

13 FAMILY LAW

13.1 Introduction

Family relations can be complex at the best of times whether you are involved directly or it is happening to your children or friends. In this chapter we look at the way the law deals with separation and the ending of a marriage as well as binding financial agreements between partners and what rights de facto couples have.

We also discuss how grandparents may get contact orders to see their grandchildren and also parenting orders in cases where grandparents may wish to become the primary caregiver for the grandchildren.



13.2 Separating from your spouse

- (a) When does separation start?

Separation begins from the time you or your spouse considers the marriage over, tells the other spouse and proceed with that intention to separate, e.g. you or your spouse move out of the home or into a separate bedroom. You must be separated for 12 months. Imprisonment, illness, or job transfers do not necessarily mean separation for the purposes of a divorce unless the spouse is told. However, sometimes the court can treat separation as starting from a certain date, for example, when one spouse begins living with someone else or has applied for a sole parent pension (Parenting Payment) or has stopped visiting.

- (b) Separation under one roof

You may regard yourself as separated but still be living in the same house. This might be for financial reasons. This may still be separation for the purposes of a divorce, however the couple will have to live independently despite living under the same roof. This is also known as separation under one roof. Evidence from you or your partner will be required that the usual aspects of married life are not taking place, whether it is sexual relations, household tasks such as cooking or washing, or social activities.

- (c) Temporary reunion

If you and your partner reunite for less than three months, the clock does not stop for calculating the separation period. You can add the prior period of separation to the subsequent period of separation to build up the required period of 12 months. However, you can only do so if there has not been more than one reunion over the required 12 month period.

- (d) Family Violence

If you have fears for your safety and welfare against your spouse or, you should contact your local police immediately. Ask to speak to the Police Domestic Violence Liaison Officers (DVLOs). A DVLO is attached to each of the 165 patrols across NSW and are specially trained to assist victims of domestic violence. See the listing under Police in Chapter 14 for contact details.

If there is a threat of violence against you, your children or grandchildren, you can also contact the Department of Community Services Domestic Violence Line for help.

You may also consider applying for an Apprehended Domestic Violence Order (ADVO) in NSW to prevent them from approaching you or from being at your place of residence or work. You should see your local police authority if you have concerns about your spouse's behaviour towards you or if there have been incidents that have caused you to hold such fears. The police may be able to bring the application on your behalf in certain circumstances or assist you in doing so. Otherwise, you may apply for one on your own. You can see the Chamber Magistrate at the local court closest to you or your lawyer for this purpose. More information on domestic violence and abuse is found in Chapter 12.

13.3 **Ending the marriage**

In some circumstances a marriage may be ended by a decree of nullity, which states that the marriage was invalid because of illegality (e.g. bigamy, at least one spouse not old enough, incestuous), no consent (lack of capacity, fraud, duress, mistake), or procedural reasons. In most cases when the marriage has broken down it will end with a divorce.

13.4 **Divorce**

A divorce ends the marriage. It does not cover maintenance, property settlement, or arrangements for the children. You may get a divorce without dealing with these other issues in legal final form, although it would be wise to have at least some discussion on these issues, as you must apply to a court for a property settlement within 12 months of a divorce.

If you want a divorce, you need only show that you have been separated from your spouse for at least 12 months and that it is unlikely that you will reunite. You cannot apply for a divorce until you have been separated for 12 months. Whilst it is not necessary to obtain a divorce unless either one of you wishes to remarry, it is an option which many people feel finalises that part of their life.

13.5 **Who can apply for a divorce in Australia?**

Anyone can apply for a divorce, regardless of "fault" or whether the other spouse wants one, as long as they have been separated from their spouse for 12 months and the marriage has broken down. The court requires one spouse to have some substantial connection with Australia such as citizenship, permanent residency, or temporary residency of at least 12 months prior to the filing of the application.

13.6 **Short marriages**

If you have been married for less than two years, you must see a counsellor before you can divorce. The Family Court has a counselling service or you may see a private counsellor. Counselling is useful for reasons such as examining where the relationship failed and not wasting the court's time. However, its main purpose is to establish that the relationship has totally broken down. A prescribed certificate evidencing counselling must be attached to the divorce application. If you do not have the certificate, you must obtain the court's leave to proceed with the application. There are some exceptions to this requirement.

13.7 **How do I apply for a divorce?**

(a) **Divorce Kit**

You do not need your spouse's consent in order to apply for divorce. As long as you have been separated for at least 12 months prior to the filing of your divorce application and

there is no likelihood of cohabitation (living together) resuming, either spouse can file for divorce.

All divorce applications are now lodged with the Federal Magistrates Court of Australia (except in Western Australia where they are lodged with the Family Court). However, the Federal Magistrates Court shares registry facilities with the Family Court. You need to complete and file an Application for Divorce (Form 3) with the Federal Magistrates Court. You can get a Divorce Kit which contains the relevant forms from the Registry, local courts, legal stationery shops, and online (details of which are located in Chapter 14). The Divorce Kit will have some information on how to complete the forms. The form is simple and you may complete it in handwriting.

After completing the form, you must “execute” it in the presence of a solicitor or a Justice of the Peace. This means they must have you swear an oath on a holy book or make an affirmation (depending on your religious or personal beliefs) that the document you are about to sign is true, and then sign the document in front of them. Do not sign it beforehand.

If there has been separation under the one roof, you will need to file an affidavit (i.e. a sworn statement) setting out the circumstances of that separation. The court will also require a corroborating affidavit from a third party. You may wish to seek legal advice in this respect.

A filing fee is payable when you lodge a divorce application. The fee is currently \$288. You may apply not to pay the fee before you lodge the application if, for example, you are on a low income. It is very hard to get a refund *after* you have paid.

You will also need evidence in English that you were married. If you don't have the original marriage certificate, and were married in NSW, you may apply for a full copy of the certificate from the Registry of Births, Death and Marriages. Marriage certificates from overseas can be translated by the Immigration Department. Alternatively somebody who is officially qualified to translate may do so and supply an affidavit (i.e. a sworn statement) setting out their qualifications and attaching the translated marriage certificate.

Give the Court Registry the original and 2 copies. They will stamp them (giving you a hearing date) and return the copies to you.

(b) Online Applications

The Federal Magistrates Court has developed an online divorce application to simplify the divorce process. It is now possible to complete (but not lodge) divorce forms online – see Chapter 14 for details. Once the form is completed, you must print it and lodge it with the Registry.

(c) Joint applications

In some cases, both spouses may wish to apply for divorce together. This makes procedures very simple - it is almost a divorce by post. Filing fees can be shared and you do not have to formally "serve" the documents on your spouse. The same forms are used but you will need to indicate on the form that it is a joint application. Both spouses will then sign the form.

13.8 Serving the documents

A stamped copy of the application must be delivered to the other spouse. This is called "serving" the document. At the same time the document server must give a pamphlet from the Divorce Kit, which outlines the effects of divorce. An Acknowledgment of Service is also included. You must

serve the document at least 28 days before the hearing if your spouse is in Australia and at least 42 days before the hearing if your spouse lives overseas. Remember that this is not a full hearing in the sense of a criminal trial. We discuss this further below.

(a) Who can serve the documents?

Anyone over the age of 18 except the person applying for the divorce can hand over the documents. If there is a reasonable communication between your spouse and yourself, you may serve the documents by post. This is discussed in more detail below.

(b) How do you serve the documents?

A friend or relative may do this (you should not be present). Or you may wish to find a professional process server from the Yellow Pages. They may charge around \$40-\$100 depending on travel and the number of attempts needed to serve the documents.

The documents must be handed directly to the other spouse. The court needs strict proof that they received the papers, so they cannot be left with someone they share the house with or with a workmate. If the person serving the documents does not know the other spouse, it is useful if a photograph of that spouse is made available. The document server should identify the spouse by asking for that spouse's full name. The document server then tells the respondent spouse that the applicant spouse is seeking a divorce and that the papers are from the Family Court for a hearing on a particular date (stamped on the papers).

Ideally, the respondent spouse will also sign an Acknowledgment of Service form from the Divorce Kit. This proves personal delivery.

(c) What if the respondent spouse won't accept the papers?

The document server may put the documents down in their presence, explaining what they are and what they are doing.

(d) Affidavit of Service

The document server then completes an Affidavit of Service (i.e. a sworn statement) recording time, date, place of service, and any relevant conversation while serving. It is then signed on oath or affirmation before a Justice of the Peace or solicitor. The signed Acknowledgment of Service is attached if the respondent spouse has signed one.

(e) Service of documents by post

If it is likely that the respondent spouse will sign an Acknowledgment of Service, you can post the documents. Include a stamped self-addressed envelope for the respondent spouse to send the documents back to you. When you receive the documents back from your spouse, you complete an Affidavit of Service, detailing when you sent the documents, and stating that you recognise the respondent spouse's signature because you have seen it on previous occasions. Attach the signed Acknowledgement of Service form.

(f) Opposing a divorce

There are limited legally acceptable reasons for opposing a divorce. The applicant spouse only has to show an irretrievable breakdown and separation of 12 months. Effectively the main valid dispute is separation period. The respondent spouse can correct errors such as this and other details by filing a Response.

(g) Arrangements for children

The divorce application asks for details about the children's living arrangements and housing, school progress, health, supervision, financial support, and how often they will see the parent they will not live with. The court will not make final divorce orders until it is satisfied that suitable arrangements have been made for the children (of the marriage or living as a family).

(h) Do we have to go to court?

If there are no children under 18, you do not have to go to court unless the respondent spouse files a Response.

If neither of these situations apply, the court may grant the divorce "in chambers", meaning that rather than hearing the divorce in open court, the judge will read the papers in his/her office and process them at a convenient time on the hearing day.

Some lawyers recommend that separating couples attend the divorce hearing and treat it as a ceremony to end that part of their life.

13.9 The hearing

The divorce hearing is fairly simple. The Family Court was set up to be less formal than other courts so that people would not feel intimidated in what can be a very personal and emotional situation. You may bring friends and relatives to court for support. There may also be free child minding facilities available but you should telephone the court beforehand to ascertain if such facilities are available prior to going to court.

If you fear that your spouse may be violent, notify the court. They will arrange for increased security measures for your safety as well as that of the judges and court staff, and the general public in and around the building. Again, we suggest that you provide a photograph identifying your spouse.

13.10 What is involved in a hearing?

You can appear in person at the hearing or have a barrister or solicitor represent you. The judge or registrar hearing your case is used to unrepresented people appearing in court. Family Court adjudicators specialise in this area.

The hearing is a simple procedure in which the judge or registrar will formally confirm that the grounds of divorce (relationship breakdown and 12 months separation) have been established. If there are children under the age of 18, then the court will also need to be satisfied that proper arrangements have been made for their care and welfare.

The Family Court is in a number of major locations in the NSW region. On the morning of your hearing, your case will be listed in the court notices section of the *Sydney Morning Herald* - you should make a note of the judge or registrar and courtroom. There will also be a list of cases outside the court. Arrive early and a court officer will note that you have arrived so that the court can organise its hearing time. They may also explain the procedures briefly. Wait outside the court until directed.

A court officer will call you inside the court. You should bow to the judge or registrar on entering and leaving the room. A registrar or a judge will hear your case. You should address the person on the bench (the judge or registrar) as "Your Honour" or "Registrar". You should stand whenever the registrar or judge speaks to you.

You will be asked for your name, whether there are any children under 18, and a few brief questions on the contents of the papers.

As there are normally only two or three issues to be proven in a divorce, the hearing may be very short. In some cases, it may take only a matter of minutes.

Even in the slightly more complicated case of separation under one roof, the adjudicator will generally rely on the documents the separated couple have filed. Normally there is not a formal witness examination, although the adjudicator may wish to speak to the people who made the statements.

You may appeal the decision. However, as there are limited legal grounds on which you may appeal, this is rare. You should seek legal advice if you would like to appeal the decision.

13.11 **When do I get my divorce papers?**

At the hearing, if the grounds for divorce are satisfied, the court will make an order called a *decree nisi*. This is a temporary order, which will be sent to you (or your solicitor) by the Court. While the order is temporary, objections could be made or new evidence could come to light. If your spouse passes away during this time, you should notify the court by filing the death certificate of the deceased spouse or an affidavit setting out details of the date and place of death.

Generally one month later, a *decree absolute* is made. This is the final order, which the Court will forward to you (or your solicitor). You are then able to legally marry someone else. If the decree nisi does not set down a date for when the final order is made, then the one-month rule applies.

13.12 **So what does it mean now that I am divorced?**

You will have indicated to the court that arrangements have been made for your children (if any). These arrangements do not have to be formal. However, there are advantages to making them formal. For example, if the children live with you and you are worried that your ex-spouse will try to take them away from you. If you have a court order stating the living and visiting arrangements, that can be shown to police if any problems arise and the police can then act on it. If there is no order, you will have to go through the courts.

Often financial arrangements are made between the parties (either court ordered or agreed between the separate parties), and usually relate to child support and spousal maintenance, which is less common.

There will also be a division of matrimonial property. You *must* apply to the court for a formal property settlement within 12 months of the decree absolute (final orders) or you would otherwise have to obtain the court's permission to apply for a property settlement outside of that time.

13.13 **Adjusting property interests**

The Family Court can make orders on property settlement and maintenance arising from a marriage. Alternatively, parties can agree to sign a binding financial agreement or enter into consent orders in relation to the division of the matrimonial property and liabilities.

- (a) Do I have to go to court?

Most family law cases are resolved by consent. However, if you are unable to agree, you can file an application in the court, setting out the orders that you want the court to make. If it is urgent you can also apply for interim orders at the same time as you file your application for final orders. Interim orders provide for arrangements to be in place before the final hearing, e.g. you require a certain sum of money released to you for living expenses in the short term.

- (b) Which Court should I file my application in?

The Family Court of Australia, the Federal Magistrates Court and the local courts in each state and territory have the power to make decisions under the *Family Law Act*. The choice of court will depend on the issues involved and the availability of services where you live. The Federal Magistrates Court was set up to provide a simpler and less formal approach. It can deal with a number of the same types of matters as the Family Court with the exception of adoption, property disputes concerning property worth over \$700,000 (unless it is by consent of the parties) and applications concerning nullity or validity of marriage.

- (c) What do I need to know before filing an application?

The Family Court has introduced *Pre-Action Procedures*, a set of steps that people must follow before filing an application in the court. You and your ex-partner must genuinely try to resolve the dispute through the use of Primary Dispute Resolution (**PDR**). There are a number of exemptions for Pre-Action Procedures, for example matters involving allegations of child abuse or family violence. PDR includes methods such as negotiation, counselling, mediation, arbitration and conciliation and is provided by a range of organisations in addition to the Family Court. Discussions that take place during mediation or counselling are confidential and cannot be used in court. Agreements made through PDR can be filed with the Family Court as consent orders.

If you are unable to agree, either you or your ex-partner can commence proceedings by filing an application and the case moves into the resolution phase. On the first court date, both you and your ex-partner will attend an Information Session, a case assessment conference, a procedural hearing or a combination of these. The aim is to identify the issues in dispute, determine the next steps and if possible, reach an early agreement. Interim orders will often be made at this stage.

The court may also order mediation or counselling after court proceedings have begun. If an agreement is still not reached, the court issues a trial notice and the case enters the determination phase and the matter proceeds to final hearing. Assuming parties comply with the directions set out in the trial notice, there will be a Pre-Trial Conference where a date for the final hearing is determined.

- (d) How does the court decide how we split the property?

The court applies a four-step approach in considering what property orders to make. This approach will also be useful in helping you assess how you should split the matrimonial assets and liabilities. Briefly, the four steps are as follows:

- (i) Identify and value the matrimonial property and liabilities

In determining the net matrimonial property pool, the court will take into account all property and liabilities accumulated during the marriage. Property is anything owned by either you or your ex-partner. To a degree, the court may isolate or take

into account property owned before the marriage. Many spouses may also have all sorts of complicated financial arrangements such as companies and trusts. If a spouse owns shares in a company, those shares will be taken into account as part of the property pool. Further, if the court finds that a spouse controls a trust or otherwise enjoys the benefits of trust property, then that property may be included. If complicated financial arrangements are involved, you should seek advice from your lawyer about how to identify and value such property.

Superannuation is now considered as property and the court is able to split superannuation interests.

(ii) Consider the contributions of the parties

The court will then assess the parties' respective contributions to the "acquisition, conservation and improvement" of the matrimonial property. Contributions can be both financial and non-financial.

Examples of financial contributions include paying the mortgage or household expenses during the marriage. It also includes any gifts or inheritances received by a party to the marriage. The court can also take into account property owned by each party prior to the marriage.

Examples of non-financial contributions include caring for the children, performing household chores, and expending labour in renovating a property.

Details of the type of contributions the court takes into account are set out in section 79(4) of the *Family Law Act 1975*. At the end of its assessment at this stage, the court will generally determine a percentage division of the matrimonial asset pool.

(iii) Consider the future needs of the parties

The court will then consider whether it will need to make a further adjustment to the division of the matrimonial property pool to take into account the future needs of the parties. Such factors include the state of health, income earning capacity and financial resources of the respective parties. Those factors are further set out in section 75(2) of the *Family Law Act 1975*.

(iv) Consider whether the order proposed is just and equitable

Finally the court will consider if the orders it is going to make are just and equitable, as it may otherwise make a further adjustment.

(e) Will I have to sell the house?

If all the marriage assets are tied up in the house, the court may have no choice but to order that it be sold. If there are enough assets or a large superannuation entitlement, the court may give one party the home, particularly if they are looking after the children, and the other party would then get the other assets or their superannuation entitlement. Often one party can renegotiate a mortgage to raise money to pay out the other party and then they would be able to keep the house.

In some cases the court may postpone the sale and let the parent caring for the children stay in the house until the children grow up, if this is not too far off, and the other party has a cash flow or some money to go on with in the meantime. This type of order is rare.

- (f) What if we can agree on how we split the property?

Spouses can make enforceable agreements about child arrangements, property, and maintenance (except Stage 2: Child Support). If you are both able to come to an agreement as to how you wish to divide the property pool, you can formalise that agreement by filing consent orders or by signing a financial agreement.

- (g) Consent Orders

Consent orders are binding and enforceable court orders. Presumably they are even more likely to be followed as the spouses have worked through to an agreement and understand the other spouse's view.

Record the agreement on an Application for Consent Orders. You should get independent legal advice before signing any agreement.

If the property to be divided is worth less than \$40,000, you may file the orders in the Local Court, otherwise you must file the orders in the Family Court or the Federal Magistrates Court. The orders can be the first and only document filed, or they can be filed after proceedings are started (at any time before the judgment is given).

A Registrar will decide whether it is a fair property settlement. If the orders include parenting orders, the Registrar will also consider whether the property settlement is in the best interests of the children. The Registrar will usually make the orders if both spouses have received independent legal advice. If at least one of them has not had independent legal advice, more information may be required about financial or parenting arrangements.

13.14 Binding financial agreements

It is possible to make a binding financial agreement with your spouse about what will happen with your property in case of marriage breakdown or after a marriage has broken down. A binding financial agreement can be made before, during or after a marriage and can cover both financial settlements for after the marriage as well as for maintenance.

A binding financial agreement does not need to be registered with a court but for it to be legally binding, it must comply with Part VIIIA of the *Family Law Act 1975* that includes the following:

- (a) The agreement must be in writing.
- (b) The agreement must specify whether it is made under section 90B (i.e. before marriage), 90C (i.e. during marriage) or 90D (i.e. after marriage) of the *Family Law Act 1975*.
- (c) Both you and your spouse have signed the agreement;
- (d) Both you and your spouse have received independent legal advice before signing.
- (e) The lawyers providing the advices have each signed a prescribed certificate and those certificates are annexed to the agreement.
- (f) The agreement has not been terminated and has not been set aside by a court.
- (g) After the agreement is signed, the original is given to one spouse and a copy is given to the other.

It is also now a requirement for parties to sign a separation declaration in order for certain parts of the binding financial agreement to become effective.

It is important that you get independent legal advice prior to signing any agreement as a concluded, valid and enforceable binding financial agreement removes the court's jurisdiction to otherwise make orders for maintenance (except where the party seeking maintenance is unable to support him or herself without an income tested pension, allowance or benefit at the time of making the agreement) and property settlement.

A binding financial agreement can only be terminated by the parties entering into a termination agreement or be set aside by the court on those limited grounds set out in section 90K(1), e.g. fraud or material change in circumstances.

13.15 Stamp duty

If property is transferred from one spouse to another under a financial agreement or pursuant to court orders, no stamp duty has to be paid on that transfer if the parties are separated or divorced. You will need to show the financial agreement, court order or the divorce decree to the Office of State Revenue to get the exemption. The requirements to obtain the exemption may vary from state to state.

In some cases, capital gains tax (CGT) rollover relief may also be available to the spouse into whose name the property is being transferred. You should obtain advice from your accountant about that issue.

13.16 Spousal maintenance

In relation to spousal maintenance, the starting point is that each spouse is expected to try to support himself/herself after separation. Maintenance may be payable if you are unable to meet your own needs and your ex-partner has the capacity to assist (or vice versa). Common examples are a spouse having the care of young children or a spouse being unable to work because of a physical or mental disability.

13.17 Grandparents and family law – Parenting Orders

The *Family Law Act* provides for people who are significant in a child's life to apply for parenting orders. For grandparents, this will often involve a desire to maintain contact with their grandchildren. However, in some circumstances, particularly where both parents are unable to look after the child, it may be appropriate for the child to live with a grandparent. Parenting orders specify who the child will live with and spend time with. These are known as residence orders and contact orders. Parenting orders may also include specific issues orders for example, relating to medical treatment, education or religion.

It is important to note that the terms "residence" and "contact" replaced the terms "custody" and "access" in 1996. Rather than the rights of parents or other adults, the *Family Law Act* is primarily concerned with the rights of children and the responsibilities parents have in relation to their children.

The underlying principles are:

- (a) Children have the right to know and be cared for by both their parents;
- (b) Children have the right of regular contact with both their parents and with other people significant to their care, welfare and development;
- (c) Parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) Parents should agree about the future parenting of their children (section 60 B).

These principles are to be given effect unless it would be contrary to the best interests of the child, which must be regarded as paramount in all decisions on parenting orders (section 65E).

13.18 Residence orders for grandparents

A grandparent's application for a residence order is only likely to succeed if the court decides that it is in the child's best interests to live with a person other than their parents. In considering whether the grandparent is the best person to care for the child, the court will look at the amount of time the grandparent has spent caring for the child and the nature of the relationship with the grandparent.

Circumstances in which the court is likely to make a residence order in favour of a grandparent include where one or both of the parents have a serious health problem or drug/alcohol addiction, or the parents are not competent or willing to adequately care for the child. The Department of Community Services will often become involved in such circumstances. Rather than applying to the Children's Court for the child to be placed into care and fostered, the Department may elect to support the grandparent's residence application in the Family Court.

If someone other than a biological parent applies for a residence order, the *Family Law Act* requires the court to order a report from the court counselling service. This assists the court in deciding whether the order is in the child's best interests. All parties must consent to the report being produced.

13.19 Contact Orders

As mentioned above, the *Family Law Act* recognises children's right of contact with people other than their parents who are significant to their care, welfare and development. The Family Court generally takes the view that it is in children's best interests to have contact with their wider family. However, in some circumstances, the court may decide that it is not in the child's best interests to have contact with their grandparents because there is a risk of harm to the child.

Contact orders can be very brief or very detailed, depending on the ability of the parties to agree in the future. Contact may be face-to-face or by telephone, letters or other means. In some circumstances, the court requires contact to be supervised.

13.20 Factors that the Court considers in making parenting orders

As mentioned previously, in making a particular residence or contact order, the court must make the best interests of the child the paramount consideration. Section 68F of the *Family Law Act* sets out a list of factors that guide the court in determining a child's best interests. They include:

- (a) Any wishes expressed by the child and factors which might affect the weight given to those wishes (eg the age of the child);
- (b) The nature of the relationship of the child with each of the child's parents and with the child's grandparents;
- (c) The likely effect of any changes in the child's circumstances including separation from either parent or from other people the child has been living with;
- (d) The practical difficulty and expense of a child having contact with a grandparent;
- (e) The capacity of each parent or grandparent to provide for the child's needs including emotional and intellectual needs;
- (f) The child's maturity, sex and background;
- (g) The need to protect the child from physical or psychological harm;

- (h) The attitude of the child and to the responsibilities of parenthood demonstrated by each of the child's parents or grandparents;
- (i) Any family violence involving the child or member of the child's family (including the child witnessing any family violence);
- (j) The need to make the order that would be least likely to lead to further applications for parenting orders;
- (k) Any other fact or circumstance that the court thinks is relevant, such as the age and health of the grandparents or their physical and mental fitness.

Example -

If a parent seeking a residence order proposes to move somewhere else with the child, the court will have to consider the likely impact on the child. Where there is a close relationship between the children and a grandparent, the court would look at the effect of separation from the grandparents. If a grandparent has applied for contact orders, the court would consider the feasibility of maintaining contact if the parent were to relocate. On the other hand, the court may decide that it is in the best interests of the child for the residence parent to move closer to the grandparent because of the financial and other support.

13.21 Variation of parenting orders

If circumstances change, for example to do with the child growing up or a parent's living arrangements, there may be a need to vary the existing parenting orders. The parties may vary the arrangements by consent or may apply to court for variation of orders. However, the court is very reluctant to vary orders for residence unless there has been a significant change in circumstances.

13.22 Do I need to go to court?

It is not necessary to go to court when there is agreement between the parties. An agreement can be made between the parties and registered with the Family Court, Federal Magistrates Court or Local Court. These are known as consent orders and have the same force as orders made by a judge or magistrate. If the orders relate to children, the court will check that the child's best interests are met and register the agreement. Your solicitor can assist you in preparing consent orders.

However, if you are unable to agree, you can file an application in court, setting out the orders that you want the court to make. We have discussed above how you decide which court to file your application in as well as the procedure after you have filed your application. As it can take up to 12-18 months before your application for final orders is heard, you can apply for interim orders in the short term, if necessary. In children's matters, the court will normally make interim orders that maintain the existing arrangements, unless this would not be in the child's best interests.

13.23 Can I get Legal Aid?

As a grandparent, you may be able to get legal aid funding for your family law matter. You will need to satisfy Legal Aid's means test and merit test as well as their guidelines and policies.

Priority is given to urgent matters, for example, where a child is at risk. For non-urgent matters, there is a requirement that applicants use Primary Dispute Resolution (where appropriate) before receiving aid for court proceedings.

Contact your closest Legal Aid office or consult the Legal Aid Website for further information. Contact details are set out in Chapter 14.

13.24 De facto relationships

NSW legislation provides for rights for people in domestic relationships, which include de facto relationships as well as other types of personal relationships.

(a) What is a domestic relationship?

Under the *Property Relationships Act 1984*, a domestic relationship includes:

- (i) A de facto relationship, that is, a relationship between two adult persons who live together as a couple and are not married or related by family. This definition includes same sex relationships.
- (ii) A close personal relationship (other than a de facto relationship) between two adult persons, whether or not related by family, who are living together and providing domestic support and personal care.

Factors that determine whether a domestic relationship exists are as follows:

- The duration of the relationship
- Whether or not a sexual relationship exists
- The degree of financial interdependence between the parties
- The ownership, use and acquisition of property
- The degree of mutual commitment to a shared life
- The care and support of children
- The performance of household duties
- The reputation and public aspects of the relationship

(b) Property disputes on separation

Unless the dispute concerns children, de facto couples cannot go to the Family Court for property settlements; only people who are married can go to the Family Court for property settlements. Property disputes between domestic partners can be dealt with in the Supreme Court, the District Court or the Local Court, depending on the value of the property. However, a lawyer can assist you in making a legally binding agreement without going to court.

(c) Property agreements made before separation

It is also possible to make a binding financial agreement before or during a relationship. These can be made enforceable under the *Property Relationships Act*. This is known as a Domestic Relationship Agreement. It is a way of safeguarding assets, particularly those acquired prior to the relationship. The agreement may also provide for all property jointly acquired during the relationship to be divided equally on separation. You need to be aware that there are strict rules which must be satisfied, including a requirement that each party have independent legal advice.

13.25 The Property (Relationships) Act

In NSW, property of domestic partners is dealt with under the *Property (Relationships) Act 1984*. This Act allows courts to divide or adjust a person's interest in property in a 'just and equitable manner'.

But before a court can deal with property of the partners to the relationship, the partners must:

- Have lived in a domestic relationship for at least two years; or
- Have a had child together; or
- Have made a substantial financial or non-financial contribution to the relationship.

Additional requirements are that:

- The parties must have been resident in NSW for at least one third of the period of the relationship and the applicant must be resident at the time of making the application.
- The application must be made within two years of separation unless there are exceptional circumstances.

(a) What property can the court deal with under the Act?

Under the legislation, the court can make orders over 'property' of a person to the relationship. Property is defined to include anything owned by you and your partner (separately or jointly), as well as any debts. However, it does not include superannuation, retirement benefits or trusts, although the value of these items can be taken into account by the court in making orders.

(b) What does the court consider 'just and equitable'?

In determining a just and equitable division of the property the court considers:

- (i) The types of contribution, financial and non-financial, which are made directly or indirectly to the purchase, maintenance or improvement of property.
- (ii) The contribution to the welfare of the partner and/or family including as a homemaker and parent.

Compared with property settlements under the *Family Law Act*, under the *Property Relationships Act* non-financial contributions are given less consideration. Also, the future needs of either party are not taken into account as for married couples.

(c) What types of orders can the court make?

The aim of the court is to finalise the financial relationship between the parties and it can order any of the following:

- (i) Transfer of property between parties;
- (ii) Sale of property and distribution of proceeds;
- (iii) Production of and signing of necessary documents to change ownership of assets;
- (iv) Payment of money by one party to the other in a lump sum or by instalments; and/or