



## Family law checklist

While the following checklist is not exhaustive, it does draw attention to the key areas many practitioners overlook in family law matters.

### 1. Managing the retainer

- Have clear criteria for taking on a new client, including their capacity to pay your fees. Consider if there are any signs at the beginning that suggest this client will be difficult to manage.
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- Be clear at the start of the retainer about the likely cost of the matter.
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- If the initial retainer only relates to child issues and not property matters, advise your client of the 12-month limitation period for making an application for property orders, which runs from the date of the divorce order or in relation to de facto relationships, two years after the date of separation.
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- If you are instructed not to deal with property matters, advise your client that any delay in resolving property matters could result in property being dissipated. Keep a file note and confirm this advice in writing.
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- In your initial meeting with a client, raise with them the two-year limitation period to commence property proceedings for de facto clients or one year after the divorce order for married clients.
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- Make a comprehensive file note of the initial conference with your client.
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- Obtain clear instructions as to the basis on which you are to proceed, particularly where your client seeks to limit your retainer or fails to take your advice.
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- Confirm your retainer and your advice in writing, particularly where the retainer is limited, setting out:
- any areas where your client has chosen not to take your advice and elected to accept the resultant risk (eg. not issuing a property application or obtaining independent verification of property values).

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- the limitation period in relation to property matters, whether the parties were married or in a de facto relationship.

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Do not act for both parties. Write to the unrepresented party, explaining that you are not acting for them and recommending they obtain independent advice.

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Document all attendances and meetings with your client and other relevant parties.

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Record the appropriate limitation period for instituting property and maintenance proceedings in your diary system and follow up any clients that have not instructed you to issue proceedings as the time limit approaches.

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Ensure your matter checklist deals with:

- who will lodge the child support agreement with the Department of Health & Human Services – Child Support and, if appropriate, register it with the Family Court
- whether the issue of investing any money in an interest-bearing account has been raised with the client and undertaken
- checking the child support agreement has been lodged with the child support agency.

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Check email addresses are correct and confidential. When important information is to be passed on to clients, consider contacting them by telephone as well.

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Where your client is causing delay or an increase in the costs, set out in writing the consequences of their behaviour including any relevant time limit(s).

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Ensure that your file notes:

- are dated
- identify the author
- record the duration of the attendance
- record who was present or on the telephone
- are legible to you and someone else
- record the substance of the advice given and the client's response/instructions
- are a note to the file rather than a note to yourself.



## 2. Costs

- Resist the urge to give an off-the-cuff estimate range as clients will only remember the lower figure in the range.
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- Invest time at the outset of the retainer to properly scope the matter so realistic estimates can be given to clients.
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- Set out your cost estimates clearly in writing and update the estimate promptly when you are approaching the estimate.
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- Give advice to the client about the possibility of unrecoverable costs.
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- Keep your client informed about the costs on an ongoing basis. Consider providing monthly accounts or information statements even where you have agreed to costs being payable at different stages or at the end of the matter, just so clients understand how the fees are mounting.
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- Do not delay in contacting clients when their account is not paid by the due date. Ensure the client understands that the consequence of failing to pay is that you may cease to act.
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- Have you given an estimate of anticipated fees and disbursements as required by the Legal Profession Uniform Law Application Act 2014?
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- Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the costs involved.

## 3. Running Litigation

- Warn your client about the specific risks of litigation.
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- Advise your client in writing of the cost consequences of winning or losing.



Advise your client about the progress of the trial and if necessary, make settlement recommendations.

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Confirm your advice and your client's instructions in writing, particularly where an offer is made and rejected against your advice.

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If you require costs before preparing for trial, ensure you receive them well in advance.

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Have a clear policy that you will stop acting if the client does not pay when required to in the lead up to trial. Ensure the client understands the consequences of not paying.

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See also our commercial litigation checklist.

## 4. Property disputes

Obtain your client's instructions to conduct comprehensive searches or make appropriate enquiries so consent orders or financial agreements may be framed with full knowledge of the liability position.

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Seek instructions to lodge a caveat as soon as possible if real property is involved and your client is not on title.

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Where the real property is in the name of the former spouse and represents a significant asset of the marriage:

- seek formal written acknowledgement from the former spouse that they will not draw down further funds against the property or otherwise encumber it
- write to the mortgagee including a copy of the acknowledgement if you receive one, and ask that the mortgagee agree it will not allow further funds to be drawn down against the property
- if the former spouse or mortgagee will not provide the above acknowledgement or agreement, consider applying to the court for an injunction preventing further funds being drawn down or other encumbrances being imposed on the property

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- Wherever possible, seek to have existing joint mortgages or loans refinanced.

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- Where this is not possible, warn your client of their ongoing liability and confirm the warning in writing.

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- Advise your client about CGT issues or refer the client to an accountant or tax lawyer **if** you are excluding that advice from your retainer.

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- Advise your client to retain an independent accountant when considering the property division.

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- Recommend that valuations be obtained for real property and business assets of the marriage and warn your client of the risks of not doing so in writing.

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- When advising on spousal maintenance, address the circumstances in which periodic payments may stop and the grounds upon which capitalised maintenance may be revisited.

## 4.1 Superannuation

- Take comprehensive instructions on the employment background of the parties and possible superannuation entitlements.

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- Act promptly when requesting information concerning the member spouse's interest from the trustee of the superannuation fund.

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- Read the completed Superannuation Information Form carefully to check the type of fund, whether the interest is splittable and any other important information about the superannuation interest.

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- Obtain a professional valuation of the superannuation interest based on the information received from the trustee.



- If appropriate, flag the interest in the former spouse's superannuation by way of a superannuation agreement or court order.
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- Develop a file management system to ensure original sealed orders are served promptly on superannuation trustees. Do not serve unsealed orders.

## 5. Drafting orders and agreements

- Take time to step back and consider any proposed orders or agreement terms. Where possible have someone else review the wording with 'fresh eyes'.
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- Check that the wording achieves what the client wants. Ensure the wording will protect the client from the bad behaviour of the other party.
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- Double check any schedules or spreadsheets to ensure all assets are properly dealt with.
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- If you can't agree on wording with the other side that will completely protect your client, you need to explain the risks and consequences to the client and confirm it in writing.
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- Ensure that each order states who is to act, what is to be done and when it is to be done.
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- Include any necessary third parties, such as family companies, to ensure that the orders are enforceable.
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- Consider the benefits and risks of dividing the proceeds of sale in percentage terms or giving your client a dollar amount. Usually percentage divisions work best so that both parties share in any windfall from a better than expected sale price. Of course, they will also share the risk of the sale price being less than expected. Dollar amounts can disadvantage a client where the sale is delayed or the time between trial and judgment is prolonged



## 6. Disbursing funds

- Always refer to orders before disbursing any money to ensure the correct amount is distributed.
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- When receiving email instructions from clients about where to send funds, always confirm those instructions orally as we have seen examples of email hacking where money has been directed to fraudsters' accounts. See the Cyber security section of our website.

## 7. Drafting financial agreements

- Don't act unless you are an experienced family lawyer.
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- Don't act for both parties.
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- Confirm in writing who you are and are not acting for.
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- Explain carefully to your client:
- the importance of disclosure
  - the importance of valuations
  - the circumstances in which agreements will not be binding especially:
    - material change to circumstances
    - unconscionability
    - undue influence
  - duress – especially when insisting on signing close to the wedding date
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- Make file notes of your meetings or discussions with the client and ensure you include:
- who was present
  - the duration of the meeting
  - a summary of your client's instructions and your advice to the client.
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- Confirm your advice to your client in writing.



- Ensure the wording of the agreement and certificate reflects the requirements in section 90G or section 90UJ.
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- Carefully check the agreement to ensure it complies with all the client's instructions. In particular, review the schedules and road test any formula. Where possible have someone else in your office review the agreement.
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- Keep a copy of the financial agreement and your file indefinitely.

## 8. Certifying financial agreements

- Don't act unless you are an experienced family lawyer.
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- Open a file even if you did not draft the agreement.
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- Have a face to face meeting with your client without the other party to discuss the agreement.
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- Provide comprehensive advice to your client including:
- a clear statement about forgoing rights in the future by signing the agreement
  - the advantages and disadvantages of entering into the agreement
  - not entering into the agreement where the agreement is manifestly unfair for your client
  - the importance of valuations.
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- Advise your client about any amendments to the agreement made after your initial advice and how those amendments impact on your earlier advice..
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- Make file notes of your meetings or discussions with the client and ensure you include:
- who was present
  - the duration of the meeting
  - a summary of your client's instructions and your advice to the client.





Confirm your advice to your client in writing.

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Obtain a written acknowledgment from your client that they understood your explanation.

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Ensure the wording of the agreement and certificate reflects the requirements in section 90G or section 90UJ at the time the agreement is executed.

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Keep a copy of the financial agreement and your file indefinitely.

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Charge an appropriate fee for the work required.

## 9. Child support agreements

Proofread the child support agreement to avoid ambiguity and ensure all issues have been addressed. Where possible have someone else review the wording with 'fresh eyes'.

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Ask the Department of Health & Human Services – Child Support to review the agreement before it is executed. This is a free service.

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Make an application for the child support agreement to be accepted by the child support agency. Remember, if it is not accepted, it is not enforceable.

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If there are non-periodic payments in the agreement, register the agreement with the Family Court.

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If the parties have agreed as part of the property settlement that a share of property is to be transferred to the other party as child support, ensure the child support agreement states this and that the annual assessed rate of child support is to be reduced by the annualised dollar value of that share of the property.

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- Advise your client that a child support agreement is not final and may be varied by a new agreement or court order, if circumstances change.
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- If the parties have entered into a binding child support agreement, keep a copy of the agreement and your file until at least 12 months after the youngest child turns 18 years of age.
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- Be clear in your advice to the client about the differences between the two types of child support agreements – a [Limited Child Support Agreement](#) and a [Binding Child Support Agreement](#).
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- Ensure your matter checklist deals with who will lodge the child support agreement.
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- Ensure your file closing checklist includes checking the child support agreement has been lodged with the CSA.