

Chapter 23

Breaking up

Emotional security is just as important as financial security.

P.K. Shaw

People live 'happily ever after' in fairy tales, but in real life many of us will have to cope with at least one broken relationship during our lifetime. Australia has one of the highest divorce rates in the world, with one in three marriages failing.

Whether you are married or living in a de facto or same-sex partnership, any relationship breakdown is traumatic, even if you are the one who initiates the break. However, if you are left with children, rent and other bills to pay, how will you survive? This question is particularly important in cases where a partner's income had supported you while you looked after the house and children.

If you left home because of domestic violence, make an appointment immediately with a Centrelink social worker. You may be eligible for financial assistance, and they may be able to help with emergency accommodation. They will also advise you about applying for a restraining order if you wish.

If you feel that counselling might help solve the difficulties in your relationship, you could seek assistance from Relationships Australia. Contact numbers are given in Part 3.

MY PARTNER AND I HAVE JUST SEPARATED. WHAT SHOULD I DO FIRST?

If you and your ex-partner have a joint credit card, you may want to cancel it as you are both liable for any current and future debts on it (so if your partner goes on a wild spending spree, you may find yourself footing the bill.) The same applies to any joint loans; you are both responsible for the repayments. You may also want to close any joint savings accounts to prevent your ex withdrawing the funds.

You can apply for the Sole Parent Pension by filling out the appropriate forms at Centrelink. They will also expect you to apply for Child Support from your ex-partner (this must be done within 28 days of being told about this requirement.) In certain circumstances, such as fear of violence from your ex-partner, you may be exempted from taking child support action.

You should make a note of your separation date as it could be important later.

WHAT IS CHILD SUPPORT?

It is government policy that both parents' are responsible for supporting their children, and the Child Support Agency (CSA) was established in 1989 to assist in the collection of child support payments.

You can, of course, make a private agreement with your ex-partner regarding maintenance payments for your children. If this is not an option, the CSA will set the amount payable using a set formula based on your ex-partner's taxable income, after setting aside an amount for basic living expenses. The percentage payable for child support depends on the number of children involved, as follows:

1 child 18 per cent; 2 children 27 per cent; 3 children 32 per cent;
4 children 34 per cent; 5 or more children 36 per cent.

If the custodial parent earns above average income, that will also be taken into account when the assessment is made, as will the number of nights per year the children spend with the non-custodial parent.

Once the assessment has been made, it will take a number of weeks before child support payments commence, as they have to be collected and then go through what can be a very confusing and frustrating system. If you disagree with the assessment and believe you have a further entitlement (for example, your ex-partner has not revealed the full extent of his income, or he has arranged a salary package which includes a company car, entertainment allowance and other bonuses in lieu of wages), you can go through an appeal process and have the assessment varied. The paying parent can also appeal.

You can appeal for a variation of the assessment if you have a child with special needs, for example, because of a disability or medical condition which requires high-cost medication, physiotherapy or other expensive treatment.

MY FORMER PARTNER IS A WOMAN AND WE HAD A CHILD USING DONOR SPERM. CAN I GET CHILD SUPPORT FROM HER?

The Family Law Act now enables parenting orders to be applied to non-biological parents; for example, a non-biological parent leaving a same-sex relationship could be ordered to pay child support for a child conceived during their relationship using IVF or donor sperm.

WHAT IF HE OR SHE DOESN'T PAY?

If your ex-partner refuses to pay child support, do not retaliate by refusing access to the children; this can only strain your relationship further and add to the hurt and confusion of your children, who are the innocent victims of the situation.

Contact the CSA if child support remains unpaid for several weeks; there are several legal steps they will take. If your partner still does not comply, the CSA can take legal action to sell assets or deduct money from bank accounts, tax refunds, or wages. There is a complaints service if you have a complaint against the agency. (See Part 3 for the contact number.)

HOW DO I DIVORCE MY PARTNER?

Since the introduction of the *Family Law Act 1974* there is only one ground for divorce – irretrievable breakdown of the marriage – and you must have been separated for twelve months (this is why it is advisable to make a note of the separation date, and confirm this, preferably in writing to your partner.) If it is not appropriate for either person to leave the marital home for the separation, it is possible to live separately under one roof; however, the Family Court will closely examine any claim.

Legal advice is highly recommended in all cases of separation and divorce. If you have children, counselling may be required by the courts. After separation, you should alter your will if your ex-partner was a beneficiary.

With regard to dividing shared property, you need to think clearly and not be overwhelmed by feeling of remorse or revenge. Family and friends will give you and your partner endless advice, some telling you to 'take him to the cleaners'. If you have children, you do need to protect their interests as well as your own. Your children's clothing, food and educational needs will cost a lot of money, and these costs should be shared fairly by both parents. However, if possible, it is best to keep on polite if not friendly terms; your relationship may be over, but your children will continue to need their father.

Any financial arrangements made between you and your ex-partner should be legal. What will happen to your 'verbal agreement' if their father re-marries and has another family? Will your children then be conveniently 'forgotten'?

An application for divorce can be signed and lodged the day after the twelve-month separation has expired. It will take a number of weeks to come before the Family Court. To save on legal expenses, 'Do It Yourself Divorce Kits' are available (contact your local Legal Aid). You will incur a cost for filing for divorce, the amount of which may differ from State to State.

WHAT DOES 'PROPERTY' MEAN?

'Property' is personal possessions, real estate and anything else of value. It can include your house and other property, cars, boats, shares, bank accounts, furniture, jewellery, art works, land, antiques, and so on. It also includes any collections you or your partner may have acquired.

CASE STUDY – Judith and Max

Judith and Max separated after twenty-four years of marriage. During the marriage, Max had collected automobile memorabilia and had purchased and restored four vintage cars. At their hearing, Judith was awarded a 50 per cent entitlement to the collection.

AS I HAVE NOT WORKED FOR A LONG TIME, AM I ENTITLED TO A SHARE OF OUR PROPERTY?

When settlement is decided, the court will consider the contributions made by both parties as well as their future needs; the input of the person who looked after the home and family is regarded as just as important as the person who earned an income. All assets obtained during the period of the marriage (and during any previous period of living together) are seen as joint property. The length of the marriage is also taken into consideration.

OUR SEPARATION IS FRIENDLY. DO I NEED A LAWYER FOR MY DIVORCE?

Many couples hope to have an amicable divorce, but good intentions often disintegrate, particularly if it takes a long time to come to settlement. The best and cheapest settlement is the one reached quickly and without lawyers, as legal involvement tends to promote rather than resolve conflict and legal costs can be extremely high. At times the only ones who make any money out of a divorce are the lawyers.

CASE STUDY – Sonia

When Kristina and Vijay's marriage failed after two years, they had about \$20,000 equity in the home they were purchasing. The court ruled that each partner was to receive 50 per cent each. Unfortunately, however, Kristina incurred barrister and solicitor costs of \$17,000.00. The house was sold, realising little money, Kristina had to go into voluntary bankruptcy, and her lawyers received nothing.

UNDER WHAT CIRCUMSTANCES DO I NEED A LAWYER?

Even if you and your ex-partner do come to an agreement, it is still desirable to have that agreement put in writing and handled by a lawyer. Your trust in your partner may be misplaced.

Sometimes people are so bitter and hurt by a break-up that they will do anything to stop their ex from retaining any property – destroying valuable assets or giving them away, gambling all their money away, going on a huge spending spree, and so on.

I SEE MY MARRIAGE COMING TO AN END. WHAT SHOULD I DO?

List all your assets, including the household furniture, bank accounts, superannuation policies, then another list of any outstanding debts (such as mortgages on your house and car) and who incurred them. If your husband is employed or runs his own business, obtain copies of tax returns and, if possible, copy any computer accounting onto a disk. Even if you only find out your marriage is in trouble when he has cleaned out the bank account, mortgaged the house, and run off with 'the other woman', you should detail all you know of your financial affairs.

If you do keep the house, remember to change house and contents insurance into your name (in case of a claim), as well as car registration and insurance, if you get to keep the car.

Settlement and how it is distributed will depend on how long you have been married, how many children you have, who brought what into the marriage, and who the main earner was. Do not minimise your own contribution: you were probably the cook, chauffeur, book-keeper, counsellor, arbitrator, nurse, nanny, cleaner, and so on.

This is the time in your life when you really need to know how much you spend each week to maintain the family home, education, car expenses, and any such luxuries as birthdays, Christmas, holidays and entertainment for yourself and the children. Times will be tough during the initial period of separation, not only emotionally but financially; *this is why it is most critical that every woman is aware of her and her partner's assets and liabilities through out their life together.*

Any financial settlements must be finalised within twelve months of a divorce.

WHAT ABOUT MAINTENANCE FOR MYSELF?

You can apply for maintenance if you are unable to support yourself adequately (because you are caring for young children, for example, or you are unemployable due to age or ill health); the granting of maintenance will depend on your husband's capacity to pay. You must apply within twelve months of your divorce.

WILL WE HAVE TO SELL THE HOUSE?

If your home is in joint names and is your only major asset, it may have to be sold and the proceeds divided between you. If you want to stay in the house, you will have to negotiate with your ex-husband. It might mean giving up your claim to one of the assets, for example, a holiday home or boat, in return for retaining the house, or you may have to pay off your husband's share in instalments over a specified time.

You may wish to stay in the marital home that still has a mortgage, but can you afford to do so? Can you afford to pay him his share of the property, refinance and meet repayments? For example, if the house is valued at \$300 000 and the mortgage outstanding is \$100 000, each share in the home is \$100 000. Therefore, if you have to pay \$100 000 to your husband as well as the remaining \$100 000 mortgage, you will need to be able to refinance and prove you can afford to pay a \$200 000 mortgage.

The federal government has recently indicated that divorced women will be guaranteed a share of their ex-husband's superannuation assets, but this will not be much use if you can't access it until after your retirement. If your husband has a large superannuation policy, it may be better to negotiate a settlement where he retains his super and you retain the home.

IF WE BOTH WANT CUSTODY OF THE CHILDREN, WHO MAKES THE DECISION?

Try to work out a custodial arrangement satisfactory to both of you without resorting to the court. Your children's happiness should be your primary aim and

both of you may have to compromise to achieve that. It is best for them if they can stay in the same house, or at least the same neighbourhood, so that they do not have to change schools and lose close friends, as well as suffer the trauma of their parents' parting.

Ask yourselves: Whose routine is best suited to caring for them? Which parent has the most time? Whose job has the most flexible working hours? With which parent do they get on best? If they are old enough to understand, ask them: What do *you* want?

If you cannot reach agreement on this issue, you will have to go to court, which will involve legal costs. You will be charged not only for time spent in court but other things such as telephone calls, preparation of documents, any conferences to discuss the case, letters written on your behalf, and sundries.

CAN I APPLY FOR LEGAL AID?

Unfortunately, you have to be near-destitute to get legal aid funding as resources are limited. Enquire at your nearest Legal Aid office. You will need to supply details of income, expenses, assets, and so on. If granted legal aid, you may be required, at a later date when your finances are healthier, to contribute to, or to repay, costs incurred on your behalf.

WHAT ARE MY ENTITLEMENTS IF MY DE FACTO RELATIONSHIP BREAKS DOWN?

De facto laws are governed by State law, and vary according to the State in which you live. Though living together without a marriage certificate is more acceptable today, in most States separating de facto couples are disadvantaged when compared to married couples in the same situation. For example The Family Law Legislation Amendment Act 2001, which takes effect towards the end of this year 2002, allows superannuation in divorce property settlements, but does not yet apply to de facto couples.

In some States, if you have lived together for more than two years or have had a child together, you are entitled to a property settlement. If there is a child, maintenance payments are the same as if you were married. Usually there is no provision for maintenance to be paid to a former partner in a de facto relationship, but de facto status is recognised by most superannuation funds in paying death benefits.

If you are separating and your partner was in your Will or a beneficiary under your superannuation policy, change these immediately. Go to the Bank if you have a joint account or if either can sign withdrawals.

Be aware that, under de facto laws, you could lose your house if you allow someone to live with you, even though he doesn't contribute. The fact that he has lived with you and shared the home may be enough to give him some entitlement to your property.

To find out your full entitlements, seek legal advice if the relationship looks like breaking down or immediately after separation.

WHAT ABOUT SAME-SEX RELATIONSHIPS?

Same sex relationships are viewed the same as de facto couples. If you have had a child together (artificial insemination), the one who has custody of the child may be entitled to child support.

WHAT CAN UNMARRIED COUPLES DO TO MAKE A BREAK-UP EASIER?

Just as some people contemplating marriage sign pre-nuptial agreements, people who prefer to live in a relationship without marrying may be sensible to have a lawyer draw up a cohabitation agreement. This document should state when you began living together, list all assets owned by each of you, outline the financial aspects of your arrangement (i.e., if one works and one looks after the home), and what settlement you each expect upon separation. These agreements may not be legally enforceable but can be used as a basis for settlement should the relationship fail.