



# The Australian Finance Podcast Episode Transcript

**Episode:** Divorce & financial separation | Family Law Barrister

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**Speakers:** Kate Campbell & Kat Stavrou

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## Episode transcript:

Kate:

Katherine, welcome onto The Australian Finance Podcast today.

Kat:

Thank you. Very lucky to be here today. It's lovely to chat with you.

Kate:

And it's wonderful to have you here to continue on our conversation in the family law space, talking about divorce and separation and all of the stuff involved, because this is a hard thing to find information on, especially online. And it's hard to know where to look and it can be really expensive to go and see a lawyer just to ask a couple of questions. So it's great to have you with us today to share some of these resources and just higher level information. So if people do speak to one of these experts or use the tools online, at least they have a starting point and know what to look for and what kind of questions to ask.

Kat:

No. Wonderful. Thank you. I think it's great because obviously it does really dispel those misconceptions that people have on family law and all aspects of family law. So thank you.

Kate:

Yeah. And I think sometimes we have the perception that lawyers can be a bit scary, so [crosstalk 00:01:17] it's good to chat to some and go, "Hey, not too scary. And they're actually really friendly people."

Kat:

No, I'd like to think we all are. So yeah, I hope so.

Kate:

And because we haven't spoken to too many lawyers and you're also a barrister as well on the podcast, I'd love to know a little bit more about what you do in your role, just so we have a little bit of background here before we jump into the conversation.

Kat:

No, that's great. So I've been primarily working in the area of family law now for just over 15 years, which has been great. And two years ago or three years ago I moved in with the Legal Services Commission. And my position there is that I'm the family lawyer on the project team with amica, which is an online dispute resolution tool, which Gabrielle talked about earlier. And really, the tool helps separating couples make arrangements for children and property and generate documents, agreements and orders to really cover those arrangements between parties.

Kate:

Absolutely. And I should mention that this is a continuation of part one of this conversation. So if you haven't gone back and listened to our previous episode, please listen to that first because that'll give you a good primer for today's conversation. Now, Kat, marriage is fairly clear. And one of the questions I wanted to talk about was de facto relationships, because I've had friends that have gone, "Oh, shit. I'm actually in a de facto relationship. I didn't even realise." And we know about marriage, the signing on the dotted line and going through that process. But I'd love if you could talk a little bit about how are de facto relationships defined, how do we even know if we're in one? Who do they apply to?

Kat:

Yeah, of course. Yeah, that's a really good question. I think a lot of young couples enter into a relationship, and you're right, they don't know if it's classified or classed as a domestic relationship or a de facto couple. So I guess generally speaking now, really there are three main factors that need to be considered. You need to look at the couple, whether or not they're legally married to one another, whether or not they're related by family, and also if they're living together as a couple. And the wording is really as a genuine domestic couple, on a genuine domestic basis, sorry, for at least two years without any sort of separation. So it's important to point out that the length of time to be considered to be a de facto couple is two years. However, there's always exceptions. So if you've got children together, so if there's children of the relationship or if there's been some substantial contributions made by one party to joint property, then there are exceptions that are made to this rule

Kate:

As with anything, I think with law, there's a lot of exceptions and if, but, and ands. So is a good idea to probably, if you are interested in that ... Is that something that you could speak to a lawyer to, to go, "Actually, am I in a de facto relationship or not?"

Kat:

Yes, of course. Definitely. I mean, there's a number of things, or I guess you could say factors that need to be considered to see if you are in a genuine domestic ... as a couple on a genuine domestic basis. And I guess the questions that surrounding that are what lawyers ask, are: how long have you been together, are you intimate with one another, do you have any mail being sent to one address in particular, is one party financially dependent on the other party? The reputation or public perception of the relationship, what your address is registered on with Centrelink and the ATO, they're all important factors in determining whether or not you actually are in a de facto relationship.

Kate:

Yeah. And the reason I wanted to bring that up is because when we move on to talking about separation, it is important to know whether you're in a de facto relationship or not, and the financial implications involved there.

Kat:

Yeah, that's right. And look, if you're unsure, it's important to probably seek proper legal advice about that because it is very important to first identify if you are in a de facto relationship before you go ahead and try to claim any sort of property settlement between you. So it's good to seek some wise legal advice, I think, from a solicitor beforehand.

Kate:

Yeah. And so if a couple are married or in a de facto relationship and they are splitting up, what are some of these sort of high level things that you think really impact, financially, getting separated?

Kat:

Oh, between you? I guess the main thing that can probably impact is ... The two issues, really, I guess, in answering your question is the property, and then also the children's arrangements between you, if you've got children in the relationship too. But obviously this is very broad. We can go into more detail obviously later about it, but there's so many issues that can be raised that it's probably important to do your research and to see, first of all, whether or not you are in a partnership, or a de facto partnership.

Kate:

Yeah, because there's a lot of different things that people don't always think about, like the superannuation when splitting property. And I know there's a lot of myths and misconceptions

about divorce and financial separation. And I'd love if you could elaborate on a couple that you think are really important for people to know about.

Kat:

Yeah, of course. I mean, it's really important for people to know, in a family law context, what's part of the property pool. Focusing more so on family now, you're looking at what an asset is. So you're looking at anything that is property of the relationship, whether it be tangible or intangible, regardless of whose name the property is held in. If it's got a value, then it's identified as an asset of the relationship. And similarly with a liability of the relationship, which is the a of debt or financial burden or responsibility of the relationship. That's classified as a liability too.

Kat:

And things that form part of the asset pool are things like real estate ownership, whether it's held solely or jointly with somebody, motor vehicles, furniture and personal effects. Even when you go on to have collectibles and artwork and jewellery, they're all important assets of the relationship because they may have a significant value. And then, of course, you've got superannuation, which of course a lot of parties do have significant balances. And it's important to mention that it is an asset of the relationship too.

Kate:

Yeah. And I know you mentioned that liabilities are also taken into account here, when it comes to separating. Does this include any debts that the parties have?

Kat:

Oh, that's a good question. So generally speaking, it does. It depends on whether or not the debt was accumulated during the relationship. So you hear different stories of couples who have accumulated a debt without the other party knowing. And then it's arguable that that debt may not be a debt of the relationship. It may be one party's debt, which they then take as part of the separation. But obviously every situation is so different, Kate, that it's really hard to say whether or not that debt is ... more often, we could say that it is a joint debt, but it's obviously a different situation on a case by case basis, as we say.

Kate:

Yeah, I can imagine it'd be quite difficult splitting up and finding out there was a debt there and having to share that as well. So it's good that there's some considerations taken into account there.

Kat:

Of course. Yeah, that's right. And every couple's situation is different. And unfortunately, sometimes more often than not, you're not sure how the court will take a certain avenue until [inaudible 00:09:18] all the important, relevant facts are confronted by or dealt with through the court process.

Kate:

And what about super splitting? Because often there's some misconceptions there about how that works. I think it used to be quite different, didn't it?

Kat:

It was, yeah. And obviously, people started accumulating super during their relationship and early on. And so now it's important to note that super is actually treated as property under the Family Law Act, but it differs from other property because it's held in a trust. So what it does is it allows super to be divided when you're separating, particularly if one party has got a higher superannuation balance, more so than the other party, because one party may have been the worker and the other party may have been the primary caregiver for the children throughout the marriage or the relationship. So it can be settled by consent through parties who say, "Okay, we'll agree on a superannuation split whereby we each achieve an equal balance," or it can be that one party receives, say, 60% of the other party's super, or 70%, depending on what the parties agree on. And obviously it applies to couples that have been married or in a de facto relationship.

Kate:

Yeah. I think that's really important to know because, as you mentioned, sometimes one person is the primary caregiver and one person is working. And so the superannuation balances after an extended relationship can be so wildly different.

Kat:

Of course. And I think a lot of people should understand, as well, is that super doesn't ... so super splitting, sorry, doesn't convert the superannuation into cash. So it's still paid out according to superannuation law, but it's retained, usually until sort of a retirement age is reached by one of the parties. So it's really important that you get proper legal advice about the splitting agreement between you, or it won't be binding on the trustee of a superannuation fund.

Kate:

Absolutely. And you can see that advice being even more important after an extended relationship rather than just a couple of years, because there would be a significant sum involved there.

Kat:

Definitely. That's right.

Kate:

And speaking of large sums, another thing I wanted to talk about was lump sum payments and how they play into separation things like workers' compensation, if you're lucky enough to get a significant gift or inheritance from a family member.

Kat:

Definitely. If you're very lucky, that's right. So I guess a windfall is generally what it's called. And it's a sum of money that one party receives, but I guess they really haven't worked for it. So

they've been lucky enough to receive it in inheritance or whether it be a large pay out, like you said, during the relationship.

Kate:

Maybe even the lottery?

Kat:

That would be nice. That's right. So I guess the question that I get a lot is whether or not a windfall forms part of the asset pool. And it does. And it's available for distribution between the parties. Obviously, some say there that it's not a definitive yes or no, but depending on the nature of the relationship and the length of the relationship and the type of windfall, more often than not, it does. But it does depend on a number of factors, again. So it depends on when it was received. Did you receive it before the relationship commenced or did you receive it during the relationship? And I guess it's important that people know that the court does have the discretion to alter the property interests depending on the windfall and when it was received and so on. So it is considered a financial contribution of the relationship for the party who may have contributed the windfall towards the relationship.

Kate:

Yeah. So there's a lot of variables in this one. So that's probably another area, if it is a significant payment, to get advice for.

Kat:

Most definitely, of course. Especially if it's a big lump sum that you've contributed towards your relationship, of course you want to get some sort of recognition for that. Definitely.

Kate:

Yeah. And another thing that people need to think about when separating is making arrangements for children. And I'd love to know your thoughts on how is this managed and how does it impact the financial separation?

Kat:

Yeah, it does. I guess when it comes to making arrangements for children, first of all, what I'd like [inaudible 00:14:16] to understand is that it's important that you look at the best interests of the child, which should really be the main focus when making arrangements for your child. And parents should really be realistic and practical. And many parents can really figure out what a child's best interests are without even knowing what the family law is.

Kat:

And obviously, there are many factors to consider here, like the age of the child, how dependent they are on one parent, for example, if they're 17 and they're quite independent, or 16, or if they're three and they're very dependent on their parents. And when it impacts a financial separation, then that is very important because it looks at which party has the predominant care of the child or the children. And generally, more often than not, there is a percentage

arrangement where there is an adjustment in that party's favour if they've got the predominant care of the children, because it's not enabling them to work as much as the other parent, who's got less care, for example, of the children.

Kate:

Yeah, because I think that's another one that's a little bit complicated. I know we hear about the child support thrown around, and there's a lot of thoughts and feelings on that one. So it's interesting to know how that plays into it.

Kat:

Yeah. And I guess it could be equally as important to have a bit of background information in that area of family law, which can assist you in making those agreements about children, particularly when you're trying to create what's called a parenting agreement or a parenting plan. And I think it's important that you do some research on the internet and you read up on things and you talk to people. And I guess it's important to even speak to a lawyer or those that would be able to assist you in that area to see what the best options are.

Kate:

Are there websites online that people can go to, to sort of understand what the basic entitlements they have in this sort of situation?

Kat:

Yeah. I think a good start would be to go on your local legal aid website. And that would be a wonderful start. Look at your local legal help line, which you can actually call and get some free advice. And they actually do offer some first free appointments where you can actually meet with them and have that conversation about what your issues are. All of this is found, I might add, on the amica website, where you can actually find where your local legal aid is and give them a call, definitely.

Kat:

Obviously, the Legal Services Commission websites have got some wonderful information on there and helpful information, helpful hints for families when dealing with separation on how to make arrangements for children. That can be very helpful. And obviously, there are opportunities to meet with some community organisations out there like Relationships Australia and [Angricare 00:17:15], and try and do some mediation if you'd like to, to try and discuss what the options are best for the children. So there's both online assistance and assistance through community organisations.

Kate:

So there's other resources out there. It's not straight from separating to court. There's a whole spectrum of resources in between.

Kat:

Yes. Well, a requirement is for parties who can't reach an agreement to sit and try and mediate the matter and try and work out an arrangement for the children without to resort to going to court straightaway, unless it's urgent. Then parties will have that option to do that.

Kate:

Yeah, because it is a very expensive process, from what I've heard, going to court.

Kat:

Of course, it's very stressful, very costly. And at the end of the day, if parties can just remain amicable, then that really does help, for the sake of the especially.

Kate:

Absolutely. And another thing I want to talk about because not too many people talk about or share information, it's seen as a bit of a taboo subject, like talking about money, but the term prenup. And we probably hear about this a lot in movies and books and with the wealthy couples getting prenups. I know they're also known as binding financial agreements. And I'd love to know a bit more about how they work in Australia and sort of the basic crash course there.

Kat:

Yeah, of course. So that's a really good question because first of all, it's not even really called only a binding financial agreement, Kate. You can call it a number of things. So they're known as prenups, prenuptial agreements. They're known as postnups, so even after the marriage is ended. They're known as cohabitation agreements, separation agreements. And of course, you've got divorce agreements.

Kat:

So really what it is, it's a document that governs your property interest in the event of a separation during a marriage or de facto relationship. And this includes property that's the assets of the relationship, the debts. And then it can even include spousal maintenance and other matters. I think it's important for listeners to understand that the Family Law Act does set out very strict requirements before a BFA will become legally binding.

Kat:

And obviously, when you enter into any agreement, even with a BFA, it's on your own free will. And you obviously have to be fully informed of what it is that's stated in the agreement. And you have to sign that you've received independent legal advice about the specific matters, and sign a certificate, and next to the agreement, which is signed by each of you with the legal advisor. So in order for it to be binding, there are strict requirements in place for parties to enter into it.

Kate:

So there's no signing it on the day of the wedding?

Kat:



No. No, or even the day before. That's right.

Kate:

Yeah. And you mentioned before prenups and postnups. That sort of indicates to me that you can get them at different stages of the relationship. So is this like a before, during and after thing you can get?

Kat:

Yes. Under different sections of the Family Law Act, you can sign an agreement. So it can be entered into before, which is the colloquial term is prenup. It can be entered into during, which is a nuptial agreement, if you want to call it that. Or you can enter into it after, which is a postnup. So it falls under, I guess you could say, the umbrella of a binding financial agreement. But if you're doing it after the marriage, particularly if you're married, the binding financial agreement, it's important to know, must be made within 12 months of an order for divorce because there are limitation periods. So when parties have separated and they say, "Look, let's enter into a binding financial agreement," but they're already being divorced, they've got that 12-month period in which they need to finalise that agreement.

Kate:

Absolutely. Yeah. And I know they're quite complex agreements. And as you mentioned, there's a lot of rules there. And I have looked at a few legal firm websites, and they're quite expensive documents to have advised on and produced. Are you able to talk about a couple of the pros and cons of getting binding financial agreements?

Kat:

Oh, look, there are so many out there, but ...

Kate:

Key top ones?

Kat:

Yeah. I'd probably say ensuring that you've understood the document properly is really important, and that you understand what the implications are of signing a binding financial agreement, because it's very different to, say, a consent order, which is another option formalising and finalising your separation, which is signed and sealed by the court. This document is not going through the court process. It's simply signed by each of you individually, independently with your solicitors. So it's outside of the court process.

Kat:

And it's also important to note that if you're doing a prenuptial agreement or any binding financial agreement before, or even during, it needs to continually be updated. You can't just forget about it. Especially if you've got a 10- or 15-year marriage and you've got two or three children together, situations change. And if you entered into agreement early on and then your asset pool has increased, it's hard to say that that has a lot of weight, given that it was done

early on. So what we tend to say is that you continue to update them when situations change, maybe every three, every four years.

Kate:

Okay. So things like having kids, that would indicate that maybe you needed to update this disagreement?

Kat:

Especially like I mentioned earlier, how the arrangement ... If you separate, the children's arrangements are important because it can make an adjustment in one party's favour if they've got more care of the children or the child.

Kate:

Yeah. And have you seen some examples where it has been quite useful for the parties to enter into binding financial agreements? Because I know sometimes if people are entering second marriages and there's different children involved.

Kat:

Yeah. So it's good if you've entered into one and you've got yourself a financial backing, or you've got your own little asset pool in the background and you've entered into your second or your third relationship. It's really important to do that. I think it's just to protect your assets. But like I said, you do it, but then don't forget about it. It's important that you keep updating them so you always know that if your asset pool increases together, it's wonderful. But just to ensure that you've got that security, knowing that if you separate, then you know how your assets will be divided. And I guess it alleviates any worry between the parties, because they've communicated with one another openly about how they intend on dividing their assets in the event of a separation, if it happens, which we don't, but it can.

Kate:

Yeah, because I think there's some sort of negative connotations that if you're putting this in place before the marriage or entering a de facto relationship, it indicates that you're planning to separate down the track.

Kat:

Yeah, I know. But my view is that it's always good to be organised and to know. This is your asset pool that you've worked hard for so many years, that it's good to know and have that communication up front, and that transparency where you know that in the event that the relationship doesn't work out, that you know how your assets will be divided.

Kate:

Yeah. And I know another thing you wanted to talk about as an alternative to having a binding financial arrangement is getting consent orders from the court. Are you able to just explain what they are and how they work?

Kat:

Yeah. So as I mentioned earlier, Kate, you've got your binding financial agreement and you've got your consent order. So consent orders are written agreements that are lodged and approved by a court, which is now the Federal Circuit and Family Court of Australia. And you can actually apply to the court for the consent orders without going to court, which is great. And the solicitor can prepare the application and draught it, or you can prepare them yourself, which can be done through that useful website and tool that we talked about with Gabrielle, called amica. So it can help you prepare your consent order through a guided collaborative process where you can then finalise your property agreement, your consent order. And you can lodge that with the court. And it has the same effect as if an order was made by a judge at trial, so it's full and final.

Kate:

Yeah. And is this something that would usually only be used upon separation?

Kat:

Yes.

Kate:

Yeah. Okay. And does it apply to parenting and property orders as well?

Kat:

So you can do parenting orders, yes, through the process, through an application for consent orders in the court. And you can do property as well.

Kate:

Okay, fantastic. And I know we have mentioned amica a few times, but is this something you can do through the platform, like you don't have to go to a lawyer's office and have a long conversation and pay a lot of money?

Kat:

Yeah, definitely. So on amica, you have the option of preparing a parenting ... So talking more so about parenting now, you can create a parenting agreement or a parenting plan document. And look, parenting agreements differ for every couple, so they can generate their agreement and they can revisit and change the agreement that they've made every few years or when their circumstances change. So amica can certainly help you with that. And with property, amica can generate a consent order for property settlements. Yes, it can.

Kate:

Awesome. And it's good to have that tool now because I think the middle ground used to be just either do it verbally and not get it officially organised or going to court. And that's expensive and scary and stressful. And now there's tools like amica and mediation to actually find that middle ground where you can come up with a fair agreement without having to spend a lot of time and stress worrying about it.

Kat:

Oh, definitely. Yeah. I mean, look, Kate, amica is great because it empowers separating couples to reach an amicable family law settlement, whether it be about parenting or whether it be about the division of assets. And I guess it's important to note that there are two key parts on amica. So there's a very user-friendly website that users can obtain helpful information, what we talked about earlier, that you can actually get on there and read up about the law and how it can help you, and all other aspects of family law. And then you've got the platform or the tool, which enables the couples to negotiate online about parenting and property, and obviously reach an agreement about those matters.

Kate:

Yeah, because even if you're not in that situation where you are separating, having a bit of understanding of the basics by able to read these easy materials would really help you, I think, just feeling more empowered with your financial situation and your relationship because you know what your rights and maybe responsibilities are here.

Kat:

Yeah, of course. And look, it helps mainly those couples that I guess we call are the missing middle. So they're those sorts of couples that can't afford a lawyer and don't qualify for legal aid. So they've got a bit of an asset pool. I guess we sort of tend to call them your house and garden type clients, but yet they really can't afford to go get that legal representation.

Kate:

Yeah. And if someone's listing right now and is going through a situation where they're considering separating or separating and they wanted to get some more information or resources, or maybe even just speak to someone for support, what are some of the resources you send people to for this?

Kat:

Oh, look, I'd probably say get on the amica website, [www.amica.gov.au](http://www.amica.gov.au). And especially when you're searching, look up how it helps. There's wonderful help there for all users to be able to understand the process, how it works, and just some general guidance and family law information. Most definitely, I'd start there, especially if parties are amicable, Kate. So if they're just wanting to settle quickly and on with their respective lives, which I think is the best option, then amica is perfect for them.

Kate:

Yeah. And if they're not amicable, what's the pathway usually like there? Just go to see a lawyer or-

Kat:

I'd probably say start with some mediation. Yeah. If you can avoid going straight to court, and obviously that's the best start. And try and just be open and honest with one another in terms of your settlement. And try and attend some mediation with one another to settle. A lot of matters

do settle at mediation without having to resort to court. And obviously, that's something that we do try and push for at the Legal Services Commission. We do push parties to try and settle amicably.

Kate:

Yeah. And a mediator is appointed by the court or do you just sort of Google "mediator near me"?

Kat:

Oh, if you go to court, they could order that there be mediation or conference between the parties. But it's always a good start to try and get in touch with some mediations, like community legal centres at first, and see whether or not they can offer any mediation for finance and for parenting. That's always a good start.

Kate:

Okay, wonderful. Yeah., So community legal centres, just finding the local ones. You giving them a call and seeing where you can go to from there.

Kat:

Most definitely. And do your research. Go online and you look up if there's any mediators that you would prefer to meet with. There are a lot out there at the moment, because I think there's a big shift in family law where the courts are trying to have parties settle outside of court without having to resort to going to trial because it's so stressful for everybody, and timely and costly. So we do try to push for parties to try and settle without doing that.

Kate:

Absolutely. And Cat, before we wrap up today's conversation, is there anything else you wanted to share with my listeners?

Kat:

Look, I just think it's important to do research, like I mentioned earlier. And if you do have any concerns, if you're worried about whether or not you are in a de facto relationship, or whether you're looking, unfortunately, at finalising your relationship with your former partner, do your research, ask questions. Go on our website at the Legal Services Commission, your local legal aid, and even look on amica. That's a wonderful starting point.

Kate:

Wonderful. Well, we'll include links in the show notes to amica and the other resources we mentioned. But Cat, thank you so much for joining me on The Australian Finance Podcast today.

Kat:

Thank you, Kate. It's been wonderful. Thank you very much.