



This fact sheet summarises the Ask LOIS webinar on this topic presented on 4 May 2022 by Kellie McDonald, Senior Solicitor, Women's Legal Service NSW and Lody Stewart, Senior Financial Counsellor, Women's Legal Service NSW. To view this webinar for free, or to access other resources, visit www.asklois.org.au

This factsheet will cover the following:

- **options if your client or their ex-partner owns their home;**
- **options if your client or their ex-partner rents their home.**

Options if the home is owned

Not sure who owns the home

If your client is not sure who owns the home, they can do a title search. A range of services provide title searches for a small fee.

Both names on the title

If your client and their ex-partner are both named on the title, they both need to agree to sell the property. Either person can move out of the property, without losing their interest in the property.

Both people can stay living in the property unless they are excluded by:

- an apprehended domestic violence order (ADVO); or
- a sole/exclusive occupation family court order.

One person named on the title

If only your client or their ex-partner are named on the title, the person who is named on the title can sell the property and/or ask the other person to move out.

If your client is not named on the title, they should get urgent legal advice and consider making alternative accommodation arrangements in case their ex-partner asks them to leave.

If your client is worried their ex-partner may sell the home, a lawyer may advise them to:

- apply for an urgent injunction from a family law court to stop them selling the property; or
- seek a written undertakings (agreement) that their ex-partner not sell the home or that the proceeds of the sale be held in a trust account until an agreement is reached about how they divide the funds; or
- apply for a caveat.

A caveat is a form filed with the NSW Land Registry Services that creates a notice on the title of the property that prevents the registration of dealings, for example, a transfer of a title.

A family law interest in a property is not a caveatable interest. Your client should get legal advice before applying for a caveat because they may have to compensate the owner if the caveat is lodged without good reason and causes financial loss.

Mortgages

If your client and their ex-partner are named on the mortgage, they are both joint and severely liable. They are both responsible for paying the whole mortgage. If there is money owing, the lender can seek to recover it from both or either of them.

Your client should advise their lender:

- that they have separated from their ex-partner;
- that they have experienced domestic violence;
- about their new safe contact details;
- to implement two to sign on the mortgage and any associated redraw facility and linked accounts.

The Australian Financial Complaints Authority (AFCA) *Approach to Joint facilities and family violence* offers protections for victims of domestic violence including:

- that the lender not disclose your clients' personal details to their ex-partner;
- that your client can make an arrangement with the lender without their ex-partner's consent, including making hardship arrangements.

Interest only hardship arrangement

Your client can request interest only repayments. They will need to demonstrate that they can afford to meet the interest only repayments. The loan will be temporarily converted to being interest only for the arrangement period. No arrears will accumulate. The repayment history information (RHI) on the client's credit report should show as on time.

Reduced repayments hardship arrangement

If your client cannot meet the interest only repayments, or the normal repayments, they can request a reduced repayments arrangement. They will need to demonstrate that they can afford to meet the proposed reduced repayments. Arrears will accumulate. The arrears could be dealt with by capitalising them and extending the term of the loan or by selling the property. The RHI should show as not reported.

No repayments hardship arrangement

If client cannot afford to make any repayments, they will need to show they are in hardship and cannot make any repayments. This is a typical arrangement where the ex-partner is living in the home but not making any payments and refuses to make a hardship arrangement with the lender. Arrears will accumulate.

If little to no equity in the property, then the lender may only agree to this type of arrangement for a shorter time, for example, three to six months. The RHI should show as not reported.

Time to sell hardship arrangement

If your client cannot demonstrate ongoing affordability, they could request a time to sell arrangement with either no or reduced repayments. Their lender will generally agree to this type of arrangement for three to six months. Your client will need to provide evidence of the real estate agent contract and that the property is being marketed and listed for sale. If your client's circumstances improve before house is sold, they could renegotiate with lender to resume normal repayments, capitalise arrears and no longer have to sell the property.

No hardship arrangement

If the client does none of these things, and the normal repayments are not made, then arrears will accumulate, and the lender can move to take further action, such as issuing a Default Notice (DN), giving them 30 days to remedy. If the DN expires and there is still no remedy, then the lender can commence legal action by issuing a Statement of Claim.

The costs of the lender taking enforcement action are added to the amount owing, which will dilute your client's equity interest. Non-payments and defaults will appear on client's credit report.

If the lender repossesses and sells the property, they are unlikely to get a good price as they just want enough to pay their costs and the mortgage. If there is still money owing after the lender repossesses and sells the property, your client and their ex-partner will be jointly and severally liable.

Dividing property of the relationship

Your client is not automatically entitled to any property in their ex-partner's name. Your client is not liable for debts in their ex-partner's name. If no action is taken after separation, the people walk away with the assets and debts in their name. A family court can readjust property interests either by agreement or after a hearing.

Your client and their ex-partner need to make full and frank disclosure of the value of all the assets and debts in their name before they can attempt to negotiate property division. It is very important to get legal advice before reaching an agreement about property division.

If your client and their ex-partner can reach an agreement about property division, they can have:

- an informal agreement;
- apply for Consent Orders; or
- instruct a lawyer to write a Binding Financial Agreement.

If they cannot reach an agreement, they can attempt mediation through a Family Relationship Centre, Legal Aid NSW (if the property pool is less than \$500,000) or a private mediator.

If they still cannot reach an agreement, they will need to seek court orders. They need to apply within 12 months of a divorce taking effect or within 2 years of separating from a de facto partner.

The court will divide the property in a just and equitable way after considering:

- the financial and non-financial contributions the parties made; and
- the parties' current and future needs.

Domestic violence can be considered if there is evidence sufficient to satisfy a court that the domestic violence had:

- a significant impact on the ability of the party to make contributions during the relationship or made making those contributions more arduous; and/or

- a significant impact on the parties' health, causing them to have greater future needs.

Your client will generally need to pay a lawyer to help them with property division. Some lawyers will agree to defer their fees until they can be paid from the property settlement. A lawyer may suggest seeking court orders for partial distribution of property division to cover their fees or ask that orders be made that the other party pay their fees.

A grant of legal aid is only available if your client has a low income and is unlikely to receive any money at the end of the matter, for example, they will be keeping the home or only seeking superannuation splitting orders.

Options if the home is rented

Your client wants to leave

If your client's name is not on the lease, they can just leave.

If your client's name is on the lease, they can leave and end their liability immediately by giving a domestic violence termination notice (DVTN) to their landlord and any other co-tenants. A sample DVTN is available on the Tenants Union website (see referrals below).

They will need to attach one of the following pieces of evidence of domestic violence to the DVTN they give to their landlord:

- a certificate of conviction of their ex-partner;
- an ADVO protecting them from their ex-partner;
- a family law injunction made because of domestic violence by their ex-partner; or
- a prescribed declaration by a 'competent person' who has formed the opinion your client, or their dependent child, has experienced domestic violence.

The prescribed declaration is available on the Fair Trading NSW website (see referrals below). The following people are considered a 'competent person':

- a registered health practitioner;
- a registered social worker;
- an employee of a NSW government agency that provides child welfare services;
- an employee of a non-government agency that receives government funding to provide services in relation to domestic violence or sexual assault or refuge or emergency accommodation; or

- a Victims Services approved counsellor.

If your client does not have evidence of domestic violence and the lease has expired, they can give a 21 days written termination notice to their landlord and any other co-tenants.

If their lease has not expired and their ex-partner is the other co-tenant, they can make an application to the NSW Civil and Administrative Tribunal (NCAT) for an order ending their tenancy due to the 'special circumstances' of the case.

Your client wants to stay

If your client is the only person named on the lease, they can stay in the property and ask their ex-partner to leave.

If their ex-partner is also on the lease, they can make an application to NCAT for an order ending their ex-partner's tenancy due to 'special circumstances' of the case.

If your client is not on the lease and their ex-partner has been excluded from the property by a final ADVO, they can make an application to NCAT to be recognised as a tenant.

Referrals

Women's Legal Service NSW

Visit www.wlsnsw.org.au for advice times.

Domestic Violence Line

Call 1800 65 64 63 for referrals to emergency accommodation.

Law Society Solicitor Referral Service

Call 9926 0300 for referrals to private family law solicitors for advice about property division.

Australian Financial Complaints Authority

Visit www.afca.org.au for their *Approach to Joint facilities and family violence*.

Tenants Union NSW

Visit www.tenants.org.au to find your client's local tenants and advice and advocacy service and a sample DVTN.

Fair Trading NSW

Visit www.fairtrading.nsw.gov.au for a *Declaration by a competent person* form.