**The role of the family lawyer**

When there is a relationship breakup issues inevitably arise around the care of children, division of property, child support and spousal maintenance.

These issues are best agreed, and if agreed can be recorded in written agreements with the assistance of your lawyer. When agreement cannot be reached a Judge in the Family Court can decide the issues that you and your partner cannot resolve.

When a spouse or partner dies issues often arise over division of property, and about the property in the deceased persons estate.

These are typical situations when you need a good and experienced family lawyer.

**Practical tips**

Professional legal advice and assistance can be expensive and so you should do what you can to ensure your lawyer can work with you efficiently.

There are things you can do to make the task simpler and easier for your lawyer and therefore less costly for you.

You want your lawyer carrying out legal work for you, rather than administrative work which you can often do yourself.

Provision of information to your lawyer in a coherent and helpful way means your lawyer can work efficiently for you.

An example is providing your lawyer with basic necessary information as is on the checklist at the foot of this document.

If your situation is complicated, then providing your lawyer with well presented information sorted chronologically results in less administrative work for your lawyer, more timely advice for you, and less cost for professional services.

You need your lawyer to help you get to the stage when matters are resolved as well as they can be for you, and as soon as possible. There are sensible and practical things you can do to assist that process.

The earlier you can find out how it all works and what is likely to happen on your relationship breakup the better. You are likely to make better decisions with that information and knowledge.

So you should consult your lawyer at an early stage.

**Separation and Dissolution of marriage**

When a husband and wife live apart this is their *separation date* which can be important for property division purposes. A couple could be separated even though they are still living in the family home.

Either spouse may apply to the Family Court to have the marriage dissolved two years after separation. You can get the forms for this from the Family Court Registry, and you do not need a lawyer.

A dissolution of your marriage changes your legal status to being single again and you are free to remarry. It can affect the entitlement of a spouse such as to a superannuation entitlement.

An important consideration is that a spouse needs to apply to the Court for a division of relationship property within a year of the dissolution.

For de facto or civil union partners, the time limit for applying to the Court for division of relationship property is three years after living apart. However the Court may grant *leave* to apply later if there is a good reason for your delay.

**Division of relationship property**

Your relationship property is usually divided on a 50:50 basis after a marriage or committed relationship that lasts three years or more. Couples in a relationship of less than 3 years can in some circumstances have their property divided on the basis of their contributions.

While that sounds simple enough, working out what it means in your case may not be straightforward.

The family home and family chattels are to be divided equally, and in practice it is usually the same equal division for other property.

**Values**

When it comes to entering into Agreement or having the Court order a division of property, it is usually the *current value* of property that is used. However some property, such as your bank account balances and superannuation entitlements, may have an earlier valuation date, usually the date the relationship ended with separation or living apart. The rationale is because at the living apart date the partners or spouses ceased to be in partnership and have now gone their own way financially.

The half division of a *Superannuation* or *Kiwisaver* entitlement is of its relationship component, in other words what property was built up between the start of the relationship and when the parties ceased to live together.

Professional valuers may be needed when values cannot be agreed. This may be a Registered Valuer for real estate, an Actuary for superannuation, and increasingly Forensic Accountants to value interests in a business, company or Trust.

**Economic disparity**

Sometimes a relationship breakup means one partner’s income and living standards are likely to be significantly higher than the other because of what has happened during the relationship. One such scenario is a mother out of the workforce caring for children, while the father’s career has taken off and his earning potential has increased.

In these circumstances the Court can award a lump sum to be paid to the so disadvantaged partner out of the other party’s relationship property entitlement.

A recent Supreme Court decision has bolstered the entitlement of the disadvantaged party to this remedy. Sometimes expert accounting advice is necessary to calculate and quantify this likely entitlement.

**Occupation Orders**

On living apart one partner may need continued occupation of the family home as an interim measure. If agreement cannot be reached, the Family Court can order an *Occupation Order*. This usually happens when there are children who need the continued security of a stable home environment.

In some circumstances the occupying parent may need to later reimburse the other owner for what is termed an occupation rental.

**Agreements**

For an Agreement about your relationship property to be binding there are some formalities. It must be in writing and the independent lawyers for each party must sign a *certificate* on it that says you have received advice and you know what you are doing.

Other Agreements, for example about the children’s care arrangements, spousal maintenance or child support do not need that certificate. Everything that is agreed can still be put in the one Agreement which has the lawyer’s certificate*.*

**Division of trust property**

In some families property is held in a Trust. When a relationship breaks up the issue is then how the entitlements of the partners should be resolved in the changed circumstances.

It is increasingly common for the family home to be trust property, and sometimes business interests are ultimately owned by the trustees of a family Trust.

While property is held in the name of trustees, the trustees do not have ownership rights. They hold the property in trust for the *beneficiaries* of the Trust.

*Discretionary beneficiaries* of a Trust do not have any right to trust property, but the trustees must consider their circumstances and have a discretion to give them trust property. *Final beneficiaries* of a Trust are the persons who end up with the trust fund at the end of the Trust’s life if there is then any left.

The person who can hire and fire the trustees, often called the *Appointor*, is the person who controls the Trust. If that person does not have your interests at heart you are unlikely to continue to receive benefits from the Trust.

If there is a *nuptial* flavour to the accumulation of property into the Trust the Family Court has jurisdiction to restructure it so as to benefit both spouses and any children beneficiaries. This is on the basis that with the changed circumstances on a dissolution of marriage, the previous benefits a husband and wife may have had from the Trust may have ceased for one of them. This remedy is only available when there is a marriage. It does not apply to de facto relationships.

Despite this possible Court intervention, a division of trust property can always be agreed.

**Pre-nuptial Agreements**

The *Property (Relationships) Act 1976* applies to division of relationship property, unless the partners have agreed otherwise. Such an agreement has to be a valid written Agreement made pursuant to the Act.

These Agreements are *Pre-nup Agreements*, but they do not have to be made prior to a marriage, and indeed can be made by the partners of a de facto relationship or a Civil Union.

Since there is a general presumption of equal sharing after 3 years of a relationship, and sometimes one partner has considerably more property than the other at the start of the relationship, these Agreements are often entered into before the 3 years are up. But they can be entered into at any time.

Deciding what to provide for in one of these Agreements is often difficult. This is because you are providing for what might happen in the future if your relationship were to break down, or for when one partner dies.

These Agreements are especially useful in second relationships, when there might be children from prior relationships for whom each partner wants to make provision for in their respective Wills. An Agreement may restrict the division of property on death to the surviving partner so that the deceased’s partner still provides for his or her children from a previous relationship.

Deciding what should happen in the future over division of property is often difficult, especially for older couples with children from previous relationships. You will need guidance from a good and experienced family lawyer to help you decide what is best to do for your partner and your children, and to ensure that what you decide is carefully documented so problems do not arise in the future.

**Spousal maintenance**

The need for spousal maintenance often arises alongside division of property and arrangements for the children.

A classic situation is a wife and mother in need of financial support as a result of the breakup of a relationship. She may not be able to look after herself financially until she gets her property entitlement, or it may be longer if circumstances prevent her from being able to fend for herself.

An important part of spousal maintenance for practical purposes is the ability to get *interim spousal maintenance* to help fund the necessary legal and other professional fees needed for a division of property. These costs are allowable as a budget item for example in a claim by a woman who has to incur significant professional fees to unravel and conduct Court litigation to divide relationship property or property held in a Trust.

While spousal maintenance is often important, it is not always, and you need good legal advice about its necessity or otherwise.

**De facto relationships**

Couples who live together and are not married are known to be living in a de facto relationship.

Sometimes it is difficult to ascertain whether a qualifying de facto relationship exists, which is important to establish, usually for the purpose of division of their property on a relationship breakup or when one partner dies.

A determining factor is whether the couple have a mutual commitment to a shared life together, but there are other factors as well.

After a de facto relationship of three years or more, the division of property regime that applies to married couples also similarly applies to couples in a qualifying de facto relationship.

The property of a couple in a de facto relationship of less than three years may still be divided if there is a child of the relationship or one partner claims to have made a substantial contribution to the relationship.

**Care of children**

When parents live apart it is usually best for children to continue their relationship with both their parents.

Issues that typically need to be resolved revolve around their day to day care, arrangements over the time they are going to spend in each parent’s care, their schooling and all the other aspects of parenting.

What is best for a particular child is always the determining factor in deciding what should happen.

Parents can agree on what is best for their children’s care arrangements. If there are problems, or agreement is not possible, the Family Court Judge will decide.

Unless in an emergency, there are matters that need to be attended to before being able to apply to the Family Court to ask a Judge to make a decision. It is necessary to attend the *Parenting Through Separation* course, and there needs to be an attempt to resolve matters at mediation by attending the Family Court’s *Family Disputes Resolution* process.

Your lawyer is not automatically allowed to represent you in *Care of Children Act* cases but can in some situations. If there are serious issues about your children’s welfare, the Judge will appoint a *lawyer for the child*, and in some difficult cases the Judge will appoint an expert such as a child psychologist. Parents can be required to contribute to the costs of these Court appointed persons.

**Child support**

Both parents have a continuing obligation to financially support their children even though the parents and their children will no longer be living together as a family.

Parents can agree on how they will do this in the changed circumstances. But if agreement cannot be reached, either parent can apply to *Inland Revenue Child Support* for what is called a *Formula Assessment* of child support. This assessment works out how much one parent needs to pay the other having regard to their respective incomes, and the amount of nights the children are in their care.

Your likely *Formula Assessment* can be calculated by visiting the [*www.ird.govt.nz*](http://www.ird.govt.nz) website. The benefit of an annual *Formula Assessment* rather than an Agreement is its flexibility, as the needs of the children and the resources of their parents change over time.

A *Formula Assessment* may not work in your circumstances, perhaps because even though the paying parent has plenty of money, a low taxable income is used in the formula. There is an *Administrative Review* process to change a formula assessment in such situations.

In some situations a Family Court Judge can decide how much child support is appropriate.

**Division of property on death**

When one partner dies, the survivor still has an entitlement to division of relationship property.

The surviving partner needs to either negotiate that entitlement with the *Executors* or *Administrators* of the deceased partner’s estate, or apply to the Family Court within 12 months of *Probate* of the deceased’s Will.

If there is a small estate able to be distributed without formal administration, the choice must be made within six months of the date of the partner’s death.

Before applying for division of property the surviving partner must first make a *choice*. The choice is between applying for the usual half division of all the relationship property, or instead accepting whatever the deceased partner left for the surviving partner.

The surviving partner always requires good legal advice as to the wisdom of making that choice.

**Claims against estates**

Surviving spouses, partners, children and even grandchildren have potential claims against the property of a deceased spouse, partner, parent or grandparent. The nature and extent of these entitlements varies in different situations.

You may have a claim if there has been a *breach of moral duty* the deceased owed you. The extent of your claim will depend on the seriousness of the breach, the size of the estate, the terms of any Will, and other deserving beneficiaries of the deceased’s *estate.*

In some circumstances a person dies without fulfilling a promise made to benefit someone in his or her Will. It is called a *testamentary promise*, and claims can be made against the estate under the Testamentary Promises Act. An example would be a claim by a caregiver who looked after the deceased for a number of years for little or no reward, where the deceased promised the caregiver would be rewarded in the deceased’s *Will*.

There are time limits for notifying Executors of estates of your intention to make a claim, and for bringing claims in the Family Court against estates being administered.

Good legal advice is always needed about time limits, entitlements and claims against estates.

**Wills** **and estates**

A person of sound mind can make a Will leaving their estate to whom they wish.

However if their Will means a breach of moral duty, perhaps owed to a dependent spouse or child, the Family Court can intervene to rectify the breach. Similarly if a Will fails to honour a testamentary promise the Court can rectify that.

There are formal requirements for a valid Will such as it being in writing and the testator’s signature witnessed by two persons. However if the formal requirements are not met but the testators’ intention is still clear, the High Court can validate an otherwise invalid Will.

You will need a good and experienced lawyer to advise and conduct the necessary litigation to validate an otherwise invalid Will.

Helpful information about making a Will and Estate Administration is available on the New Zealand Law Society website at [www.nzls.org.nz](http://www.nzls.org.nz).

**Domestic violence**

Sadly woman and children are all too often subjected to physical or psychological abuse. The Police and the Family Court take domestic violence very seriously. The first port of call for a victim of domestic violence is Women’s Refuge [www.womensrefuge.org.nz](http://www.womensrefuge.org.nz).

The first step in the Family Court process for a domestic violence victim is to urgently obtain a *Temporary Protection Order,* which the Police immediately serve on the perpetrator and start the process of trying to remedy the situation. Women’s Refuge are able to put victims in touch with a lawyer experienced in these cases.

**Please fill this out as best as you can, and email to johnd@familylawyers.nz  
If you have not emailed it, bring it with you when you meet your lawyer.**

*Briefly describe the problem and the result you want*

**Your details**

*First name*

*Middle name*

*Last name*

*Occupation*

*Home address*

*Work address*

*Date of birth Age*

*Home phone*

*Work phone*

*Email*

**Details of the other party to your relationship**

*First name*

*Middle name*

*Last name*

*Occupation   
Home address*

*Work address*

*Date of birth Age*

*Home phone*

*Work phone*

*Mobile*

*Email*

**Your relationship**

*Describe the background to your relationship*

*The date you started living together*

*If you are married, the date of your marriage*

*If there any periods of living apart for 3 months or more during your relationship; when were they and how long did they last?*

*The date from when you separated or lived apart*   
  
 *Are you or the other party now in a new relationship?*

**Your children**

*Full Name*

*Date of birth* *Age*

*Full Name*

*Date of birth Age*

*Full Name*

*Date of birth Age*

*Full Name*

*Date of birth Age*

*If the children are at school, which school, which year and what will they most likely be doing between now and when they get to 18?*

*If there is a Parenting Order from the Court, or a Parenting Agreement already in place, please give* *details*

*Set out the current care arrangements for your children.*

*If you or the other parent pays child support, give details.*

*Do you or the other party have any children from a previous relationship?*

*Please provide the contact details of your accountant if you have one.*

*Please provide the contact details of a trusted friend or relative.*

*Any other relevant information or additional matters you want to discuss with your lawyer*

**Relationship property**

**Your family home**

|  |  |  |  |
| --- | --- | --- | --- |
| Address | Owner | Latest valuation and its date | Aprox. value |
|  |  |  |  |

**Mortgage over family home**

|  |  |  |  |
| --- | --- | --- | --- |
| Bank | Owed at separation | Owed now | Repayment details |
|  |  |  |  |

**Any other real estate**

|  |  |  |  |
| --- | --- | --- | --- |
| Address | Owner | Latest valuation and its date | Aprox. value |
|  |  |  |  |
|  |  |  |  |

**Mortgages over other real estate**

|  |  |  |  |
| --- | --- | --- | --- |
| Bank | Owed at separation | Owed now | Repayment details |
|  |  |  |  |
|  |  |  |  |

**Motor vehicles/ boats etc**

|  |  |  |
| --- | --- | --- |
| Details | In whose possession? | Aprox. value |
|  |  |  |
|  |  |  |
|  |  |  |

**Household chattels**

|  |  |  |
| --- | --- | --- |
| Brief description | In whose possession? | Aprox. value |
|  |  |  |
|  |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Bank | The name on the account and the account number | Type of account | Balance at separation date | Current balance |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

**Bank account and credit card balances**

**Kiwisaver**

|  |  |  |
| --- | --- | --- |
| Name | Value at start of relationship | Value at separation date |
|  |  |  |
|  |  |  |

**Superannuation / Life insurance surrender values / investments**

|  |  |  |
| --- | --- | --- |
| Description | Owner | Value at separation date |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |

**Any debts you or your partner owe**

|  |  |  |  |
| --- | --- | --- | --- |
| Description | | Amount owed at separation | Amount owed now |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |
|  |  |  |  |

**List any other property below**