



# Staying in The Home While Separated – The Practical and Legal Risks

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Separation is usually a difficult decision, irrespective of whether there are children of the relationship. Deciding who stays in the family home post separation can create further stress and acrimony. Each party may feel they have a greater right to remain in the home, including that it was their home prior to the relationship or marriage, they made greater financial contributions or have primary care of children.

However, there are times when both parties wish to remain in the family home post separation including for financial reasons, to reduce trauma to children or one party has nowhere else to go.

This paper will:

- Examine the reasons why parties may wish to remain living under the one roof post separation.
- Outline the practical and legal risks a party can face associated with living under the same roof post separation.
- Identify the mechanisms available to evict a spouse.
- Provide a check-list of essential points to advise your client when remaining living under the one roof is an option.

## Why remain living under one roof?

The act of separation requires a departure from the state of things rather than from a particular place. It is not a requirement of separation that parties must reside in separate residences. There are numerous reasons both parties may be reluctant to leave the family home following separation.

Arguably the most common reason cited for both parties remaining in the home is that the financial pressure associated with relocating is simply too great. That is, the funds that previously supported one household do not stretch to cover two households.

Another common reason is where parenting arrangements are yet to be determined. In the absence of formalised arrangements, the non-primary carer may be concerned that if they move out of the family home, they will be prevented from having regular access to the children. Similarly, if



parenting arrangements are being contested, the non-primary carer may feel their case will be strengthened by them remaining in the property and involved with the children for as long as possible.

Parties may also wish to continue to live under the one roof in order to provide stability for the children. Whether the children are benefitted from this ultimately depends on the parties' ability to shield the children from their conflict.

Depending on who wishes to retain the home as part of any final property settlement, a party may consider it strategic to remain in the property pending the making of final orders. For instance:

- If both parties wish to retain the home as part of the overall settlement, they each may feel as though moving out compromises their claim in this regard.
- If one party wishes to retain the home and buy the other out, the other party may still wish to remain living in the home to ensure that the retaining party is incentivised to progress the settlement in a timely way. Practitioners will be all too familiar with matters where one party resides in the home with little incentive to change the status quo.

There may also be the well-justified fear that once a party leaves the property, it will be hard to move back in without the permission of the other party. Irrespective of who is on the legal title, if a party moves out, the remaining party acquires a form of tenancy with respect to the property. In this instance, the only recourse may be to seek an order facilitating that party's return to the property.

There may be no strategic or practical benefit to be gained from living under one roof, however one or both parties refuses to leave nonetheless. Where a practitioner suspects that a party's desire to remain under the one roof is motivated by a desire to exercise control over the other party, frank advice should be given about the risks that this conduct could support a finding of control-based family violence.

Finally, depending on the level of acrimony between the parties, continuing to reside in the home may also assist to preserve the status quo pending settlement and reduce the incidence of the premature disposal of physical property.

## Practical and legal risks

### *Practical risks*

From a practical perspective, the most obvious risk is the continuation of the conflict. This is particularly problematic where there are children who are exposed to the conflict. It is well established that children are at a greater risk of developing emotional, social and behavioural



problems from exposure to ongoing conflict and litigation between their parents, than the separation itself.<sup>1</sup>

For matters involving family violence, the time of separation poses the greatest risk for the victim. By continuing to reside under the one roof this risk is exacerbated.<sup>2</sup> In instances of family violence, the family violence intervention order legislation and regime (discussed below) is often the most effective way of securing a party the exclusive use of the home in the immediate aftermath of a separation. Urgent court orders may also be sought pursuant to the *Family Law Act 1975*.

Another practical concern is the lack of privacy. Parties may wish to consider changing the passwords on their personal computers and email accounts, taking photocopies of important documents in the filing cabinets, and redirecting their mail.

Depending on the financial relationship between the parties, there may also arise disputes between the parties as to the payment of household expenses. As the nature of the financial relationship between the parties differs from case to case, so too will be the appropriate approach to the payment of these costs in each matter.

## Legal risks/issues

Date of separation. Staying under the same roof after separation may render it difficult to establish the date of separation, should this prove to be a fact in dispute. This was highlighted in the decision of *Pavey and Pavey* (1976) 25 FLR 450, which was an appeal from a decision dismissing an application for the dissolution of marriage. At the time the application was made, the parties were living in the same house and had been doing so for a number of years. Although they had slept in separate rooms, the Wife did her husband's laundry and cooked for him occasionally. The Wife had also obtained a maintenance order against the Husband the year prior to the making of the Application.

The Full Court ultimately found that the Trial Judge had erred in his assessment that the parties had not separated. The Court found the making of the maintenance order as a determinative factor in evidencing the breakdown of the matrimonial relationship. When determining whether a separation has occurred, the Court was cognisant that what constitutes the marital relationship will differ from case to case. Rather, what is important is to examine and contrast the change in the state of the relationship before and after the separation.

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<sup>1</sup> See for example publication from the Family Court of Australia, "*Parental conflict and its effect on children*", <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/parenting/parental-conflict-and-its-effect-on-children>

<sup>2</sup> "*Safe at home? Housing decisions for women leaving family violence*", Diemer K et al, Australian Journal of Social Issues, Volume 52, Issue 1, 6 April 2017.



Use of joint funds. Where one party vacates the family home after separation, they will usually incur costs of establishing a new residence, including furniture and appliance purchase costs, rental deposit and the like, often funded from joint savings. This is generally considered by the court as a legitimate use of joint funds. Where however parties reside in the same home up until the implementation of a final settlement, it may be appropriate for the leaving party to receive an adjustment to the amount they receive on a final basis to adjust for the costs in setting up a new residence.

Assessment of contributions. Similarly, where one party moves out of the home, it is generally considered reasonable for the remaining party to meet the costs associated with the home. If both parties remain in the home but one party continues to be solely responsible for the payment of the mortgage and outgoings, that party may be able to establish a greater contribution-based entitlement in the capital growth in the property between the date of separation and any final settlement.

Care arrangements for children. In parenting matters, residing under the one roof following separation can also blur the lines of primary care, and proving who is the children's primary carer may be more difficult as a result.

## How to remove a recalcitrant spouse

There are three main avenues for pursuing the sole use of the family home; an application for exclusive use pursuant to the *Family Law Act 1975*, an application for an exclusion condition within a Family Violence Intervention Order pursuant to the *Family Violence Protection Act 2008*, and the "self-help" method. Each is discussed in turn.

### Injunction for the exclusive use of the family home, pursuant to the *Family Law Act 1975*

For married couples, section 114(1)(b) of the *Family Law Act* enables a court to make an injunction:

*"restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated"*

Section 114(1)(f) also enables the court to make:

*an injunction relating to the use or occupancy of the matrimonial home*

For de facto couples, the power to make this injunction comes from section 90SS(1)(k). It is worded more broadly than its section 114 counterpart, and enables the court to:



*“make any other order, or grant any other injunction, (whether or not of the same nature as those mentioned in the preceding paragraphs of this section) which it thinks it is necessary to make to do justice”*

The specific criteria from the *Family Law Act* to make an exclusive use injunction is simply that the Court may make such order “as it sees proper”. There are a number of Full Court decisions which provide clarification as to the matters to be considered when making this assessment. A non-exhaustive list of potentially relevant matters when making such an order is as follows:

- The means and needs of the parties (*Davis & Davis* (1976) 26 FLR 302);
- The needs of the children (*Davis & Davis* (1976) 26 FLR 302);
- The hardship to either party or to the children from the making of an order (*Davis & Davis* (1976) 26 FLR 302);
- The conduct of one party which may justify the other in leaving the home or asking for the expulsion from the home of the first party (*Davis & Davis* (1976) 26 FLR 302);
- Whether a party can be adequately housed elsewhere (*Plowman v Plowman* (1970) 16 FLR 447);
- Whether money is available, either from a party’s own resources and/or the other party’s to provide that housing (*Plowman v Plowman* (1970) 16 FLR 447);
- For whom is it less convenient to have to live away from the home (*Plowman v Plowman* (1970) 16 FLR 447);
- What is in the children’s paramount interests (*Plowman v Plowman* (1970) 16 FLR 447);
- What are the relevant proprietary rights of the spouses (*Plowman v Plowman* (1970) 16 FLR 447);
- Whether a non-molestation order would be an appropriate alternative to an order for expulsion (*Plowman v Plowman* (1970) 16 FLR 447);
- Whether there is a possible use of improper methods either by way of intimidation or fraudulent condonation to prevent a party from pursuing their rights, if the spouses continue to reside on one home (*Plowman v Plowman* (1970) 16 FLR 447);
- The possible injustice of forcing a party to establish for themselves another home, or otherwise accept inferior accommodation without just cause (*Plowman v Plowman* (1970) 16 FLR 447)

It is not enough to decide the matter simply on the balance of convenience (*Jyotisha & Jyotisha and Anor* [2016] FamCA 738), and the court has often repeated the statement (or version thereof) of Justice Murphy that “*It is a very serious matter to turn a husband or wife out of their home*” (*O’Dea and O’Dea* (1980) 6 FamLR 675). It is for this reason that an injunction for the exclusive use of the family home has a reputation for being difficult to obtain.



Where a party has already left the home, it can become even more difficult to shift the status quo and achieve an order for exclusive occupation. This is because by leaving the home, that party will have presumably have established an ability to rehouse themselves elsewhere, at least temporarily.

Recent examples of the application of judicial consideration on the making of an exclusive occupation order are as follows:

- *Sansom & Sellar* [2013] FamCA 507. The de facto husband sought an order for the sole occupation of a property in his sole name. The de facto wife opposed this, however did not seek a competing order. There was an Apprehended Domestic Violence Order against the husband, listing the wife as the protected person. The husband had also been charged with assault. After coming to the conclusion that it was inappropriate for the parties to continue to live in one residence, her Honour ordered that the husband be granted the sole use of the property. In reaching this decision, her Honour emphasised that she was not swayed by the husband's status as registered proprietor. Relevant factors were the wife's financial capacity to rehouse herself, coupled with her failure to seek a sole use order herself.

- *Zegar & Zegar* [2015] FamCA 132. This case highlighted the impact of allegations of family violence on exclusive use applications. The wife sought the exclusive occupancy of the family home for a period of a month, until the matter was next before the Court. The wife alleged she was a victim of family violence. The husband disputed this and noted that criminal charges and an AVO against him were dismissed, following a hearing in the state court. He argued that it would be unfair to keep him out of the home on this basis, given the allegations of family violence were dismissed. The court was not persuaded by the husband, and found, at paragraph 6, that

*"it would be quite inappropriate if there is some prospect of a finding being made that the wife was the victim of a reasonably serious domestic violence incident to expect that she should continue to live in the house with the perpetrator, in the event that he were to be found to have committed that assault on the civil standard"*

Also of note for the court was the fact that the husband had already been out of the house for some time, and had established that he had the ability to house himself elsewhere.

- *Walliams & Mandrill* [2018] FamCA 456. The wife sought an order for her to have the exclusive occupancy of the family home. She was unsuccessful. The relevant factors for the court were:
  - The husband was the legal owner of the property.
  - The child of the relationship was only 5 years of age, and had an established relationship with the husband. The removal of the husband from the property would likely have an impact upon the relationship between husband and child.
  - The evidence did not establish that the environment in the house arising from the joint occupancy was such to expose the child or wife to unnecessary or unreasonable levels of stress.
  - Although the wife had produced evidence of her poor mental health, there was no evidence establishing that this would improve if the husband vacated the property. She



had also not been proactive in taking up her doctor's recommendations for counselling/therapy.

- The husband did have another property he could occupy, however this was not considered to be determinative of the wife's application.
- His Honour emphasised that he did not want either party to use the court as a tool to achieve a perceived strategic advantage.
- *Jyotisha & Jyotisha and Anor* [2016] FamCA 732. In issue were competing applications for sole use of a property in which the wife resided. An unusual feature of this case was that the parties' 26 year old daughter resided in the property with the wife, yet supported the husband's application. One of the arguments advanced by the husband was that the wife had failed to properly maintain the property, causing it to decline in value. Her Honour was not persuaded by this, and found that to the extent that this was able to be proven, its diminution in value could be addressed at trial. The determinative factor when making the orders sought by the wife was that the husband had the greater financial capacity to house himself elsewhere. It was further found that the injunction was necessary as the husband had attended the home on numerous occasions to visit the daughter, use the pool and putting green, to meditate and have piano lessons there. If the injunction was not made, it was likely that he would continue to do so.
- *Wilde & Foster* [2018] FamCA 502. Again, competing applications for exclusive use of the family home on foot. When approaching the exercise of the discretion, the Court first embarked on a consideration as to whether it was necessary for an order to be made at all for one or the other to have exclusive occupation. Having found in the affirmative to this question, as a result of an incident requiring police involvement, the question then turned to in whose favour the order ought to be made. Both parties had the financial capacity to obtain alternate accommodation. The court ultimately found in the husband's favour, on the basis that was to be the primary carer for the children pending further order.

The onus of establishing the basis on which the Court would be persuaded to exercise the discretionary injunctive power to order a party to move out of the home rests with the party seeking the injunction.

It is to be noted that the making of any such injunction does not in any way affect the property interests of the parties. The making of an injunction creates a temporary and personal right only (*Tansell and Tansell* (1977) FLC 90-307).

## Family Violence Intervention Orders

In instances of family violence, it may also be possible to obtain a Family Violence Intervention Order which includes a condition prohibiting one party from returning to the family home.

The power of the court to make this condition comes from section 81 of the *Family Violence Protection Act 2008 (Vic)*. This section enables the Court exercising jurisdiction under that Act to include in a family violence intervention order "any conditions that appear to the court necessary or



desirable in the circumstances". This includes excluding the respondent from the protected person's residence (an "exclusion condition").

In addition to section 81, section 82(1) imposes a positive obligation on the court to consider whether to include an exclusion condition when making an order. Subsection 82(2) lists the following factors the court must have regard to:

- (a) the desirability of minimising disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support which may be lost if the protected person and the child were required to leave the residence or were unable to return to or move into the residence;*
- (b) the desirability of continuity and stability in the care of any child living with the protected person;*
- (c) the desirability of allowing any childcare arrangements, education, training or employment of the protected person or any child living with the protected person to continue without interruption or disturbance.*

On an interim basis, the criteria for the making of a Family Violence Intervention Order is that the Court is satisfied, on the balance of probabilities, that an interim order is necessary pending a final decision to ensure the safety of the affected family member or to preserve any property of the affected family member. Family Violence Intervention Orders should not therefore be used as a backdoor method of securing sole use of the family home, in the absence of genuine safety concerns for a party. It is noted that an Application for a Family Violence Intervention Order is made on oath or Affidavit.

## "Can I just change the locks?"

Whether a party has the ability to change the locks depends on the ownership of the property. Specifically:

- If it is a jointly owned property, then both parties are able to change the locks
- Where the property is owned by one party, that party has the right to change the locks.
- If the property is being leased by the parties, the landlord should be consulted about the lock change.

Even if the party who is remaining in the property is not the legal owner, it can nonetheless be justifiable for them to change the locks if the other party has moved out and has removed their possessions. In those circumstances, it could be argued that the remaining party is entitled to peaceful enjoyment of their residence, somewhat akin to the circumstances of a tenant.

It is generally not advisable to change the locks as a tool to evict a party from the property. In addition to increasing the acrimony between the parties, it can also reflect poorly in any subsequent





court proceedings. An example of this is the decision of *Guzniczak & Rogala* [2017] FamCA 758. Here, the husband changed the locks on the jointly owned home while the wife was out, and informed the wife she could only return to the home provided she undertook psychological treatment and returned the children to him. The court was unimpressed by the husband's conduct, and found this to be an example of the husband's controlling behaviour.

## Advice check-list

When faced with a situation where both parties are residing under the same roof, the following is a guideline of matters for practitioners to discuss and advise their client on:

- Explore their motivation for wanting to remain in the family home. Does it arise out of a long-term desire to retain the property, or is it a short term objective, such as ensuring stability for a child during an important year of schooling.
- After obtaining instructions, identify whether there are safety concerns, and whether the children being exposed to parental conflict.
- Obtain instructions about what the proposed interim financial and parenting arrangements would be if after the parties remained under the same roof, or one party vacated the home.
- Explain to the client the pitfalls of remaining in the home with their former partner. Weigh these up against what the party wishes to achieve by remaining in the property. Is there a better option rather than remaining under the one roof? For example, if the costs of establishing a new household is a deterrent for a party, consider whether an application for urgent or interim maintenance to fund a relocation would be appropriate.
- Consider and advise upon whether there are grounds to seek an exclusive occupancy order.
- Consider and advise upon whether a family violence intervention order would be appropriate.
- Consider and advise upon whether a therapeutic counsellor should be engaged by the parties to assist with any issues around parenting that may arise.

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