance to respond to your application before the court makes any order

d. The application itself costs $220 for the court filing fee. Parents need to go through a Family Dispute Resolution service before they can file any application to the Family Court for a parenting order.

3.11 Family Disputes Resolution "FDR"

a. An independent mediator will help you try to reach an agreement

b. This process is free to people whose income is below a certain amount and others will need to pay

c. If you reach an agreement – you can enter into a parenting agreement or ask the Court to seal the parenting agreement to a parenting order

d. If you cannot reach agreement or cannot resolve all disputes – you can ask the FDR mediator to sign a form to prove you have tried FDR but failed, then you can apply to Family Court for the Court to decide the remaining disputes.

e. If you reached an agreement but after trialling the arrangement agreed at the FDR you decided you are not happy with them, you can apply to the Family Court for a parenting order

f. You have to make your application within 12 months of your FDR process, otherwise, you will have to go through FDR again

g. When FDR is not compulsory

   i. When you are applying for a consent order (this is where both sides want the same thing and ask the judge to make this into a court order – e.g. you have reached a private parenting agreement and wish to formalise it into a parenting order)

   ii. If it's an urgent application (called a "without notice" application, because the other parent isn't told about your application before the judge makes a decision)

h. If you provide an affidavit (a sworn statement) with your application, giving evidence that at least one of you is unable to participate effectively in Family Dispute Resolution or that the other person has been violent towards you or your child.

3.12 Parenting Through Separation courses

a. The Family Court provides free "Parenting Through Separation" courses, to help separated parents understand how separation affects their children and to help them manage the process and deal more constructively with each other.

b. The course will be four hours long, held over one or two days. The courses are delivered to small groups by an experienced facilitator. Your group will include other parents who are separated or who are thinking about separating.

c. You usually can't apply for a parenting order from the Family Court unless you've attended a Parenting Through Separation course in the last two years.

3.13 Without notice

a. This is for urgent situations – usually where violence or other safety issues for the child are involved.

b. The court will consider your application straight away and without informing the other parent of your application, but this is a high threshold and there must be evidence of the safety issue presented to the court.

c. Application without notice can usually be made if the delay caused by making the application on notice would or might entail serious injury or undue hardship or risk to the personal safety of the applicant or any child of the applicant's family, or both

d. When the judge considers your "without notice" application the judge can usually only make an interim (temporary) parenting order.

e. However, the judge can decide that it's not appropriate to make any order without the other person being notified; in that case the judge will direct that your case should follow the "standard track". The process will then be the same as if you'd applied "on notice" at the outset.

f. It is recommended that you get a lawyers' assistance to make a without notice application for a parenting order because of the types of evidential threshold and speed with which it needs to be done.

3.14 Once your application is accepted by the Family Court – what is the Court's process in Parenting Order cases?

a. Once you have filed your application, usually a Family Court judge will consider it and decide what the next steps in the case should be.

b. Various conferences will be held before the final court hearing, including an "issues" conference and settlement conference.

c. Each conference will be run by a Family Court Judge

d. The process of each parenting order application is different, depending on the complicity of the matter.

e. Lawyer for Child (s7):

   i. It is common for the Family Court Judge to appoint a lawyer to represent you child.

   ii. The Family Court can appoint a lawyer to represent your child if the judge has concerns about the child's safety or well-being and thinks the appointment is necessary. This lawyer is called "lawyer for the child".

   iii. The role of the lawyer will be to act for the child in a way that they think promotes the child's welfare and best interests. The lawyer will meet with the child to find out his or her views, and will present those views to the court. The lawyer will also give advice to the child about appealing the Family Court's decision to a higher court and must give this advice in a way that's appropriate to the child's level of understanding.

   iv. If a lawyer is appointed for your child, you and the other parent will usually have to pay two thirds of the lawyer's fees, in equal shares. But you may not have to pay your share if this would cause serious hardship to you or your children.

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