Catherine HENRY LAWYERS

Families and the Law:

A guide to help you navigate the family law system

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Using this guide

This free guide has been published by the team at Catherine Henry Lawyers to help individuals to navigate the legal system in the following areas of life:

- separation
- divorce
- property settlement
- de facto relationships
- parenting arrangements
- financial agreements and spousal maintenance
- apprehended domestic violence orders (ADVO)
- child support

Going through a family breakdown is one of life's most traumatic events. Knowing where you stand legally, right from the start, is important so that you can enforce your rights and confidently start to make plans to move forward.

This guide looks at the family law system and provides information and tips for individuals to protect themselves and their loved ones.

We will continue to update this guide and welcome your feedback on how it can be improved. Please send your feedback to info@catherinehenrylawyers.com.au or call (02) 4929 3995.

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Disclaimer

Information about the law is summarised or expressed in general statements in this publication. The information should not be relied upon as a substitute for professional legal advice or reference to the actual legislation.

Separation

When you separate, the issues you may face include, finding somewhere to live, sorting out arrangements for your children, applying for child support, working out a property settlement, and establishing how to support yourself - including applying for Centrelink benefits and considering spousal maintenance.

Determining whether you have separated is usually obvious. There could be some or all of the following.

- Your living arrangements change. You or your partner leaves the home. Possibly you both stay in the home, but one of you moves to another bedroom;
- You cease going out as a couple;
- You cease having a sexual relationship; and
- You separate your finances.

In this eBook we use the term 'partner' to cover the person you are married to, but now separated from; the person you were married to but are now divorced from; or the person that you were in a de facto relationship with.

Divorce

The grounds for divorce

Australia's divorce laws operate on a 'no fault' system. You don't need to show any wrongdoing to get divorced. When applying for a divorce, the only ground to be proven is that the marriage has irretrievably broken down. This is established by you and your spouse having been separated for at least 12 months.

A divorce order will not be made if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed. If you have been separated but are living under the same roof, you have separated for the purposes of gaining a divorce. If you separate, and later resume cohabitation but separate again within three months, and then continue to live separately and apart, the two periods of separation can be added together to form the necessary 12 months of separation.

The process

An application to the Court can be made by you, your partner or both of you together. There is no requirement for you to attend court for the making of the divorce order if:

- You do not have children under the age of 18; or
- You and your partner jointly apply for the divorce.

You only need to attend court if you are making a sole application for divorce **and** you have children under the age of 18.

The Court will grant a divorce order once it is satisfied that the necessary requirements have been met.

If you have children under 18, the divorce order does not take effect unless the Court declares that it is satisfied that there are:

- Proper arrangements in place for the care of the children; or
- There are circumstances by reason of which the divorce order should take effect even though the Court is not satisfied that proper arrangements are in place for the care of the children.

In most cases the divorce order will take effect one month and one day following the making of the order. It is possible to apply to the Court to shorten this period. The other party needs to be given notice of the proposed application.

Once the divorce order takes effect, either party is free to re-marry.

Divorce and property settlement

You do not have to be divorced to have a property settlement. If you do get divorced, you have one year from the date that the divorce order takes effect to apply to the Court for a property settlement. Outside of this period you need the Court's permission to apply for a property settlement. You cannot assume that the Court will give its permission.

Property settlement

Time limitations

You don't have to wait until you've been separated for a certain period or divorced before you sort out a property settlement. We recommend sorting out a property settlement as soon as possible.

There are time periods in which you must act. Married couples have 12 months from the date that the divorce order takes effect to apply to the Court for a property settlement. De facto couples have two years from the date of separation to apply to the Court for a property settlement.

De facto relationships

A court can only make a property settlement order in relation to a de facto relationship if one or more of the following provisions applies to your situation:

- Your de facto relationship lasted for at least two years in total;
- You have a child with your de facto partner;
- You have made a substantial contribution to the relationship (and the failure to make an order would result in serious injustice to you); or
- The relationship was registered under a state or territory law.

There are also some geographical requirements before the Court can make a property settlement order in relation to a de facto relationship, but that is rarely an issue.

You were in a de facto relationship with another person if:

- You were not married to each other;
- You were not related by family; and

- You had a relationship as a couple living together on a genuine domestic basis.

When working out if you were in a relationship as a couple, factors considered include:

- The duration of the relationship (you don't have to have been living together for a minimum period);
- The living arrangements;
- Whether a sexual relationship existed;
- The way finances were arranged;
- Whether you own property together and how you bought it;
- Whether your relationship was registered under state or territory law;
- The care and support of the children; and
- The way you presented your relationship in public.

De facto relationships can be heterosexual or same sex. A relationship does not have to be a full-time relationship to be a de facto relationship.

Disclosure
Before working out a property settlement, it is essential that you and your partner make full disclosure of your financial position.

Disclosure might include providing:

- Bank statements;
- Up to date super statement;
- Tax return and Notice of Assessment for the last three years;
- Up to date disclosure of shareholding; and
- Financial statements for all companies, trusts and partnerships.

If you do not make full disclosure, then you run the risk that any orders made might be varied or set aside and another order made.

The five steps in a property settlement
Whether you are/were married, or you were in a de facto relationship, the law sets out five steps in working out the division of property. The five steps are:

1. Determine whether it is just and equitable to make an order.
2. Identify the assets and debts of each party.
3. Assess the contributions made by each party.
4. Consider the factors listed in section 75(2) of the Family Law Act (section 90SF(3) in a de facto relationship). This is often referred to as assessing the future needs of each party.
5. Determine whether the proposed order is just and equitable.

Identifying the assets and debts
This usually involves preparing two lists. One list is of the superannuation entitlements, the second list is of the non-superannuation assets. The second list may include real estate, cars, shares, contents, savings, business etc.

An asset is not exempt because:

- You or your partner owned it at the commencement of the relationship; or
- It was inherited by you or your partner; or
- It came into existence after separation.

Valuations may need to be obtained. The up to date valuation of an asset, including super, is always relevant. If the matter goes to court, the Judge will consider the assets that exist at the time of the trial.

Contributions
Contributions made by you or your partner include:

- Bringing assets into the relationship;
- Earning an income;
- Caring for children; and
- Receiving a lump sum during or after the relationship e.g. an inheritance.

Post separation contributions are relevant. Lump sum financial contributions need to be assessed in the context of the whole of the relationship.

Assessing the future needs
An important issue here is the arrangement for the children. If the children primarily live with you, then you are likely to receive an adjustment in your favour in the property settlement.

The amount of the adjustment will depend on factors including:

- The age of the children;
- The number of children; and
- The precise arrangement of the care of the children.

Another important issue is the income of each party. If your income is significantly lower that your partner's income, then there may be adjustment in your favour in the property settlement. Health issues can also be relevant, particularly if you have expenses as a result of the health issues.

General
Each party should receive an appropriate division of the non-super assets and an appropriate division of the super. If you receive a super-split it goes into your super fund. You can't receive it as cash (unless you have met a condition of release). It is possible to trade off your entitlement to super against your entitlement to non-super assets e.g. it may be agreed that you receive extra cash in return for receiving less super.

Resolving property disputes – mediation
It is not compulsory to have a mediation prior to commencing court proceedings for property settlement, but it is a very good idea. Our experience is that private mediation has a high prospect of success in property settlements, particularly when each party has their lawyer attend with them. For mediation to be successful, there needs to be thorough preparation.

This includes obtaining and disclosing:

- Appraisals/valuations of all real estate;
- Appraisals of all motor vehicles (e.g. go to www.redbook.com.au);
- Up to date superannuation statements;
- Documents showing the value of all other assets e.g. latest dividend statement to show the number of shares held;
- Bank account statements; and
- Financial statements for any business and, if necessary, having the business valued prior to the mediation.

If the mediation is successful, the agreement should be formalised.

Formalising a property settlement
If you reach a property settlement, it should be formalised by way of a consent order made by the Family Court or by way of a financial agreement. There are two reasons for this:

- Firstly, a consent order or a financial agreement provides finality, except in very limited circumstances (such as if a party has not made full financial disclosure); and
- Secondly, a consent order or a financial agreement provides exemption from stamp duty for assets transferred pursuant to the consent order or financial agreement.

Resolving property disputes – court proceedings
If agreement can't be reached, then the matter will need to go to the Family Court or Federal Circuit Court. The Court will determine the division of property in accordance with the five steps.

There are steps that need to be followed before you file an application for property settlement with the Family Court. These are known as pre-action procedures. They include making financial disclosure and trying to resolve the matter by negotiation and/or mediation.

Many different orders can be made in a property settlement. They commonly include:

- The home being sold, and the proceeds of sale divided;
- You or your partner retaining the home, as long as the mortgage is discharged. Possibly there will be a payment from the person receiving the home to the other party;

- Splitting superannuation from one person's superannuation fund to the other person's superannuation fund; and
- Orders relating to personal property, such as one person retaining a motor vehicle, contents etc. or the division of these items.

Financial agreements

It is possible for you to enter into a financial agreement prior to marriage or prior to commencing living together. Sometimes these are known as 'pre-nups'. It is also possible to enter into a financial agreement while you are happily living together (married or de-facto). The purpose of such financial agreements is to provide for what happens if there is a separation. It is most common where one of you brings substantial assets to the relationship.

If you do not want to be subject to the principles of the *Family Law Act*, you need to enter into a financial agreement. There have been cases where the Court has overturned a financial agreement. This does not mean that you should not enter into one. It means that you should give careful thought to the terms of the financial agreement and you should instruct a specialist family law solicitor to prepare the financial agreement.

Spousal maintenance

What it is

Spousal maintenance is where one person provides financial assistance to the other person. Usually this is a periodic payment (weekly/fortnightly/monthly). Sometimes it can be a lump sum payment.

A spousal maintenance order can be made whether you are/were married or in a de facto relationship.

An urgent claim for spousal maintenance can be made to the Court in certain circumstances.

When an order will be made

The Court will only make an order for spousal maintenance if:

- The party seeking the maintenance is unable to support themselves without a pension, and
- The other party has the capacity to pay the spousal maintenance.

The inability for you or your partner to self-support has to be for at least one of the following reasons:

- By reason of caring for a child of the relationship who is less than 18 years old;
- By reason of age or physical or mental incapacity for appropriate employment; or
- "For any other adequate reason".

In considering an application for spousal maintenance, the Court will have regard to the matters set out in the *Family Law Act* which include:

- The age and health of you and your partner;
- The capacity of you and your partner to obtain appropriate employment;
- The property and financial resources of you and your partner;
- If the relationship has affected your ability to earn an income (or the ability of your partner to earn an income);
- If there are children to maintain;
- The commitments of you that are necessary to enable you to support yourself;
- The commitments of your partner that are necessary to support themselves;
- What a suitable standard of living would be for the person applying for the maintenance; and
- If either of you are cohabiting with another person, the financial circumstances relating to the cohabitation.

When an order ends

A spousal maintenance order will automatically end if:

- If the party receiving it remarries;
- If the party receiving it dies; or
- The party paying it dies.

It is possible that a spousal maintenance order is made for a specified period. In that case, the order ends at the end of the period. There are situations in which the order does not automatically end, but the paying person might apply to the Court to end the order e.g. if the other party obtains employment or enters a de facto relationship.

Time limits

There are time periods in which you must file an application for spousal maintenance:

- If you were married, you have 12 months from the date that the divorce order takes effect.
- If you were in a de facto relationship, you have two years from the date of separation.

Payment of expenses following separation

Often an issue arises as to who pays the mortgage following the separation. The *Family Law Act* is silent on the subject. The Court can make an order about this if an application is made for it to do so. The mortgage document states that all parties to the mortgage are liable to make 100% of the payments.

Parenting arrangements

General

The two main issues which arise on separation in relation to children are:

- Parental responsibility; and
- Division of time.

Parents, grandparents, or any other person concerned with the care, welfare or development of the child, may apply to the Court for parenting orders. This could be an order that the child spend time with you and communicate with you. This could be an order that the child live with you.

Parental responsibility

Parental responsibility refers to the duties, powers, responsibilities and authority which a parent has in relation to a child. In the absence of a court order, each parent of a child who is not 18 has parental responsibility for the child. This can be exercised jointly or individually. When making a parenting order, the Court must apply a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility.

BUT:

- The presumption does not apply in all circumstances e.g. where there are reasonable grounds to believe that you or your partner are engaged in violence or abuse of the child.
- In proceedings for interim parenting orders, the presumption applies unless the Court considers that it would not be appropriate in the circumstances for the presumption to be applied.
- The presumption may be rebutted by evidence that satisfies the Court that it would not be in the best interests of the child for you and your partner to have equal shared parental responsibility.

A court can allocate parental responsibility in the following ways:

- Equal shared parental responsibility to more than one party (usually the parents);
- Sole parental responsibility to one party; or
- A combination of exclusive parental responsibility to one party for one issue/some issues and shared parental responsibility to more than one party for one issue/some issues.

When there is an order for you and your partner to share parental responsibility and there is a decision to be made about a major long-term issue in relation to the child, this decision needs to be made jointly. You are required to consult with your partner and make a genuine effort to come to a joint decision.

Division of time

Often the major issue relating to children is the amount of time that the children have with you and with your partner. Should they live with each of you for equal amounts of time? Should they primarily live with one of you? If they primarily live with one of you, how much time should they spend with the other parent?

The Court may make such orders as it thinks proper. Where there is an order that you and your partner have equal shared parental responsibility for the child, then the Court must consider the following:

- Whether spending equal time with each of you, would be in the best interests of the child;
- Whether the child spending equal time with each of you is reasonably practicable; and
- If it is practicable, making an order for the child to spend equal time with each of you and your partner.

If a parenting order provides that you and your partner have equal shared parental responsibility for the child and the Court does not make an order for the child to spend equal time with you both, the Court must:

- Consider whether the child spending substantial and significant time with each of you would be in the best interests of the child; and
- Consider whether the child spending substantial and significant time with each of you is reasonably practicable; and
- If it is practicable, consider making an order for the child to spend substantial and significant time with each of you and your former partner.

A child spending substantial and significant time with a parent means:

- The child spends time with that parent on weekends;
- The child spends time with that parent in holidays;
- The child spends time with that parent on days other than weekends and holidays;
- That parent is involved in the child's daily routine;
- That parent is involved in occasions and events that are of significance to that parent.

In determining whether it is reasonably practicable for a child to spend equal time with each of you, or substantial and significant time with one of you, the Court must have regard to:

- How far apart you live from each other;
- Your and your partner's capacity to implement the arrangement, including your ability to communicate;
- The impact that the arrangement would have on the child;
- Any other relevant matter.

Best interests

When a court decides whether to make a parenting order, it must regard the best interests of the child as the paramount consideration. In determining what is in the child's best interests the two primary considerations are:

- The benefit to the child of having a meaningful relationship with both parents; and
- The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The second of the two primary considerations are to be given the greater weight. Additional considerations in determining what is in the child's best interest include:

- The child's views, depending on their age and maturity. The Court may inform itself of views expressed by a child by:
    - The Family Report;
    - An Independent Children's Lawyer (ICL); or
    - Any other means the Court thinks appropriate.
- The nature of the child's relationship with each of you and your partner;
- The extent to which each of you and your partner have participated in decision making for any long-term issues in relation to the child;
- The extent to which each of and your partner have taken the opportunity to spend time with and communicate with the child;
- The likely effect on a child if there was to be a change in their circumstances, such as where they live, who they live with, and any separation from a parent, sibling or other significant person in their life;
- The capacity of you, your partner and any other relevant person to provide for the needs of the child; and
- The existence of any family violence involving the child or a member of the child's family.

Resolving parenting disputes – mediation

In most cases, it is best to try to resolve your dispute by agreement rather than by going to court. One of the avenues to try and reach each agreement is by way of mediation or family dispute resolution.

Mediation is the process of you and your partner attending a meeting with an independent mediator. Lawyers can be present. You and your partner can meet with the mediator or you can be in separate rooms and have shuttle mediation.

Some of the advantages of mediation are:

- It is cheaper than running a court case;
- It can occur quickly, and an outcome can be reached long before a court decision; and
- You have more control over the outcome. A decision is not being imposed on you by a Judge.

Normally you both pay one half of the cost of mediation. Subject to some exceptions, you cannot file an application with a court seeking parenting orders unless you have a certificate from a family dispute resolution practitioner. The certificate can state one of several things, including:

- That you and your former partner attended family dispute resolution and made a genuine effort to resolve the issues but could not do so;
- That you did not attend family dispute resolution because your former partner failed to attend; or
- That you did not attend family dispute resolution because it was not appropriate to do so e.g. because of family violence.

You do not have to have a certificate to commence court proceedings for reasons including:

- There has been abuse of the child by one of the parties;
- There has been family violence by one of the parties; or
- Urgency.

An example which might amount to 'urgency' is:

- You are the primary carer;
- You don't have Orders;
- Your partner doesn't return the children; and
- You seek to file an application that the children be returned to you.

Formalising an agreement

If you come to an agreement about parenting issues, you may wish to put it in writing. One option is a parenting plan. It is a written agreement which sets out the parenting arrangements for your children. It does not go to court.

The limitation of a parenting plan is that, after making the parenting plan, it is possible for a person to apply to the Court for a parenting order. The Court is to have regard to the terms pf the parenting plan if doing so would be in the best interests of the child, but it is not bound by the parenting plan.

A second option is a consent order. Your agreement is sent to the Court and the Court makes orders as set out in your agreement. It is legally enforceable. You do not need to attend court.

Resolving parenting disputes – court

If you can't reach an agreement, you will need to file an application with the Court. Court proceedings can take a long time. Due to the delay, it may be necessary for the Court to make interim orders which will be in place pending the making of final orders. At a trial in parenting matters, the Court may have the assistance of a family report and/or of an ICL.

Family report

A family report is a document which is generally written by a family consultant appointed by the Court.

It provides an independent assessment of the issues and makes recommendations. The family consultant will interview the relevant adults. The children will usually be seen separately from the adults. The family consultant may observe the interaction between the children and the relevant adults in separate observation sessions.

The family consultant may speak to teachers, doctors etc. They usually read material that has been subpoenaed. What is said to the family consultant is not confidential. The family report cannot be shown to anyone other than parties to the case and their lawyers,

Independent Children's Lawyer (ICL)

An ICL represents the child's best interests. They are obliged to consider the views of the child. An ICL is usually appointed where one or more of the following circumstances exist:

- Allegations of abuse or neglect;
- A high level of conflict between parents;
- Allegations made as to the views of the children and the children are of a mature age to express their views;
- Allegations of family violence;
- Serious mental health issues regarding one or both parents or children; and
- Difficult and complex issues.

An ICL will often:

- Arrange for necessary evidence to be obtained (expert evidence, subpoenas, speak with teachers, counsellors etc.);
- Meet with the children;
- Facilitate negotiations; and
- Question witnesses at the final hearing.

Passports

The first issue with overseas travel concerns is whether your children have passports. If not, you will need to make an application to the Australian Passport Office. Each parent will need to sign the passport application. Even if you have sole parental responsibility, the other parent is still usually required to sign the passport application.

If the other parent won't sign the application, what can you do? Under the *Passport Act,* a passport may still be granted without the necessary consent if it is decided that there are special circumstances. An example of a special circumstance may be when your partner can not be located. If the Passport Office refuses to grant the application without the consent of your partner, you can apply to the Court for an order that a passport be issued without the consent of your partner.

Travelling overseas with children

Before taking the children on an overseas trip, you should be aware of the process when there are parenting orders in place (or an application for parenting orders has been filed).

You must not take the children out of Australia when there are orders (or an application for parenting orders has been filed) which provide for where a child is to live, who they should spend time with, communicate with, or which allocate parental responsibility for a child unless:

- You have obtained written consent of the party in whose favour the order is made; or
- There is an order allowing the international travel.

If you breach this, you could face three years imprisonment. If you or your partner have parenting orders or proceedings currently afoot, be sure to seek legal advice as to whether you need to obtain the permission of your partner before booking your overseas holiday.

Stopping your partner from taking the children overseas
What to do if your partner wants to take the children overseas without your consent?

The Australian Federal Police maintains the Family Law Watchlist. If your children are on the Watchlist, the police will be alerted if an attempt is made to remove them from Australia.

To have your children registered on the Watchlist you need to either have obtained a court order, or an application for parenting orders has been filed. Specifically, the order (or order sought) will prohibit or limit the children's travel overseas and request that the Australian Federal Police place the children's names on the Watchlist for a specified period.

Once you have an order (or have filed your Initiating Application), you can then complete the Family Law Watchlist Request Form. A copy of the order or sealed Initiating Application will need to be forwarded with your request form. You can confirm whether your children's names are on the Watchlist by completing a Family Law Watchlist Enquiry Form.

Your children's names will remain on the Watchlist for the duration of the order. If proceedings are pending when the names go on the Watchlist, they will remain on the list until the proceedings have been dealt with. If a final order is made to place the children on the Watchlist for a further period, it would be wise to complete a fresh Family Law Watchlist Request Form.

If someone attempts to take the children overseas while the order is in place (or the Application is still to be finalised), the person attempting to remove the children from the country will be liable to punishment of three years imprisonment.

What if you have an order which prevents international travel, but you and your partner agree that you can travel overseas with the children? If you have an order which prevents international travel altogether you will need to obtain a further order from the Court to enable you to take the children overseas, even if you have the consent of your partner.

If you have an order which prevents international travel without consent, you need to provide the Australian Federal Police with evidence of your partners consent.

You should carry copies of all your documentation to the airport to avoid any possible delays. You should also contact the Australian Federal Police at least 10 days prior to your intended travel to notify them of the arrangements.

If you decide that you no longer want the children's names on the Watchlist, you will most likely need a further order from the Court (unless your order was for a fixed duration).

Relocation

There are many reasons why you may want to relocate a substantial distance with children following the end of your relationship e.g. to be closer to family, for a new job, or a new partner.

The Court cannot make orders restricting the movement of a parent. The Court can make orders about where a child can live. It is generally unwise to relocate children unless you have the permission from your partner or court order.

It is unusual to get an interim order allowing you to relocate children. The Judge will usually want you to stay in the area you have been living in until the final trial. If you relocate the residence of a child without permission from your partner and they file an urgent application with the Court, it is likely that the Court will make an order for the return of the child to the original location pending the final trial. In deciding, the Court's paramount consideration is what is in the best interests of the child.

The Court will consider the possibilities including:

- You moving with the child;
- You remaining where you are with the child;
- The child living with your partner (whether or not you move)

If you are the parent who is *not* relocating and are concerned that a move will take place without your consent you should contact a family lawyer urgently to make an application with the Court. Failure to act quickly when a parent relocates the residence of a child can seriously affect your case. Every case is different and will be decided on its individual facts.

When an Apprehended Domestic Violence Order (ADVO) is made before a parenting order

Where there are no parenting orders in place and there is an ADVO, you are required to comply with the terms of the ADVO.

You are generally required to attend mediation before commencing court proceedings for parenting arrangements. One exception to this requirement is if it is not appropriate to attend mediation. The existence of an ADVO does not necessarily mean that mediation is not appropriate. However, it may mean that the mediation will need to take place by shuttle, or alternate means, so that all parties are protected. If court proceedings are commenced, the parties need to inform the Court of the existence of the ADVO and its conditions.

The Court is required to consider any allegations of family violence when making a parenting order. If a parenting order is made by the Court which is inconsistent with the ADVO, the Court must specify that in the Orders, explain the Orders to all parties and provide a copy of the Order to the Police, the Court which made the ADVO and the child welfare officer where the child resides.

When an ADVO is made after parenting orders

If you have parenting orders and there is a subsequent ADVO taken out against you, or for your protection and/or the protection of the children, you might be wondering where the parenting orders now stand. An ADVO is usually made in the Local Court of NSW, being a State Court. Parenting orders are made in the Family Court of Australia or Federal Circuit Court of Australia, a Federal Court.

In the case of parenting orders, where there is an inconsistency between the parenting order and the ADVO, the parenting orders will take preference. This is because they are made in a superior court. One exception to this is where the ADVO specifically varies the orders, although there may be other instances where this may not apply.

For example, a parenting order which provides for the defendant in the ADVO to spend time with the children from the conclusion of school on Friday to the commencement of school Monday, with changeover to be affected by collecting or delivering the children to school, will override a term of the ADVO which provides that the defendant must not come into contact with, or approach the children. However, the defendant must not contact, or approach the children at any other time (except as permitted by the Orders) as that would be a breach of the ADVO.

Another example may be an order that the other parent speak with the children on the telephone three times a week at 5pm by calling your telephone number. At these days and times, it would not be a breach of the ADVO for the other parent to call you to speak with the children. If the other parent calls at a time that is not permitted under the Orders, this may be a breach of the ADVO.

All parties must comply strictly with the terms of the ADVO and the parenting orders. Therefore, if your parenting orders are silent on anything such as where changeover is to take place and who with, and the ADVO states that you must not approach the home where the children and other parent live, you should not attend the home just because you have parenting orders for you to see the children, notwithstanding that this may have been what you always did. This may be a breach of the ADVO.

In some cases, the Court can vary the terms of the parenting orders to ensure you comply with conditions of the ADVO and still see the children.

Complying with parenting orders

You must do everything that a parenting order says. You have a positive obligation to take all reasonable steps to ensure that the order is put into effect. This includes positively encouraging your children to comply with the orders. Sometimes a parent will bring contravention proceedings against the other parent. In this instance, the Court can decide:

- The alleged contravention was not established;
- The contravention was established but there was a reasonable excuse;
- There was a less serious contravention without reasonable excuse; and/or
- There was a more serious contravention without reasonable excuse.

If there has been a failure to comply with a parenting order without reasonable excuse, the Court may impose a penalty. Depending on the situation and the type and seriousness of the contravention the Court may:

- Vary the parenting order;
- Order attendance at a post separation parenting program;
- Order compensatory time;
- Require the parent who contravened the order to enter into a bond;
- Order the parent who contravened the order to pay the legal cost of the other parent and/or expenses lost as a result of the contravention;
- Order community service;
- Impose a fine; and/or
- Send the contravening party to prison.

Child support

The basics

Calculating the amount of child support to be paid can be complicated but, keeping it simple, it is determined by:

- The number of children;
- The income of each of you and your partner;
- The care arrangements for the child i.e. how much time they live with/spend with each of you and your partner; and
- The cost of raising children. This is assessed by independent research. In part it depends on the combined income of both parents i.e. the higher the combined income the higher the cost of raising the children. It also depends on the age of the children. It is considered that the cost of raising children 0-12 years is less than the cost of raising children 13 years or older.

If you fit into the circumstances of the basic formula, then please use the following link to access the basic formula
https://www.humanservices.gov.au/customer/enablers/online-estimators

Challenging the formula

If you are of the view that the formula produces an inappropriate result in your case, then you may be able to do something about it. In certain circumstances, you (whether you are the payer or payee) can apply for a change in assessment. There are many possible situations in which you could apply for a change of assessment including:

- The child has special needs;
- The child attends a private school and both parents intended this;
- The other parent has a greater earning capacity than is reflected in their income used in the assessment; and/or
- You have a duty to maintain another person or child which affects your capacity to support the child.

If you believe that the child support agency has got it wrong, your first step is to lodge an objection to their decision. This objection is reviewed by a Child Support Agency officer who was not involved in the original decision. If you are dissatisfied with the outcome of the objection review you can appeal to the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT).

If you are dissatisfied with the decision of the AAT, you can appeal to the Federal Court or the Federal Circuit Court, but only on a question of law.

Child support agreements

Parents can reach agreements as to the financial support of a child. There are two types of child support agreements, a binding child support agreement and a limited child support agreement.

Payment of child support
Payment and collection of child support normally takes place between you and your partner. The Child Support Agency can be involved in the collection process.

The Child Support Agency has the power to order a paying parent's employer to garnishee their wages until outstanding child support debts are paid. The Child Support Agency can also request an ongoing garnishee order against the parent who has a history of not paying.

Wills, Power of Attorney and appointment of Enduring Guardian

You should always have an up to date Will, Power of Attorney and appointment of Enduring Guardian. Don't wait for divorce, property settlement or anything else before updating these important documents.