

# Disputes over who stays in the family home after separation

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After the breakdown of a relationship, it would make sense for the parties to physically separate from one another by one of them moving out of the family home. However, sometimes people can't agree on who should move out. We are often asked by clients whether they can make their ex-partner leave the family home after separation. This blog will look at who gets to stay in the family home after separation.

Australia is also currently experiencing a property crisis which is making it more and more difficult to find alternative accommodation. If you must continue to live with your ex-partner after separation and until any settlement can be reached, it can be stressful and unpleasant. Not to mention the potential impact this could have on your children.

## Do you have more family law rights if the property is in your name only?

Family law looks at possession and ownership of property differently to commercial and/or property law. In family law matters, both parties are equally entitled to remain in the family home until property settlement has been finalised between them. It doesn't matter if only one party is registered on the title.

Either party can choose to leave the family home during the separation, however, they cannot be forced into it. Many of us have heard the stories where one party comes home to find the locks on the family home have been changed. While it's within the rights of a homeowner to change the locks, doing so without telling the other party may increase the level of conflict in an already emotional time.

If you are the owner of the property, whether solely or jointly with the other party, and choose to move out, you may want to consider a couple of things.

If you move out and then attempt to come back without the other party's consent, there is a risk that this could be considered intimidating or even threatening. Under certain circumstances, it could even be considered a form of family violence which could result in a Protection Order being issued against you.

If you have a home loan/mortgage or liability attached to the property in your name and you move out, you could be expected to pay the mortgage of the former home as well as pay any liability (e.g. rent) you incur at the new premises. Even if you reach an agreement with your ex-partner about splitting the bills, there is always a risk that they could elect to stop paying.

## What happens if neither party wants to leave the family home after separation?

In some situations, the parties may choose to continue living under the same roof for a while. This is known as "separated under one roof". You can read more about this in our blog, "Separated but living under the same roof".

While this is a possibility for some families, often what we see is the lines around separation becoming slightly more blurred by remaining under the same roof. To be considered separated in the eyes of the law, one party must clearly communicate to the other party their intentions to separate and that there is no chance of reconciliation at that time.

The parties should also no longer be acting as though they are in a relationship (e.g. sharing a bedroom, attending social events as a couple). You can read more in our blog, "Family law and separation: when are we considered separated?".

## How can I make my ex move out of the family home?

The first step, if it's safe to do so, would be to try and reach an agreement with your ex-partner about them moving out of the home after separation. You should also discuss how you are going to manage any joint bills as well as managing arrangements for any children of the relationship.

If you are unable to reach an agreement privately, you can consider mediation or family dispute resolution. The practitioner can help you facilitate an agreement, if possible.

## Applications for a Sole Occupancy Order

While both parties have a right to remain living in the family home after separation, either party can seek an Order from the Court for sole occupation of the family home. This is known as a "Sole Occupancy Order". This Order grants one party the right to continue living in the property and simultaneously requires the other party to move out.

The Court determines whether to grant this type of Order on a case-by-case basis. The Court must conclude that it would not be reasonable, sensible, or practicable to expect the parties to remain living in the family home together.

The Court will take into consideration:

if one party will have primary care of children under the age of 18 once the parties no longer live together, and what is in the best interest of the children;

the earning capacity of each of the parties (e.g. if a party could afford to rent elsewhere);

the ability to access alternative accommodation; and

the conduct of the parties, including any allegations of family violence.

Sole Occupancy Orders are usually granted in situations involving allegations of family violence. However, they have been ordered from time to time in cases where there is no element of family violence.

## Family violence considerations

You should contact the Police if you or your children are at risk of being harmed by your ex-partner.

The Police will investigate the allegations and determine the appropriate pathway forward. This may include bringing an application for a Protection Order in the Magistrates' Court. Such an Order may prevent the responding party from attending the residence of the protected person(s), and therefore, they would be required to move out of the family home.

## Get help from a family lawyer

If you have recently separated and you have questions about whether you or your ex-partner should move out of the family home, please speak to one of our family lawyers.

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*The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.*