

Who gets to stay in the house after separation?

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One of the most common issues that arises when a relationship breaks down is who should stay in the family home and who should leave. For many people, the house is the most valuable asset and represents stability. Deciding who should leave isn't always straightforward. Below, we break down your options and when the Court can step in.

Can I stay in the house after separation?

Yes, even if the home is only in the other person's name.

If appropriate, both you and your partner can remain in the family home until a property settlement has been finalised. If things are amicable, it's usually best to have an honest discussion about who will stay and who will move out. This avoids confusion and can make later property settlement negotiations smoother.

Sometimes neither person wants, nor can afford, to move out. In that case, you can be 'separated under one roof'. This means that you and your ex-partner live in the same house but no longer live as a couple. You lead separate lives, such as sleeping in separate bedrooms, having separate finances or reducing shared activities and family outings. See our blog on living separately under one roof for more information.

Nevertheless, such an arrangement can be challenging. Living in close quarters after separation can cause conflict and emotional strain. It can also complicate things if you're applying for a divorce because you'll need to provide an Affidavit to explain that you've been separated for at least 12 months, even while living together.

Should I stay or leave the house after separation?

There is no single right answer to this question. It depends on your personal and financial situation.

The following are some factors you should consider:

- **Mortgage/joint bills**: Who pays for the mortgage, house expenses and joint bills? If you move out, you may need to discuss these contributions with your ex-partner.
- **Children**: The Court prioritises the best interests of the children, so it may make sense for the parent who has primary care of the children to remain in the family home.
- **Alternative accommodation**: Is it financially viable for you to move out? The housing crisis has made finding affordable rentals more difficult.

All in all, sometimes leaving can reduce stress and conflict, even if it's financially inconvenient. It is best to speak with a family lawyer before deciding to move out.

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Can I force my ex to leave the house?

You can't physically or unilaterally force your ex-partner to leave the property. Changing the locks or denying access could backfire legally. However, there are some options available if living together is no longer safe or reasonable.

1. Sole occupancy orders

You may apply to the Court for a sole occupancy order under s 114 of the *Family Law Act 1975* (Cth). This is an injunction that gives you the legal right to live in the home and requires the other person to move out. The criteria for the Court to make a sole occupancy order are if it thinks it is 'proper', according to the circumstances of each case.

In deciding whether to grant a sole occupancy order, the Court will consider factors such as:

- the needs and welfare of any children;
- the financial and personal position of each person;
- any inconvenience or hardship to each person;
- any conduct by a party, such as allegations of family violence or threats made.

Case review – wife granted sole occupancy order

For example, in the case of *Narron &Narron* [2021] FCCA 377, the wife successfully applied for sole occupancy of the family home. The wife said the situation had become tense and stressful

living separately under one roof. She was historically the homemaker and continued to clean, cook and iron her husband's shirts, and her health condition had worsened under the strain (she had recently fallen and fractured her ribs).

The Court accepted that although there was no family violence, it was not reasonable or practical for the parties to keep living together. The wife's stress, medical condition, lack of capacity to earn income and the lack of separate living areas in the home meant cohabitation was unworkable when the husband had ample financial means and ability to find alternative accommodation.

2. Family violence intervention orders

In situations where there is family violence, family violence intervention orders (FVIOs) can be granted that include conditions that exclude one person from the house, among other conditions.

If an FVIO is granted with such conditions, this would require the affected person to leave the house immediately so as not to be in breach of the Order. In Victoria, breaching the conditions of an FVIO is a criminal offence. You can apply for an FVIO yourself with the Magistrates' Court of Victoria, or, in some cases, the police may apply for one on your behalf.

Contact a family lawyer

Smith Family Law understands that separation can be a stressful process. If you're unsure whether or not to stay in the home or need advice about financial separation or parenting issues, we can help. You can get in contact with us to arrange a free, confidential initial consultation with one of our family lawyers.

Contacting Smith Family Law

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