MILLS OAKLEY

Family Law

Steps to be taken upon separation

So you are separating?

Separation can be emotionally overwhelming and stressful. Unfortunately, it is easy to unknowingly place yourself in a position which has unintended practical and legal consequences. Planning for separation is critical and can save an enormous amount of time, energy and resources.

If you are about to separate or have recently separated from your partner, there are some initial steps that you should consider taking to protect your interests and put you in a better position to navigate your separation. Not at all of these items may apply to your circumstances and you should obtain legal advice specific to your individual circumstances at the earliest opportunity.

Set out below is a checklist of some important initial steps you need to consider, with more details in respect of each step set out below:

- ☐ Update your Will, Enduring Power of Attorney and Advanced Health Directive
- ☐ Revoke your existing Enduring Power of Attorney
- ☐ Update your superannuation death nominations
- ☐ Update the beneficiaries of your insurance policies
- ☐ Seek legal advice about severing any joint tenancies for real properties owned
- ☐ Diarise time limitations

    (a) If you are married - 12 months from the date of divorce;

    (b) If you are in a de facto relationship - two years from the date of separation.

- ☐ Seek legal advice before moving out of the former matrimonial home
- ☐ Identify or remove personal property, sentimental items or key documents (which are yours) from the former matrimonial home
- ☐ Redirect personal mail
- ☐ Protect your data and privacy. Update electronic passwords and remove your former spouse's access to your iCloud account
- ☐ Consider whether you need to change joint accounts to joint signatories, and decrease loan or credit card limits
- ☐ Create a "rainy day" account
- ☐ Understand your financial position and collate your financial documents
- ☐ If you intend to borrow to pay legal fees, prepare and sign loan documents before the money is loaned
- ☐ Focus on your health and wellbeing

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1. Updating your Will

1.1 It is important that you consider whether your Will continues to reflect your intentions upon separation.

1.2 Importantly, under Queensland Law:

(a) Upon divorce or termination of a civil or de facto relationship, gifts and appointments (including as executor or trustee) in favour of your former spouse will automatically become void by operation of law.

(b) Given a spouse can only make an application for divorce 12 months after separation, this leaves a significant period of time following separation where your Will may not reflect your intentions if it is not updated before your passing.

(c) In the event of the termination of a civil or de facto relationship, there could be an argument about whether the relationship was at an end or not at the time of death. The outcome will impact upon whether the gift or appointment was void. For many people that is a concern and can leave a burden on your family members or other beneficiaries under your Will to contest the matter.

(d) To avoid these circumstances in contemplation of separation, or upon separation we recommend you consider updating your Will.

1.3 Even if you have not provided for your former spouse in your will, they may be entitled to make a claim on your estate up until a divorce certificate issues on the basis that they did not receive "adequate provision" (known as a Family Provision Application). It is therefore important that you update your Will and include the reasons you are no longer providing for your former spouse or did not do so originally.

1.4 Please contact us in the event you require assistance updating your Will and we will arrange an appointment for you with our experienced Wills and Estates team.

2. Superannuation beneficiary nominations

2.1 Superannuation is not an estate asset and does not automatically flow to your estate under your Will upon death.

2.2 Each person is required to complete a binding or non-binding death nomination through their superannuation fund which nominates the beneficiary of their superannuation entitlement in the event of death.

2.3 You should contact your superannuation fund to obtain, and (if necessary) update these details to ensure that the beneficiary of your superannuation entitlement is in accordance with your intentions in contemplation of, or upon separation.

2.4 In the event you hold a superannuation interest in a Self-Managed Superannuation Fund and you require assistance updating your beneficiary nomination, please let us know so that we can assist.

3. Power of Attorneys

3.1 Under the Powers of Attorney Act 1998 (Qld), any Enduring Power of Attorney or Advance Health Directive made by you or your former spouse in Queensland appointing the other as your Attorney is (only) automatically revoked upon divorce to the extent it gives power to the divorced spouse.

3.2 There is no automatic revocation:

(a) Upon separation if you are married but not yet divorced; or

(b) If you are in a de facto relationship (unless you have a registered civil partnership);

and your former spouse will still be able to make financial or personal decisions on your behalf (dependent upon the terms of the document). Consider proactively revoking your Enduring Power of Attorney. You also need to consider providing notice to your Attorney of the Revocation.

4. Insurance policies

4.1 If you have insurance and your former spouse is the nominated beneficiary of your policy, you should identify and reconsider your nomination and whether you wish to nominate somebody else to receive your insurance upon your death.

4.2 This may include life, income protection and funeral insurance.

5. Severing any joint tenancy

5.1 In the event you own real property with your former spouse, you either own that property as 'joint tenants' or 'tenants in common'.

5.2 In the event you own property as 'joint tenants', upon the death of a spouse or former spouse, the surviving spouse will automatically receive the other person's share by survivorship.

5.3 This is in contrast to ownership of property as 'tenants in common' where, upon any death, the deceased's share of the property flows to their estate.

5.4 A majority of real properties are owned by spouses as joint tenants as that appears to be the presumed ownership status unless you advise your conveyancing lawyer upon the time of purchase that you would prefer a 'tenants in common' arrangement. We can assist to identify this if needed.

5.5 Following a separation and to avoid the application of survivorship upon death to your former spouse, you can sever the joint tenancy so that you own the property as 'tenants in common' pending your property settlement.

5.6 You do not require your former spouse's consent to sever the tenancy. You should seek advice prior to severing the joint tenancy as there are advantages and disadvantages as follows:

(a) Severing the tenancy protects your half share of the property by ensuring it forms part of your estate, rather than being transferred to your former spouse upon your death;

(b) Severing the tenancy means that your former spouse's share of the property will be transferred to their estate, rather than you, upon their death;

(c) It may provide your former spouse with the opportunity to encumber their share of the property, but equally may provide you with the same opportunity.

(d) It may impact any mortgages secured on the title of the property and before you take these steps any finance and security arrangements should be considered.

5.7 We can obtain a title search for you to find out whether you own any property as joint tenants. Severing the joint tenancy is an easy process that we can assist you with after you have considered the impact of this.

6. Consider and diarise time limitations

6.1 The following time limits to commence court proceedings for a property settlement or a claim for spouse maintenance:

(a) Two years following separation if you are in a de facto relationship; or

(b) Twelve months from the date of divorce if you are married.

6.2 If you have not commenced court proceedings within the time limit, you will be required to seek the leave of the Court to commence proceedings which can be a costly and time-consuming exercise. It will also be necessary for you to explain to the Court why you have delayed the commencement of proceedings, and leave will only be given in the event of hardship which cannot always be established.

6.3 Some people find themselves in this situation as a result of negotiating with their former spouse for a prolonged period of time without reaching agreement and without understanding these time limits. In these situations, it is necessary to commence court proceedings to preserve the time limit whilst you continue negotiations.

6.4 To ensure these time limitations are not overlooked in the future, you should diarise the dates as soon as possible.

7. Seek advice before moving out of the former matrimonial home

7.1 There can be legal and practical consequences if you move out of the former matrimonial home.

7.2 Once you move out, it can be difficult to get your former spouse out of the home if you wish to move back in at a later date. In some situations that may involve a court application. If you have already found alternative accommodation by the time you bring any such court application, your prospects of success will be reduced as the Court will take this fact into consideration.

7.3 Whilst not always critical, moving out of the former matrimonial home may impact upon your prospects of retaining that property in your property settlement if there an argument about who will retain the property. It may also impact upon the future parenting arrangements for your children.

7.4 There are also financial obligations associated with moving out of the former matrimonial home including payment of rent and expenses for the alternative accommodation.

7.5 If you are going to move out of the former matrimonial home, best practice is to secure an agreement with your former spouse about the payment of those expenses before you do so.

8. Removing personal properties from the former matrimonial home

8.1 Prior to moving out of the former matrimonial home, you should at least identify, or potentially remove personal belongings including sentimental and valuable items. You should also consider private or personal documents such as diaries and financial information.

8.2 You should only remove your own personal documentation from your house and should never take financial documents which do not belong to you or your former spouse. You are not entitled to those documents and this could create problems for you in the future.

8.3 If you have moved out of the former matrimonial home, make arrangements to redirect your personal mail.

9. Update all passwords

9.1 In contemplation of, or following separation, you should consider updating the passwords on your electronic devices which you have shared with your former spouse, including your email accounts, internet banking or computers.

9.2 You should also consider creating a new email account for the purpose of communicating with your lawyer for an added layer of protection.

9.3 Some people share iCloud or Apple IDs which by default shares a significant amount of personal information with your former spouse including potentially your location and personal date. You should ensure your spouse does not have access to your iCloud or other cloud storage services.

10. Access to bank accounts

10.1 You may need to consider whether your former spouse can withdraw significant funds from any joint bank accounts or drawdown on any joint mortgages or loans. Prevention is always better than the cure.

10.2 If so, you need to consider contacting the relevant financial institutions to change your accounts to joint signatories, meaning your spouse cannot access any money without your consent (and vice versa). Before you do so, seek legal advice and consider the impact of this upon practical matters like direct debits and payment of loans.

10.3 Consider cancelling any secondary credit cards in your name or decreasing the credit card limits and daily transfer limits to avoid excessive expenditure by your former spouse. Note, these limits, once instituted will then also apply to your own finances also, to the extent they relate to joint accounts.

10.4 Prior to taking the above steps, you need to consider any issues this will create in operating businesses on a day to day basis and the impact upon any direct debits that are in place.

11. Create a “rainy day” account

11.1 You should consider whether it is necessary to withdraw or transfer some money from any joint accounts to cover your legal fees or future living expenses. This is particularly important if you do not have access to any other funds in your sole name.

11.2 Once separation occurs, your former spouse may place joint signatory restrictions on joint accounts making joint funds difficult to access in the future. You then may need to seek your former spouse’s consent or bring a court application to access those funds, which is costly and causes delays and unnecessary stress. You should seek legal advice about the best way to approach this.

11.3 You should not withdraw any money in your spouse’s bank account or a company or business bank accounts. You also must not withdraw any money from accounts held by self-managed superannuation funds.

11.4 You need to be aware that any "rainy day" account will need to be disclosed to your former spouse.

12. Understanding your financial position

12.1 It will be helpful if you have an understanding of your financial position including:

(a) What assets and liabilities are owned by you and/or your former spouse.

(b) Knowing the Directors and Shareholders of any companies.

(c) Knowing the Trustees and Appointors of any trusts.

(d) Understanding where each spouse's income is deposited.

(e) Understanding where expenses are paid from.

(f) Understanding of the amount of income you and your former spouse receive each week/ fortnight/month/year.

(g) Calculating your and the children's weekly living expenses.

12.2 You should also collate any financial documents in your name to support the above.

12.3 This will assist your lawyer in giving you more specific and comprehensive advice in the initial stages of your matter.

13. Entering into loan agreements, if required

13.1 If you are required to borrow funds from friends or family to pay for your legal fees, living expenses or other expenditure, you should ensure that there are formal loan documents in place or at least clear communication in writing about this.

13.2 This will assist in the event your former spouse argues that such funds are not repayable by you and were provided by way of gift meaning they would not ordinarily be considered in the property pool available for division. Entering into loan agreements after the money has been loaned is less credible.

13.3 You should contact us for assistance if this is relevant to your circumstances.

14. Focus on your health

14.1 The research is clear and will not come as any surprise – separation places people at higher risk of health problems.

14.2 Seeking assistance at any early stage will enable you to focus on providing clear instructions to your lawyer and make informed and commercial decisions.

14.3 It is normal for people going through separation to seek assistance from experts such as counsellors, psychologist and psychiatrists, and to talk to trusted family members and friends about what they are going through. Identify and obtain a good "team" of support. There is no stigma in your settlement if you have sought professional help and indeed in most cases, it is looked upon favourably.

14.4 Be mindful that what you say to counsellors, psychologists and psychiatrists may not be completely confidential. Their notes may be subpoenaed in the future. This however should not deter you from seeking expert help when needed. Your lawyer may need to seek and rely upon reports from your treating practitioners to advance your case in the future.

14.5 Focus on you:

(a) Allow yourself to grieve the loss of the relationship in a private space and do not suppress your feelings. It is normal to experience feelings of anger, guilt, resentment, frustration, hopelessness and confusion. These feelings will lessen over time.

(b) Take care of yourself and give yourself a break. Take time to heal, regroup and re-energise. Reconnect with the activities you enjoy.

(c) Do not go through the process alone. Seek out experts, friends and family for support and a listening ear. Inform your employer about the separation so that they can be more understanding and accommodating of your circumstances.

(d) Do not involve your children in the conflict or rely upon them for support. This will be detrimental to your children's short and long term well-being and their relationship with you. You will be criticised if you do this.

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