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FAMILY LAW

Family Law
A Best Wilson Buckley Guide

FAMILY LAW: A Best Wilson Buckley Guide

Aims to provide some information or reassurance about what might lie ahead when a personal relationship breaks down.

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Contents

Important Notice

This publication contains general legal information only and is not a complete statement of the law. You should obtain specific advice about your own circumstances and not rely upon this publication until you have done so. Each family law matter is determined and decided on its own specific facts and circumstances.

Best Wilson Buckley Family Law Pty Ltd will not accept any liability or responsibility for loss occurring (including negligence) as a result of any person or entity acting or refraining from acting in reliance on any material contained in this publication.

If you have a legal issue you should always consult your lawyer for advice which is based on your particular situation.
This publication is based on the legislation current as at 1 May 2014.

About this publication

Whilst at first glance, the area of Family Law would appear to be relatively simple, a closer examination reveals a very different situation. It is one of the most complex areas of law, involving as it does the blunt intrusion of the law into personal, family and financial relationships.

More often than not, Family Law issues arise at times of personal upheaval when stress and emotions run high. The aim of this publication is to provide you with an overview of Family Law that may be applicable to your current situation or those around you.

Every Family Law matter is unique. Each relationship/family dispute has its own unique facts and circumstances that need to be considered and advice appropriate to that situation provided. However, there are general areas that are applicable to most matters.

Our goal in providing this publication is to give a guide to the interplay of Family Law and other areas of law that relate to family relationships.

Family Law is not simply property settlement, parenting and divorce. Family Law matters also invade other areas of both family and financial life including:

- taxation;
- bankruptcy and insolvency;
- trusts and corporate structures;
- estate planning and structuring;
- property law; and
- the often more complex psychological issues of child development and need.

As a central theme, the work we do is related to personal and financial relationships including:

- the structuring of property interests to minimise risk consequent upon the breakdown of a marital or de facto relationship (sometimes called "Preventative Family Law");
- pre-nuptial or pre-cohabitation financial and superannuation agreements;
- surrogacy agreements and transfer of parental responsibility;
- adoption;
- the ratification of parental rights in relation to children of same-sex relationships;
- questions of paternity;
- financial matters arising from the breakdown of personal relationships (marital or de facto) including divorce, property settlement, spousal maintenance, and child support;
- the resolution and determination of parenting disputes both immediately following separation and thereafter;
- the investigation and litigation of allegations of domestic or family violence including abuse, neglect and associated risk to children in the context of parenting disputes;
- domestic and family violence protection issues including making application for or defending protection orders; and
- the recovery of monies or property by third parties following the breakdown of a marital or de facto relationship.

About Best Wilson Buckley Family Law

Best Wilson Family Law was established in 2009 by Kara Best and Reagan Wilson as Toowoomba's first firm specializing exclusively in family law. In November 2013, Dan Buckley joined Kara and Reagan, establishing the firm of Best Wilson Buckley Family Law, with offices in both Toowoomba and Brisbane. We continue to practice exclusively in family law and are committed to providing a total client experience.

We are the largest group of family law practitioners in the Darling and Western Downs and assist clientele throughout Queensland, the east coast of Australia and beyond. In January 2014, we were recognised as one of Queensland's Leading Family Law Firms by the Doyle's Guide to the Australian Legal Profession, the only regional firm to be honoured with inclusion in the list. Reagan and Kara were personally recognized as Leading Family Law Practitioners by the same organisation and again in 2015 the Doyle's Guide to the Australian Legal Profession independent review names BWB as a leading family law firm in Queensland (second-tier), Kara Best and Reagan Wilson as Leading Family Lawyers and Dan Buckley as a Recommended Family Lawyer.

We work in a very personal area of law, so we always like to meet our clients face-to-face to get to know them and understand not only their needs but how to tailor a solution that works for them. Sometimes that's just not possible. We are prepared for this situation and can assist you with your family law matters whether you are on the other side of the world or just down the road.

We use a combination of email, phone and good old fashioned postal services in addition to modern technology including videoconferencing to provide a service that is as close to coming into our office as it can be.

We regularly advise clients who are both a long way from us and a long way from their children or their ex-partner. Whether you or the other party is interstate or overseas, we are experienced in dealing with the unique issues that arise. These may include:

- the resolution of a property settlement involving property interests in both interstate and overseas locations;
- the removal of children from Australia contrary to the wishes of a parent;
- representing parties where they are accused of retaining children in Australia from another country, contrary to the Hague Convention on the Civil Aspects of International Child Abduction;
- the practical implications of arranging regular time/communication when a parent is living overseas;
- where there is an argument as to whether the Court in Australia or the Court in an overseas location has jurisdiction to determine financial or parenting proceedings;
- seeking to obtain a passport for a child for the purpose of overseas travel where the other parent is refusing to sign the necessary documentation;
- representing both:
    - parents that wish to relocate interstate or overseas with their children; and
    - those that oppose the removal of their children from the local area; and
- The payment and enforcement of spousal maintenance or child support when parents and children live in different countries.

Your first meeting at Best Wilson Buckley

We understand that your meeting with us might be the first time you have needed to meet with a lawyer for advice. While you might have previously purchased or sold a property, or had a will drawn, seeking advice in relation to a situation of great personal sensitivity can be a daunting prospect.

What will occur at an initial attendance?

Our initial attendance is a chance for us to find out more about your situation and how we might address your current concerns. The breakdown of a personal/family relationship is a difficult time and, accordingly, we take a more holistic approach to what you need to know in order to move forward in a positive way.

We are more than happy for you to drive our discussion.

Ultimately we are here to answer your questions in the most simple and appropriate way.

We are likely to discuss with you:

- some background information in relation to your relationship and the circumstances surrounding your separation;
- if relevant, a general discussion in relation to your child or children and the arrangements presently in place for their care;
- any pressing concerns you may have in relation to urgent financial or parenting issues;
- any pressing concerns that you may have for your personal safety or the safety of your child or children; and
- any concerns you may have in relation to obstacles to the amicable or easy resolution of future financial and parenting arrangements.

After discussing with you the manner in which the law will apply to your unique situation, we are often in a position to talk to you about the range of possible outcomes and importantly, our recommendation with regard to the best way of resolving any issues quickly and without undue conflict or anxiety.

We have no difficulty with you preparing a list of questions before our meeting, but often find that such questions are answered in the context of our general discussion.

We may also take the opportunity to introduce you to other members of the Best Wilson Buckley Family Law team that are likely to be in contact with you during the course of your matter.

What will the cost be?

We offer a reduced initial attendance fee which can be confirmed by our friendly reception staff. Where possible, we will reserve at least 90 minutes in which to discuss your matter and we can, of course, arrange a follow-up attendance should extra time be required to discuss introductory matters.

What will my obligation be?

Following an initial attendance, a number of our clients will not require our assistance again – simply because they are now in a position to effectively negotiate themselves with their former partner.

Ultimately you determine the level of our future involvement. The most important thing is that we remain available to you should you need further assistance. We will not accept instructions from your former partner to act on their behalf or provide advice to them at any time. We understand that discretion is necessary at a time where you may be contemplating separation. We will not inform any person enquiring of us whether you have obtained advice from us or whether you are a client of the firm.

Your file will remain open and we remain available to assist you in formalising any agreement you may reach, or intervene should the situation become problematic again.

In the event that you do require our continued assistance, we will discuss our approach to client care with you at our first attendance. This includes providing you with information about your legal costs, how we charge you for services provided, and our obligations under the Legal Profession Act relating to costs disclosure.

In the event that you retain our firm, you will receive a client care package which includes our fee agreement and costs disclosure notice, estimates of fees for various stages in your matter and further helpful information in relation to your situation.

If you decide to retain our firm you will also be at liberty to access our emergency mobile service which allows you to make contact with one of our lawyers at any time after hours in the event of an emergency. We know that difficult situations often arise at the worst times and are available to either assist with advice on the spot or make arrangements to have your lawyer telephone you back.

TO ARRANGE AN INITIAL ATTENDANCE, YOU CAN CONTACT US ON

07 **4639 0000** in Toowoomba or **07 3210 0281** in Brisbane or email us at **info@bwbfl.com.au**

Separation

It goes without saying that separation is a significant event, with emotional, physical and financial repercussions. Accurate and timely information, emotional support and surrounding yourself with positive assistance is crucial to ensure your ability to cope with the changes to come.

Whilst every couple is unique, reconciliation counselling may help you understand more about your feelings and help you decide whether to stay together or not. As your solicitor, we are obliged to ensure that you have exhausted the prospect of reconciliation.

If separation must occur, it is natural to feel a range of different emotions, including grief, shock, relief, denial, sadness and anger. It is important to acknowledge that separation will affect everyone differently. You may be moving through the process of adjustment to separation at a different pace to your former partner, and it is important to be sensitive to different emotional responses. The emotional experience of each of you will, in our experience, directly impact on your respective capacities for negotiation in relation to joint property and parenting issues.

In addition to managing your own emotional wellbeing, often your experience is complicated by the need to respond appropriately to the grief and adjustment difficulties experienced by your child or children. Often, significant and meaningful assistance can be provided by interacting with a psychologist or counsellor experienced in assisting both adults and children to adjust to life after separation.

Following separation, it is necessary for both of you to make some immediate decisions in relation to more practical matters impacting upon your children and joint assets.
These include answering questions such as:

- How will we explain our decision to separate to the children?
- How do we best allow the children to maintain the same level of time and contact with each of us immediately following our separation?
- How do we minimise disruption to the children?
- What arrangements can be made for our living and financial arrangements immediately following our separation?
- In what way will we continue to meet our obligations to joint liabilities pending an agreement about the division of our property?
- What will happen to any joint bank, building society or credit union accounts in the short term?
- Can we agree as to how to divide our household effects, furniture and motor vehicles?

These conversations are usually very difficult given heightened emotions. If you are struggling to reach agreement on these preliminary issues, there is assistance available.

Often, separated couples are assisted by a counsellor or psychologist to help facilitate their discussion around these issues, and a local professional is often available on a more urgent basis to assist in this regard. We are able to facilitate referrals, if you feel that you or your children would benefit from obtaining this type of assistance, please inform us at your initial attendance with us.

Alternatively, Family Dispute Resolution (FDR) is a formal mediation process offered by a number of service providers (both private and community/government funded). FDR aims to provide families that are separating with alternative ways to reach agreement about arrangements for your children.

There is sometimes a waiting time applicable to these services, particularly those that are funded by the Commonwealth Government. This sometimes precludes their use around the time of separation when time is of the essence. Your closest Family Dispute Resolution provider can be located by telephoning 1800 050 321 or visiting Family Relationships Online.

You might also wish to explore the option of participating in FDR with a private practitioner. Private FDR practitioners may also offer other mediation services that could assist you in reaching an agreement about other matters such as property settlement. As private FDR practitioners charge for their services, there is usually a shorter waiting period to access these services. You can obtain information about private FDR practitioners, their location, and details of their fees by searching the FDR practitioner register.

It is imperative to obtain legal advice from an experienced family law solicitor. By obtaining an initial understanding of the law relating to family disputes, you will have a better understanding of your legal rights and responsibilities and will be in a position, should you wish, to progress negotiations directly with your former partner, seeking further advice and representation only when required in the future.

Your Name

Interestingly, around half of separated women choose to revert to their maiden name at some stage following separation. There is often some very good reasons for retaining a married name.

These include maintaining professional reputation, and the benefit of being known by the same name as children of the marriage. Obviously, in some instances there may be a desire to distance oneself from a previous relationship, or establish a new-found independence by reverting to a maiden name. We are unaware of any case where a party has been prevented from the ongoing use of their married name by injunction, and consider it unlikely that a Court would find jurisdiction to make such an Order Ultimately the decision is a personal one.

Technically, as a married woman one has a right to be known by both a married and maiden name. You only `lose' the right to revert to your maiden name if there was a need to change your name by formal registration (often called `deed poll') in order to effect the change (something routinely required where marriage has taken place overseas). A formal name change will be required in that instance to revert to your maiden name.

Where you have simply assumed your married name (which occurs in the majority of cases), you can revert to your maiden name prior to divorce with the use of your birth certificate and marriage certificate (documents which effectively establish the origin of the previous name change and the basis for the reversion). There may be some institutions that will require a Divorce Order before facilitating any change, but the Australian Passports Office, Medicare and Queensland Transport will not require proof of divorce. As three core identifying documents, most other institutions will thereafter alter your name on their records upon production of your passport, drivers licence or Medicare card (or alternatively simply your birth certificate).

Extracts from your birth and marriage registration can be requested from your local Magistrates Court (who in turn will liaise with the Registry of Births, Deaths and Marriages). To notify each organisation of your name change, simply call them or go to each institution's website in order to determine what is required by the agency. If documents are to be lodged by post or fax, please ensure that copies of your original documentation are certified by a Justice of the Peace or Legal Practitioner.

Parenting Disputes

Terminology

The Family Law Act has been amended over many years and with these amendments there have been changes in terminology. Prior to 1996, Court Order referred to notions of custody and access to children. After 1996, the terms changed to residence and contact. With the introduction of shared parenting legislation in 2006, the Act now refers to where a child will live, what time a child will spend with its parents (or other significant persons in their life) and how a child will communicate with their parents.

The Commonwealth Attorney-General's Department, in partnership with Macquarie University and the Australian National University, has released the Family Law TermFinder, a plain language translation tool of the most common terminology used in family law.

It is searchable in English and other languages. If you come across unfamiliar terms, you can search the TermFinder and understand what the term means and also see it used in context. The TermFinder can be found online at http://lawtermfinder.mq.edu.au/

How do the parenting laws work?

On 1 July 2006, major changes to the family law system took effect. The Family Law Amendment (Shared Parental Responsibility) Act marked a major cultural shift in the family law system. It placed an increased focus on the rights of children to have a meaningful relationship with both parents and to be protected from the risk of, or actual harm, abuse or neglect. The law also encourages parents to equally share responsibility for their children after separation.

In addition to changing the law, the Government introduced a range of services, which are intended to help families to deal co-operatively and practically with relationship difficulties and separations.

The core principle, both prior to, and following the change of law is that a Court will only make a parenting order which it considers to be in a child's 'best interests'.

The law makes the starting point for determining 'what is in a child's best interests' the concept that both parents should have 'equal shared parental responsibility' for the child. In other words, the law recognises that after separation both parents should jointly make major decisions about their child's care and important issues that affect their child's life, such as their education or religious and cultural upbringing. This concept of 'equal shared parental responsibility' applies to parents making decisions about their child. It does not mean that the child must spend equal amounts of time with each parent – the law considers this separately.

The emphasis on a child having a meaningful relationship with both parents

Whilst the right of children to know both parents is not new, the government has clearly emphasised it as a foundation of the family law reforms. The changes emphasised the concept that children benefit from a meaningful relationship with both of their parents, provided this does not put children at risk of harm.

The Act specifically requires parents and Courts to consider the children spending as much time as possible with each parent.

However, further amendments to the Family Law Act in 2012 clarified that a Court must now err on the side of caution. Where there may be a risk of a child being subjected to family or domestic violence, it may be necessary for a Court to consider whether it is in the best interest of a child to spend time with a parent that has, or may, expose a child to the risk of family or domestic violence or the risk of abuse or neglect.

The Family Law Act's objectives are to ensure that the best interests of the child are met by:

- ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child;
- protecting children from physical or psychological harm, or from being subjected to, or exposed to, abuse, neglect or family violence;
- ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- ensuring that parents fulfill their duties and meet their responsibilities concerning the care, welfare and development of their children.

In order to achieve these objectives, the Act provides that:

- children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;
- children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);
- parents jointly share duties and responsibilities concerning the care, welfare and development of their children;
- parents should agree about the future parenting of their children; and
- children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

The Court will also have regard to the following primary and additional considerations where determining what is in a child's best interests:

Primary considerations

- the benefit to the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm, or from being subjected to, or exposed to, abuse, neglect or family violence.

Additional considerations

- any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child's views;
- the nature of the relationship of the child with each of the child's parents and other persons (including any grandparent or other relative of the child);
- the extent to which each of the child's parents has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child, to spend time with the child, and to communicate with the child;
- the extent to which each of the child's parents has fulfilled, or failed to fulfill, the parent's obligations to maintain the child;
- the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either of his or her parents; or any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- the practical difficulty and expense of a child spending time with, and communicating with, a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- the capacity of each of the child's parents and any other person (including any grandparent or other relative of the child) to provide for the needs of the child, including emotional and intellectual needs
- the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the Court thinks are relevant;
- if the child is an Aboriginal child or a Torres Strait Islander child:
- the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture);
- the likely impact any proposed parenting order under this Part will have on that right;
- the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- any family violence involving the child or a member of the child's family;
- if a family violence order applies, or has applied, to the child or a member of the child's family - any relevant inferences that can be drawn from the order, taking into account the following:

    - the nature of the order;

- the circumstances in which the order was made;
- any evidence admitted in proceedings for the order;
- any findings made by the Court in, or in proceedings for, the order;
- any other relevant matter;

- whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- any other fact or circumstance that the Court thinks is relevant.

How are your child's wishes taken into account?

The Family Law Act requires a Court to consider the wishes of a child in relation to a parenting dispute. The Court can inform itself of a child's wishes in any way, but generally does so by appointing an Independent Children's Lawyer or requesting the preparation of a Family Report.

An Independent Children's Lawyer (ICL) is an independent solicitor appointed by the Court who assists the Court to ensure that the best interests of a child are met during the proceedings. The ICL presents evidence to the Court about what 'appears' to be in the best interests of the child.

The ICL may:

- meet with a child personally;
- request a family report or psychiatric assessment from an appropriately qualified professional;
- issue subpoenas to obtain records such as criminal histories or child protection records;
- request information or reports from teachers and schools; or,
- request reports from counsellors, doctors and other professionals who interact with your child regularly.

In all but the rarest of cases, a child will not be called upon to attend Court and speak directly to the Judge. There is a major emphasis upon protecting children from the effects of parental separation and conflict, including buffering them from any Court proceedings which are taking place.

Often, the Court asks an appropriately qualified social worker or psychologist to meet with a family, including a child or children, and prepare a report about:

- the child's relationship with both of its parents and other significant people;
- the child's views, if they wish to give them to the Family Report writer;
- the child's personal history and emotional attachments;
- the relevant family history;
- current events in the child's life; and
- the attitude demonstrated by each parent to their responsibilities as a parent.

This report is known as a Family Report. It will generally contain recommendations to the Court about where and with whom a child should live and spend time with.

Care really should be taken to ensure that you do not question your child inappropriately in relation to any conflict between parents. The Court will ultimately be seeking an assurance and evidence that

every effort has been made to protect your child from the negative impact of parental conflict and pressure.

Mothers and Fathers

We believe that it's important to challenge the myths and inaccuracies that often circulate amongst members of the community. These untruths often have potential to cause enormous distress and fear.

Whilst it is technically correct to say that following separation mothers in Australia tend to be responsible for more overnight care of children each year than fathers do, this is not necessarily a reflection of a prioritisation of maternal care. In some respects, it is more a reflection of the fact that in intact families, mothers in Australia tend to be responsible for more primary domestic care of children each year than fathers.

For more than 25 years, the Family Court, Federal Circuit Court and High Court have stated consistently that there is no legal presumption that children should be physically cared for by their mothers. So why do children continue to spend more time with mothers than fathers following separation?

The answer may be more sociological:

- During a marriage, children tend to spend more time with mothers than with fathers. These pre-separation patterns tend to continue post-separation.
- Women tend to have more part-time jobs than men. Accordingly, they tend to be more physically 'available' to care for children who are sick or on school holidays; and
- Conversely, more fathers have full-time employment than mothers do.

Every situation is unique. We find that the majority of clients express enormous relief after an initial attendance on the basis that they finally have a sense of what might be best for their kids, and what can be achieved. This is often very different from the tragic stories circulated about the "family Court system", and far more positive.

Sharing Care - Equal Time Arrangements

Shared Care is often informally defined as an arrangement where a child spends between five and seven evenings each fortnight with each parent.

There is research to suggest that shared care works well where families fit the following profile:

- they live close together;
- parents get along well enough to develop a business like working relationship;
- arrangements are child-focused;
- both parents are committed to making shared care work;
- both parents have family friendly work practices;
- both parties are experiencing relative financial comfort; and
- both parties share a confidence that the other is a competent parent.

It is stating the obvious, but many separating parents who require the Court's assistance to resolve their conflict rarely have these characteristics.

The research suggests that a shared care arrangement may entail risks for the healthy development of a child where families have the following specific factors, especially in combination:

Factors relevant to each parent:

- low levels of maturity and insight;
- a parent's poor capacity for emotional availability to the child;
- ongoing, high level of conflict;
- ongoing significant psychological acrimony between parents;
- their child is seen to be at risk in the care of one parent;

Factors relevant to a child:

- the child is under 10 years of age;
- the child is not happy with a shared arrangement; or
- the child experiences a parent whom is emotionally absent to them or unresponsive.

Ultimately, and with the exception of the rarest of cases, most parents are focused upon establishing a care arrangement that makes their child as happy and well-adjusted as possible. Often the guidance of a counsellor or psychologist who is experienced in child development will be the best way of ensuring that as a parent you are making the best decisions possible.

We would urge you to consider jointly engaging such a professional, and meeting with them to discuss your child's unique needs, and what might be best for them moving forward.

Good Parenting Conduct

Some time ago, a very well-respected Federal Magistrate published his own guide to good parenting conduct for the litigation pathway.

His Honour noted that parents who can do the following are much more likely to achieve a better outcome when travelling through the Court Process:

- demonstrate by their actions that they can be child focused;
- make decisions based around their child's needs rather than their own;
- rise above the conflict between the parties;
- remain rational, calm and centered;
- demonstrate stability in their personal circumstances and parenting decisions;
- provide a safe, secure and stable environment for their children;
- be honest in their dealings with the Court and others;
- demonstrate generosity of spirit and flexibility;
- develop a child focused parenting plan; and
- demonstrate an understanding of the position of others (empathy).

At Best Wilson we are committed to our clients embracing the above ideals, and we'll discuss with you the importance of putting yourself emotionally in a position whereby the above is achievable.

Relocation

A relocation dispute in the context of parental separation is often one of the most painful areas of litigation. Almost consistently both parents are committed and loving parents whom simply are pulled by life and circumstance in two very disparate geographic directions. Whether it is to another town, state or country, relocation can have profound effects on all parties involved, including most importantly a child.

In 2005 the Standing Committee on Legal and Constitutional Affairs tabled a report on changes to the Family Law Act. The report, entitled 'Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005' dealt with many issues; one issue of considerable concern was relocation. Chief Justice Bryant gave evidence before the committee, where her Honour noted:

Relocation cases are the hardest cases that the Court does, unquestionably. If you read the judgments, in almost every judgment at first instance and by the full Court you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem: a problem can be solved: a dilemma is insoluble.

What is Relocation?

Following a separation many parents will move to another town, city or even country. There is very little restriction, per se, on the rights of an adult to live where they choose. A `relocation' dispute emerges where the relocating parent believes that the child of the relationship is best placed with them in the new location, and the other parent disagrees. Whilst often referred to as a specific category of case, the Family Law Act (the Act) does not specifically address relocation as a concept. Accordingly, relocation is dealt with under the general principles guiding the resolution of parenting matters in the Act.

Despite the specific proposals of the parties, the Court is at liberty to consider any arrangement for the child assuming that, on the evidence available, the outcome is in the best interests of a child and reasonably practicable. Whilst a Court cannot necessarily require a parent to remain living in a specific location, in many respects the Court will engineer such an outcome by refusing permission for a child to live with the relocating parent should they move away.

Going to Court

If one parent wishes to relocate with a child and both parties cannot come to an agreement, the Court will ultimately have to make a decision in regards to the child's living arrangements. Like any parenting dispute, the Court will be required to make findings relevant to what proposal most aptly accommodates the best interests of a child.

We strongly recommend that you give due consideration to the following issues in the context of mediation before proceedings are initiated:

- Is there a way of maintaining the current significance of time spent between residences in the context of the change in residential location of one parent?
- Could the `left behind' parent potentially consider relocation with the other parent and child?
- What impact will any change have upon the child?

- Is it realistic for the child to potentially live with the parent not relocating?
- Is the child of an age where they have specific wishes which should be afforded weight?
- What are the reasons for the parent wanting the move?
- What is proposed by way of a new school, and living arrangements?
- Is there potential for an agreement to a short-term relocation?
- How can the difficulty and expense of travel between new residential locations be mitigated, and will the cost prohibit time?
- How strong is the relationship between the child and each parent now?
- What capacity will the child have to communicate by electronic means, including telephone, messaging, and Skype?
- What attitude have both parents taken to the facilitation of time and meeting the responsibilities of parenthood in the past?
- Is it reasonably practicable to require a parent to remain living where they are?
- Will they be emotionally and financially able to cope?

It is our experience that where parents have positively facilitated each other's relationship with the child in the past, permission to relocate a child is more likely. The Court is likely to have significant concern as to the capacity of a parent to facilitate a relationship whilst living a significant distance apart from each other, if the relationship has not been promoted whilst living in the same town.

The High Court of Australia has ruled that in addition to considering whether an outcome would be in the best interests of a child, the Court must consider whether it is reasonably practicable to require a parent to remain living with a child in a location against their wishes. In considering issues of practicability, the High Court pointed to some of the considerations set out above, such as the availability of affordable and appropriate housing, employment and family support, as well as the impact of an Order to remain in the location upon the emotional and mental health and wellbeing of each of the parents.

Seek Legal Advice

Relocation cases are particularly difficult and given their complexity, representation is often essential. Best Wilson Buckley can act on your behalf if you wish to negotiate your relocation, or if you wish to seek the residence of a child where the other parent is moving away.

Child Support

Child Support is, put simply, money transferred from one parent to another for the benefit of a child following separation.

The payment of child support is regulated by the Department of Human Services (DHS), the Commonwealth Department which is now responsible for Child Support, Centrelink, Medicare and other social welfare services. As parents you are able to structure the payment of child support in a manner that works for both of you.

The amount of child support to be paid can be assessed on:

- the application of a statutory formula found in the child support legislation by the DHS;
- by agreement between both of you as to the amount to be paid, and how it might be received i.e. through a periodic cash payment or via the payment of expenses directly for the child; or
- in rare circumstances, by Court order.

You are not obliged to contact the DHS following separation but, if a parent is in receipt of some form of Government benefits, there is likely to be a requirement imposed by DHS for the receiving parent to seek a child support assessment. Any Government benefit payment is then assessed on the basis that child support is being paid and received in accordance with the child support assessment. This is premised upon the understanding that parents should contribute to the support of their children before the Government is required to do so.

If neither of you are seeking any form of Government assistance, then you may choose to make your child support arrangements without any contact with the DHS.

How is child support assessed?

The assessment of how much child support is to be paid by a "liable parent" can be complicated by a number of factors. In summary, the DHS will use the statutory formula which takes into account the following:

- the incomes of both parents (including notionally adding back as income certain benefits such as salary sacrificing, tax-deductible losses, depreciation, or certain other benefits);
- a "self support" allowance to enable each parent to meet their own reasonable expenses;
- the amount of time that the child spends with each parent – calculated on the number of nights per year (referred to as the "care percentage");
- whether you have any other child support cases or dependent children; and
- the costs of raising children between certain ages set by the DHS.

It is important to understand that child support assessments are made for a 15 month period and are automatically reassessed at the end of that period. However, if your circumstances change you should immediately contact the DHS and advise them. Failure to do so may mean that you pay more child support than necessary or you may end up with a child support debt.

In order to get an idea of the amount of child support you may pay/receive, you can access the DHS online child support estimator. The estimate is just that and should not be relied upon without making a formal application for assessment with the DHS.

Changing a child support assessment

As one would expect, one formula will not fit the unique and varied circumstances of every separated family. Accordingly, parents can reach an agreement beyond the assessment at any time and formalise that Agreement (we can assist you with this process), or alternatively an application can be made to the DHS to change the assessment by relying upon one or more of the following grounds:

- the costs of maintaining a child are significantly affected by the high costs of enabling a parent to spend time with, or communicate with, the child;
- the costs of maintaining a child are significantly affected by the high costs associated with the child's special needs;
- the costs of maintaining a child are significantly affected by high costs of caring for, educating or training the child in the way both parents intended;
- the child support assessment is unfair because of the child's income, earning capacity, property, or financial resources;
- the child support assessment is unfair because the paying parent has paid or transferred money, goods or property to the child, the receiving parent, or a third party for the benefit of the child;
- the costs of maintaining a child are significantly affected by the parent or non-parent carer's high child care costs for the child (and the child is under 12 years);
- the parent's necessary expenses significantly affect their capacity to support the child;
- the child support assessment is unfair because of the income, earning capacity, property, or financial resources of one or both parents;
- the parent's capacity to support the child is significantly affected by:
    - their legal duty to maintain another child or person;
    - their necessary expenses in supporting another child or person they have a legal duty to maintain;
    - their high costs of enabling them to spend time with, or communicate with, another child or person they have a legal duty to maintain; or
- the parent's responsibility to maintain a resident child significantly reduces their capacity to support the child support child.

The Parent's Guide to Child Support is a helpful publication of the DHS which provides a plain English guide to how the child support system works. If you would like a hard copy, we can provide you with a copy at your initial attendance.

The DHS publishes a number of publications that can assist you in dealing not only with child support issues but separation and "life after separation" in general. You can access these publications in PDF or hard copy format at the DHS Child Support Portal.

Child Support is a complicated area, and for this reason, we would ideally like to discuss your specific situation with you personally in order to ensure you receive the most accurate information and advice.

Paternity

On occasion there may be some doubts held in relation to the paternity of a child. From the outset it is imperative to acknowledge that any confusion in relation to paternity should not be shared with a child without the guidance of a counsellor or psychologist, and not until there is some definitive understanding of the result of testing. It goes without saying that much damage can be done by unnecessarily disrupting a child's understanding of their world.

Determining paternity

Whilst informal testing can be undertaken using the services of many commercial providers, ultimately, if you are seeking to rely upon a paternity testing result seeking to:

- Establish exactly who the parents of a child are;
- To support an application to spend time with a child; or
- Set aside a child support obligation;

then it is necessary to obtain a formal Order of the Court authorising that testing. The Court may or may not determine to allow that testing, as they ask the question of whether that testing (and the consequences of any result) would be in the best interests of a child.

Prior to the DHS accepting an application for child support, it is necessary to establish who the parents of the child are and therefore liable to pay child support. A person can be presumed to be the parent of a child, and is therefore required to pay child support, if:

- The parents were married when the child was born;
- The parents are named on the child's birth certificate;
- The male parent was living with the mother between 20 and 44 weeks immediately before the child's birth;
- The person has legally adopted the child;
- A statutory declaration has been made by a person acknowledging they are the child's parent; or
- The person is a parent under the Family Law Act (for example, where the child was born as a result of artificial conception, surrogacy or to recognised same-sex couples).

If a child support application is refused on the basis that the DHS is not satisfied the person being asked to pay child support is a parent, the "carer parent" claiming child support can apply to a Court for a declaration about parentage or for the person that they suspect to be the parent to undertake a DNA paternity test. The DHS has no legal power to make decisions about the paternity of a child.

Same-sex couples and child support

As noted above, if a same-sex couple is recognised under the Family Law Act as parents of a child, they can seek a child support assessment on the breakdown of a relationship.

What happens when a parent believes they are not the parent of a child they are paying Child Support for?

The DHS has no legal power to make decisions about paternity; it is a matter for the Courts. The Courts can also make a declaration that a person is not entitled to an assessment against the person who is not a parent, or that a person is entitled to an assessment because the other person is a parent.

If you suspect that you are paying child support for a child that you are not a parent of, it is necessary to carry out certain steps including seeking an order from a Court to suspend the collection of child support until such time as it can be determined (by DNA paternity test) that the paying parent is a biological parent of the child.

If a Court makes a declaration that a person paying child support is not liable to do so, all child support paid is regarded as being overpaid. Any money that might be being held by the DHS can be paid back to the person who made the payments (but not money that has already been paid to the receiving parent). The Court must also immediately consider whether they should order the receiving parent repay previously paid child support.

Research conducted in Australia indicates that the actual rate of misattributed paternity in the general population is 1% to 3%.

Surrogacy and Child Support

The situation is more complicated in the case of altruistic surrogacy as set out below under the heading Surrogacy. We are able to provide you with advice on these issues.

Surrogacy

Prior to 1 June 2010, altruistic surrogacy was illegal in Queensland. The passing of the Surrogacy Act overturned the previous prohibition on altruistic surrogacy arrangements, that is, non-commercial surrogacy arrangements. Commercial surrogacy (where payment or other benefits are made by one party to another party) remains illegal.

What is a Surrogacy Arrangement?

A surrogacy arrangement is an arrangement between a woman (the birth mother) and another person or couple (the intended parents), where the birth mother agrees to become pregnant with a child for the intended parents. The child born as a result of the pregnancy will be permanently relinquished by the birth mother and parental responsibility and care for the child is transferred to the intended parents.

A surrogacy arrangement can only be made before the birth mother becomes pregnant. There are additional requirements which must be satisfied to enable the Children's Court to make an order transferring the legal parentage and parental responsibility for the child from the birth mother to the intended parents (known as a Parentage Order). These include:

- Mandatory counseling for the parties to a surrogacy arrangement prior to the birth mother entering into the surrogacy arrangement; and
- Obtaining independent legal advice before entering into the surrogacy arrangement.

It is important that legal advice be obtained by a person before the person enters into a surrogacy arrangement and that all requirements under the Surrogacy Act are strictly complied with. If the correct steps are not taken, the Children's Court may refuse to make an order transferring parentage and parental responsibility for the child.

It is important to note that surrogacy arrangements are not enforceable and a birth mother or the intended parents may change their minds at any time before an order is made transferring the parentage and parental responsibility of the child to the intended parents.

We have previously assisted parties in entering into surrogacy arrangements and obtaining orders transferring parentage and parental responsibility.

Property Settlement

The Court has a wide discretion in making Orders altering the interests of spouses (including de facto spouses) in property. The Court will not make an Order for property settlement unless, in normal circumstances, the Order is both just and equitable.

It is important to remember that the notion of fault is largely irrelevant to the Order that a Court will make for property settlement. There are some limited circumstances, for example family violence, where conduct has some relevance, but generally speaking, notions of blame and fault are not relevant to determining your entitlement to your joint property pool.

A family law property settlement generally happens in three distinct steps.

1. Valuing your Joint Property

The first step involves determining the net value of all property. This is irrespective of whether property is held legally by yourself, by your former partner, or by both of you jointly. Property includes real estate, cash, investments, furniture, motor vehicles, interests in a company, trust or partnership, and superannuation.

A value must be determined for each item of property and initially we encourage our clients to seek their former partner's agreement to a value. In the event there is no agreement, both of you can agree to the appointment of a joint expert to value the relevant item of property. At the conclusion of this step, you will be in a position to identify all property and the net value of your property pool.

It is important to understand that the value of each item of property is the current day value and not the value at the date you separated from your spouse.

Often the smaller items of property like the furniture and household goods held by each of you can cause significant disputes in relation to values. Sometimes people will claim that the furniture in the other party's hands is worth tens of thousands of dollars. This may be because they have valued the property at a "replacement" or insured value as opposed to a second hand market value. For the purposes of negotiations, it is important that all furniture and chattels be taken at their current market value or second hand value. This is often much lower than the replacement value.

Many times the value of a home is in dispute between the parties and each party will have conflicting real estate agent appraisals. In the event of disagreement, a joint expert can be appointed to value the property. Alternatively, if neither party wishes to retain the property there is no need for a valuation and the property can be listed for sale at market value with a view to reaching its true sale potential.

In order to value superannuation interests there is a process to be adopted under the relevant regulations. This will depend on the type of superannuation fund that you or your spouse are members of. We are able to assist you in obtaining information about the type of fund and its current value.

2. Assessing your respective contributions

The second step in a property settlement is an assessment of your respective contributions to your property pool, including both financial and non-financial contributions.

Financial contributions are made directly or indirectly by you or your partner towards the acquisition,

conservation or improvement of property. An example of a direct financial contribution is the income you earned through employment during your relationship. A further example of a financial contribution is the monies or property that you brought into the relationship at date of cohabitation, or a redundancy or compensation payment received by you. An indirect financial contribution might be a gift of monies received from your parents in order to enable you to purchase a property or another item.

Non-financial contributions can be made directly or indirectly by either of you towards the acquisition, conservation or improvement of property. This is often interpreted to include renovation and repair work but most importantly it includes time spent caring for children and domestic contributions around the home.

A further category of contributions are those made by you to the welfare of your family. Again, your contributions (and those of your former partner) as a homemaker and parent are relevant to this consideration. Generally the Court will not be focused upon the minutiae of contributions, in other words they won't be overly interested in who washed the dishes or who mowed the lawn on a particular date, nor who undertook a specific renovation to a property. A more 'global' approach is taken.

While there is no presumption in this regard, in a normal relationship of a reasonable duration where both of you commenced your relationship on an equal footing, the Court will generally find that the contributions of each party have been equal. This is likely to be altered by any significant contribution on your part or your partner's behalf by way of windfall, inheritance or major gift.

Each case is different and will be determined on its unique facts. Generally speaking, the Court will regard the contributions of a homemaker as equal to those of the party whom generated an income to support the family.

3. The "Future Considerations" Adjustment

The third step relevant to property settlement is an examination of future considerations.

The Court has a very wide discretion in making adjustments to reflect these considerations.

Factors often include:

- The age and state of health of you and your former partner;
- Income, property and financial resources of yourself and your former partner;
- Yours and your former partner's physical and mental capacity for future appropriate employment;
- Whether either of you have the care and control of any children of the relationship, who are yet to attain the age of 18 years;
- The commitments that each of you deem necessary in order to support yourself, a child, or another person you have a duty to maintain;
- The responsibilities of either of you to support any other person;
- The eligibility of either of you for a pension allowance or benefit under a Commonwealth or State law, or superannuation scheme;
- The standard of living of each of you and whether, in all the circumstances, this living standard is reasonable;

- The duration of the marriage or cohabitation and the extent to which it has affected the earning capacity of either yourself or your former partner;
- The need to protect any party who wishes to continue their role as parent;
- Circumstances of any cohabitation at the present time;
- Any child support that a party has provided or will provide; and/ or
- Any other facts or circumstances which the justice of the case demands the parties bring into consideration.

The right advice

There are no hard and fast rules about percentage divisions for property settlement. As a result, you should never assume what the result might be or rely on an overview such as this one to guide your decision making. Only an experienced family law practitioner can give you a clear and accurate indication of the likely outcome of your circumstances based on the unique facts of your matter.

The case law interpreting section 79 of the Family Law Act provides some guidelines to the manner in which a Court is likely to exercise its discretion to divide property. It's important to note that there is no presumption of equality, that is – no-one automatically gets 50% of the property pool.

In long marriages/relationships (generally 15 years +), where:

- The parties were in a similar financial position at date of marriage or cohabitation;
- There are no children under the age of 18; and
- When both parties have a comparable future earning potential, the result is often more equally balanced.

However, the following factors will affect the entitlement of a party to matrimonial property:

- Significant assets held by one party at date of marriage or cohabitation;
- Major contributions by one party during the marriage or cohabitation, whether they be financial or otherwise;
- The primary care of young children for a period after separation;
- The receipt of an inheritance or gift from a family member during the marriage or relationship;
- A major discrepancy in the potential of each party to generate income in the future; or
- Where one party is likely to benefit from a significant financial resource in the future e.g. when a party is a beneficiary to a family trust.

In short marriages/relationships (between 1 to 5 years), the Courts tend to take an asset by asset approach to property settlement and examine what contributions were made to an asset and by whom. As a result, a party will generally receive back the contributions that they made or the property that they have brought in.

The law is complex and far from certain, hence the absolute importance of getting advice from a solicitor whom is both experienced in family law, but also renowned for being focused upon the resolution of these matters rather than litigating at all costs.

Your financial future

You should seek professional financial advice to assist in the resolution of property issues.

By having an indication of the most optimal outcome from your perspective, in regards to future income and the structure of your assets, you may well be in a position to provide us with specific instructions at this stage.

You might also be able to obtain advice about the restructuring of your personal and financial affairs to attempt to protect your position should you start another relationship.

We urge you to seek financial advice in this regard. Best Wilson Buckley can provide assistance in locating an appropriately qualified financial advisor if you require one.

Costs and taxes

In resolving your property settlement you may wish to take advantage of exemptions from stamp/transfer duty and capital gains tax. If an Order is made by the Court (even by consent), or the two of you reach a property settlement agreement and incorporate it into a Binding Financial Agreement, then the majority of instruments to be stamped in accordance with that document including a transfer of real property between the parties will be exempt from stamp/transfer duty (in most cases).

Further, there is also "rollover relief" in relation to capital gains tax on the transfer or disposal of any assets contained in the Family Court or Federal Circuit Court Order, or Agreement. With the assistance of your taxation advisor, we can advise you in more detail about the advantages of these exemptions should they be applicable to your case.

Spousal Maintenance

When a relationship (marriage or de facto) ends, a party may be entitled to claim spousal maintenance. There is however no automatic right to, or presumption of, spousal maintenance and much will depend on your unique circumstances. The Family Law Act provides that one party to a relationship is liable to maintain the other party in circumstances where:

- One spouse is unable to adequately meet his or her own reasonable needs; and
- The other spouse has the capacity to pay maintenance after meeting their own reasonable needs.

Spousal maintenance can:

- Be paid by agreement between the parties or as a result of a Court order;
- Be paid on a periodic basis (that is, weekly or monthly) or as a lump sum;
- Include the direct payment of expenses by one party for the other; and
- Continue for a defined period of time.

What does the Court consider when making a spousal maintenance order?

There are a number of factors which the Court can consider in determining whether one party is able to adequately support themselves. This includes:

- Where one party has the care and control of a child or children;
- The age and state of health of one of the parties; or
- Where a party may not be able to obtain appropriate gainful employment.

The Court, in determining whether spousal maintenance should be paid and how much maintenance is necessary will consider what is just and equitable, taking into consideration such things as:

- A party's income, liabilities, property, and financial resources;
- A party's age and state of health;
- A party's ability to earn an income, and whether this has been affected by the relationship;
- Whether maintenance is necessary to allow one party to update or obtain qualifications in order to generate an income that is sufficient to support themselves;
- What is considered to be a suitable standard of living; and
- Whether the children live with you, or your former spouse.

It is important to remember that, even if one party is unable to adequately support themselves, then the other party is only liable to support that party so far as they are reasonably able to do so. The Family Law Act specifically precludes a Court from including any government benefits in determining the level of income of a party applying for maintenance.

We can provide you with advice about your rights to receive, or liability to pay, spousal maintenance.

Time limits on applying for spousal maintenance

Applications for spousal maintenance must be made within 12 months of a divorce order becoming effective or within 2 years of the date of separation if you were in a de facto relationship.

Divorce

Grounds for divorce?

Gone are the days of there being a number of grounds for divorce such as adultery, cruelty or the like. When the Family Law Act was introduced in 1975, the concept of "no-fault" divorce was introduced. As a result, there was no longer any need to establish grounds for divorce other than a marriage having broken down irretrievably and the parties having lived separately and apart for a period of 12 months.

When can you apply for a divorce?

You can apply for a divorce in Australia if either you or your spouse:

- regard Australia as your home and intend to live in Australia indefinitely, or
- are an Australian citizen by birth, descent or by grant of Australian citizenship, or
- ordinarily live in Australia and have done so for 12 months immediately before filing for divorce.

You need to satisfy the Court that you and your spouse have:

- lived separately and apart for at least 12 months; and
- and there is no reasonable likelihood of resuming married life.

If you are a same-sex couple and have been legally married in another country, you cannot apply for a divorce in Australia as your marriage is not legally recognised. It will be necessary for you to commence divorce proceedings where you were married.

If you were married overseas and you have a marriage certificate in another language, you will need to obtain a certified translation of your marriage certificate.

If you have been married for less than 2 years, you must undertake counselling and obtain a certificate from a relationship counsellor that states that you have considered trying to reconcile.

Do I need a solicitor to apply for a divorce?

Whilst we don't necessarily like doing ourselves out of work, you can make your own application for a divorce. However, we recognise that some clients prefer to have a solicitor draft the application.

To apply for a divorce yourself, there are two options:

- Option 1: The paper way - to do this, you can obtain forms from the Family Law Courts Website. The Family Law Courts have produced a Divorce Kit which provides detailed instructions on how to apply for a divorce, how to arrange for your divorce to be served and information about what happens at your divorce hearing; or

- Option 2: The electronic way – using the Commonwealth Law Court On-line Portal (ComCourts). To apply electronically for a divorce, you will need to register and create an account with ComCourts. You can then complete your application securely on-line and upload documents including your marriage certificate and any service documents.

If you would prefer, we are more than happy to take your instructions to draft the application for you. We can also arrange for your divorce application to be served on the other party and appear for you at the hearing.

What does it costs to get divorced?

The Federal Circuit Court sets the fee for filing your divorce application. This fee changes every 2 years. To obtain details of the current divorce filing fee, you should visit the Family Law Courts website and look for the Fees section. Depending on your financial circumstances, you may be eligible for a reduction in the filing fee on the basis of financial hardship.

We can provide you with a fixed fee quote to prepare and finalise your divorce application.

What happens if we have children?

If there are children aged under 18 (be they your biological children, an adopted child or children from another relationship that you treated as a member of your family), the Court can only grant a divorce if it is satisfied that proper arrangements have been made for their care and welfare. The application form requires you to tell the Court what arrangements are in place and whether these might change in the near future.

If you have children under 18, the person who has filed the application must attend the hearing either in person, by telephone, or through a solicitor. If you make a joint application or have no children under 18, there is no need for you or your spouse to attend the hearing.

Can I oppose a divorce application?

If the grounds for divorce have been satisfied, there are very few opportunities for oppose or challenge the making of a divorce order.

However, if there are factual errors in the divorce application, you can file a Response to Divorce form with the Court to correct the errors. Some errors may be typographical or some may be major, such as the wrong date of separation. A Response to Divorce needs to be filed with the Court within 28 days from the date you are served with the application.

If you have not reached an agreement on property settlement, spousal maintenance or arrangements for your children, this is not a valid reason for opposing a divorce. The granting of a divorce order does not finalise arrangements about the division of property, maintenance or parenting arrangements.

Time limits relating to property settlement or spousal maintenance?

The Family Law Act sets time limits for finalising your financial relationship after a divorce order is granted.

From the date that your Divorce Order becomes effective (1 month and 1 day after the hearing) you have a period of **12 months** to finalise your property settlement or make an application for spousal maintenance. If you do not take steps to do so, your rights can be affected and you need to make an application to a Court for special permission to obtain a property settlement or to seek spousal maintenance.

If you believe that your time limit may soon expire, you should seek urgent advice to protect any rights you may have.

Planning Financial Agreements

A Planning Financial Agreement is a contract. These contracts can be made before, during, or after matrimonial and de facto (same sex or heterosexual) relationships.

A Financial Agreement entered into prior to marriage or prior the commencement of a de-facto relationship (a "Pre-nup" or "Planning Financial Agreement"), carries inherently more risks because it is trying to take into account how your needs and circumstances, and the needs and circumstances of your spouse, may change over time.

Requirements for a "Binding" Planning Financial Agreement

To be "binding", the requirements of sections 90G and 90UJ of the Family Law Act 1975 must be satisfied.

The Agreement must also address how you and your spouse's needs and circumstances may change over time.

Effect of Agreement

In the case of an Agreement that is binding, the intention is to exclude the jurisdiction of the Court to make Orders for property settlement and/or spousal maintenance following the breakdown of a relationship.

What are the risks?

Given the changes that invariably occur in people's lives across time, there is no guarantee that the Agreement will stand up to challenge over time (that is 5, 10 or 20 or more years later).

Planning Financial Agreements have been set aside by the Courts for:

1. Duress
2. Lack of independent legal advice
3. Lack of comprehensive disclosure of financial information and documents
4. Inadequate legal advice
5. Poorly prepared or incorrectly executed Agreements
6. Failures to otherwise comply with the legislation

Why are family lawyers reluctant to prepare Planning Financial Agreements?

Several recent Court decisions have brought about a degree of uncertainty about the ability of family law practitioners to make these Agreements binding and not liable to being set aside at a later point. There is yet to be a response from government to lobbying to tighten the current wording of the legislation to remove these uncertainties.

As a result of the perceived risks involved, the majority of family law specialist firms will no longer prepare Planning Financial Agreements on behalf of their clients.

De Facto Relationships

Following amendments to the Family Law Act in March 2009, there is now provision for opposite-sex and same-sex de facto couples to access the Federal Family Law Courts on property and maintenance matters. Previously, couples in de facto relationships have been reliant upon the State jurisdiction in order to resolve their property settlement disputes.

The Family Law Act was amended to ensure that there is equality in terms of de-facto couples having the same rights as married couples to:

- seek a division of any property that the couple may own (either separately or together with each other);
- obtain spousal maintenance in circumstances where a party may not be able to support themselves and the other party has a capacity to pay maintenance;
- access and divide superannuation entitlements as part of a property settlement.

The Family Law Courts can make these orders if satisfied of one of the following:

- the period (or the total of the periods) of the de facto relationship is at least 2 years; or
- there is a child of the de facto relationship; or
- one of the partners made substantial financial or non-financial contributions to their property or as a homemaker or parent and serious injustice to that partner would result if the order was not made; or
- the de facto relationship has been registered in a State or Territory with laws for the registration of relationships.

The changes also include recognition of financial agreements between de facto couples under the Family Law Act.

Should you presently reside in a de facto relationship it is important to seek advice in relation to whether it would be appropriate to enter into a Binding Financial Agreement in relation to what will happen with joint property in the event of separation.

Reaching an agreement and having it properly documented

Many people believe that litigation is inevitable in a relationship breakdown and property settlement. This is not the case. At Best Wilson Buckley Family Law, we resolve the majority of cases on an agreed basis.

By reaching an agreement, you eliminate the need to place your dispute in the hands of the Court and you retain control of the process and minimise costs. Reaching an agreement also avoids having the Court impose a resolution on you and your partner, and in our experience this can sometimes be harder to accept in the long run, particularly when there are ample opportunities to settle before you get to Court.

When properly documented and formalised, an Agreement about property settlement or spousal maintenance will allow you to end your financial relationship and move forward without concern as to any future claim on your property or resources. Without the "line being drawn in the sand", you could be exposed to your spouse trying to make a claim sometime in the future, despite the fact that there might have been a long period of separation.

There are two ways in which an Agreement can be formalised.

The first is by Binding Financial Agreement prepared in accordance with the Family Law Act. It is essential that the Agreement is prepared strictly in accordance with the provisions of the Act. Each of you will need to sign the document and receive written independent legal advice from a solicitor in relation to the effect of the agreement and how it might affect your rights. Binding Financial Agreements can be used by both married parties and parties in a de facto relationship.

The second manner of formalising an Agreement is by Application for Consent Orders. To obtain Consent Orders, it is necessary to complete the relevant Application form. The Application form provides the Court with information about:

- what assets, liabilities, superannuation and financial resources you and your partner have;
- how you have agreed to divide your property between you; and
- how the agreed division might affect your financial position.

Upon lodging the Application a Registrar of the Court will consider the information provided and decide whether the Order can be made and that it is just and equitable to do so. There is no need for an appearance at Court, and an Order will be issued in due course if your Application is successful.

Importantly, property transferred between spouses in accordance with a Binding Financial Agreement or Court Order is generally exempt from stamp/transfer duty. We work closely with your Accountant and Financial Planner to ensure that any Agreement is drafted in the most tax effective way. Depending upon your unique case, we will recommend the most appropriate way to finalise your agreement.

Alternatives to Court based dispute resolution

There are some very strong options for resolving family law related disputes without the intervention of the Court, and in a manner that prioritises ongoing relationships, the needs of children and a desire to preserve financial health. Some alternative dispute resolution methods will not be suitable if there is domestic or family violence or other power imbalances in a relationship.

At Best Wilson Buckley we consider the skills required to effectively collaborate, mediate and negotiate to be equally as important as our capacity to litigate. Certainly, in most instances our legislature requires resolution by alternate means to be explored before seeking the intervention of the Court. Let's explore some of the more prevalent options:

Negotiation

Negotiation is a more global concept and will often embrace the processes outlined herein. In a more limited sense, it involves either a separated couple, or their respective lawyers engaging in a course of dialogue intended to examine the dispute, and the means by which it can be resolved. Often parties will adopt a position, which can often lead to a `stand-off' of sorts. Negotiation can take place in writing, but this is often problematic given the incumbent delay, anxiety and misunderstandings that can eventuate. Discussions in person, by way of round table discussions with either lawyers alone, or clients and lawyers, can be very effective. Often the process is categorised by compromise. For some it is a very lengthy process, and for others they either quickly reach resolution, or escalate matters to mediation or litigation.

Collaborative Law

Collaborative Law is in essence practicing law without litigation. It is sometimes described as "mediation with advice". Collaborative Law was pioneered in the United States by practitioners who were of the view that litigation was counterproductive to separating families and in particular to children who are generally caught in the middle of what is going on. Unlike the `round-table' negotiation process outlined above, the focus in collaboration is upon full transparency and collectively endeavouring to resolve a dispute on the most optimal terms for both parties.

Collaborative Law is a dispute resolution process where the parties and their lawyers enter into an agreement to resolve a dispute without resorting to litigation. If the Collaborative Law process does not work, the lawyers involved cannot go on to represent the parties in litigation. This has the benefit of all participants being focused on reaching a resolution. Negotiation is focused on identifying and meeting the `interests' of each party, and generating and exploring options in the context. It can involve both parenting and financial issues.

Collaborative Law also utilises third parties such as child psychologists and development experts, accountants, financial planners and other neutral experts when required, to provide assistance to the parties and their lawyers and to assist in problem solving at meetings. All of the negotiations are conducted in meetings with an agenda agreed before each meeting. Our practitioners are trained in collaborative processes and our role is to prepare you to participate in the collaborative process and provide advice to you during the process.

Mediation

Many would be familiar with mediation and its growing popularity as an alternative to litigation. It is often embraced after negotiation has failed to `bridge' the gap between the respective positions adopted by the parties. Mediation is a process where an independent and neutral third party assists the parties in dispute to negotiate and reach a decision about their dispute. Mediation is a confidential "without prejudice" process and whatever is said at mediation cannot later be used in Court proceedings.

The Mediator's role is to assist the parties to generate options, and reach their own decision. A Mediator cannot impose a decision but tries through the process of facilitation to assist the parties explore the issues in depth, reality test proposals and reach the best possible joint decision in the circumstances.

Mediation is generally quicker and more cost-effective than litigation and can be used early on in a dispute or during a dispute, in an attempt to resolve matters before facing the significant cost and stress of a final hearing or judicial determination. It often involves one distinct event, rather than a process over time.

Arbitration

Arbitration is a process similar to what might happen at a final hearing in a Court. The parties present their arguments and evidence to an arbitrator (rather than a judge) who then makes a binding decision. At the current time in our jurisdiction arbitrations can only occur if the parties consent to undertake arbitration rather than mediation or progress the litigation to a final hearing before a judge.

Arbitration can deal with some matters like property settlement or spousal maintenance. Arbitrations do not usually extend to parenting matters. Arbitration has a number of benefits including:

- the parties being able to control of the process;
- arbitrations are less formal to Court proceedings before a judge;
- not having to wait for the Court to allocate hearing dates as arbitrators are usually private practitioners who have more flexibility than the Courts;
- the parties get to choose the arbitrator;
- an arbitrator is required to provide their decision within 28 days; and
- the arbitrator's decision is final and capable of being enforced.

Family Dispute Resolution

Family Dispute Resolution (FDR) is a mediation process used particularly in parenting matters. It is mandated under the Family Law Act and is a requirement before commencing proceedings for parenting orders.

FDR requires parents to and make a "genuine effort" to resolve disputes relating to parenting matters. Some exceptions apply in situations involving family violence or child abuse or urgent matters. Like any mediation, the FDR practitioner will assist the parties in evaluating proposals, identifying issues that need clarification or resolution, reality testing proposals and assisting the parties to reach a formal agreement that can be later documented. During FDR parties can also discuss and try to reach agreement about other matters including property settlement proceedings.

FDR can occur through various Government funded agencies such as the Family Relationships Centre, Relationships Australia or Centacare. However, as there is generally a high demand for government funded services, waiting lists mean that you could wait a significant period before being able to use these services. FDR can also occur by engaging a private FDR practitioner. Private FDR practitioners generally have more flexibility regarding availability. Fees for private FDR practitioners vary and we can assist you in finding an FDR practitioner and obtaining cost estimates.

FDR practitioners are also able to issue section 60I certificates. It is a requirement of the Family Law Act that prior to commencing proceedings, you participate or attempt to participate in FDR. In the event that you do participate and cannot reach an agreement, the FDR practitioner is able to issue a certificate stating that you made a genuine attempt. They can also issue a certificate that a party did not make a genuine attempt to resolve the dispute or that one party (despite being requested) did not attend FDR when invited to do so.

Useful Sites

- Family Court of Australia www.familycourt.gov.au
- Federal Circuit Court www.federalcircuitcourt.gov.au
- Federal Attorney General's Dept – Family Relationships 1800 050 321, www.familyrelationships.gov.au
- Relationships Australia – 1300 364 277 www.relationships.com.au
- Kids Help Line 24 hours – 1800 551 800
- My Family is Separating – What now? www.familyseparation.humanservices.gov.au
- Centrelink www.humanservices.gov.au/customer/dhs/centrelink
- Child Support www.humanservices.gov.au/customer/themes/child-support-and-separated-parents
- Department of Human Services www.humanservices.gov.au
- Queensland Department of Justice – Domestic violence information www.courts.qld.gov.au/courts/magistrates-court/domestic-and-family-violence
- DVConnect – 24 hours 1800 811 811
- The Brisbane Domestic Violence Service – 07 3217 2544 www.bdvs.org.au
- Domestic Violence Resource Service – Toowoomba 07 4639 3605
- Legal Aid Queensland www.legalaid.qld.gov.au
- Rural Women's Outreach Legal Service – 07 4616 9700, www.tascinc.org.au
- Mensline Australia www.menslineaus.org.au
- National Council for Single Mothers & Their Children www.ncsmc.org.au
- National Association of Community Legal Centres www.naclc.org.au
- Toowoomba Children's Contact Centre - Toowoomba 07 4638 0035 www.tccc.org.au

P 07 4639 0000
F 07 4639 0001
E info@bwbfl.com.au

135 Margaret Street
Toowoomba QLD 4350

Po Box 3701
Toowoomba QLD 4350

P 07 3210 0281
F 07 3210 0282
E info@bwbfl.com.au

Level 5, 190 Edward St
Brisbane QLD 4000

Po Box 1735
Brisbane QLD 4001

bwbfamilylaw.com.au