BestWilsonBuckley
FAMILY LAW

Family Law A Best Wilson Buckley Guide

For information and reassurance about what might lie ahead when a personal relationship breaks down.

Family Law
A Best Wilson Buckley Guide

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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 July 2020.

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About this Publication

While 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.

To this end, the work we do and what we aim to explore in this publication includes:

- the structuring of property interests to minimise risk consequent upon the breakdown of marital or de facto relationships (sometimes called “preventative family law”);
- pre-nuptial or pre-cohabitation financial and superannuation agreements;
- 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;
- surrogacy agreements and transfer of parental responsibility;
- questions of surrogacy;
- child safety and protection;
- domestic and family violence protection issues, including making an application for or defending protection orders; and
- the exploration of alternatives to litigation, including roundtable conferences, family dispute resolution, mediation, and collaborative law.

More often than not, family law issues arise at times of personal upheaval when stress and emotions run high. The intention 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 to provide some clarity and help alleviate uncertainty in these situations.

About Best Wilson Buckley Family Law

Best Wilson Buckley Family Law began our journey in 2009 as Toowoomba's first firm specialising exclusively in family law. Since then we have also become a local presence in Ipswich, North Lakes and Brisbane. In 2015, we joined the Shine Group as their specialist family law business, offering a greater presence across Australia.

We continue to practice exclusively in family law and have a depth and breadth of expertise to offer you security and confidence in the knowledge that you are in many safe sets of hands.

We work in a very personal area of law so we like to meet you face-to-face to get to know you and understand not only your needs but how to tailor a solution that works for you. Sometimes, however, 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 are committed to providing a total client experience, and draw on support from a cultivated network of financial advisors, accountants and therapists, where needed, as well as through our relationships with fellow legal practitioners, to achieve the best possible outcome for your future.

At Best Wilson Buckley, we practice in such a way that honours the family you have built, as well as protecting your financial wellbeing and the future of your children. We are proud to have built our practice on a set of values that gives our clients safety and security, a sense of purpose, and the tools for their new life pathway.

Your First Meeting at Best Wilson Buckley

We understand that your first 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 prepared, 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 any current concerns. The breakdown of a personal or 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:

- 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 urgent financial or parenting issues;
- any pressing concerns you may have for your personal safety or the safety of your child or children; and/or
- any obstacles you feel there may be 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 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.

We will reserve around 60 - 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, without your prior consent, 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 to intervene should the situation become problematic.

In the event 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 client 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 after-hours support mobile telephone 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.

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, or 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 you and your former spouse to make some immediate decisions in relation to more practical matters impacting upon your children and joint assets. These can 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 an 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 and, if you feel that you or your children would benefit from obtaining this type of assistance, please inform us at your initial attendance.

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 FDR 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.

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 is 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 at least 12 months immediately before filing for divorce.

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

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

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 two 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?

You can make your own application for a divorce. However, we recognise that some clients prefer to have a solicitor draft the application on their behalf.

To apply for a divorce, there are two options.

- **Option 1 - the paper way**

You can obtain forms from the Federal Circuit and Family Court of Australia. The court has 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.

- **Option 2 - the electronic way**

You can use the online Commonwealth Courts Portal. To apply electronically for a divorce, you will need to register and create an account with the Commonwealth Courts Portal. You can then complete your application securely online 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 on your behalf at the hearing.

What does it cost to get divorced?

The Federal Circuit and Family Court of Australia sets the fees for filing your divorce application, which is currently $940. Depending on your financial circumstances, you may be eligible for a reduction in the filing fee on the basis of financial hardship.

If you choose to seek our assistance with your divorce, our professional fees will be charged as per our client agreement with you.

What happens if we have children?

If there are children aged under 18 that were 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 applicant must attend the hearing either in person, by telephone, or through a solicitor. You can avoid this appearance if you make a joint application with your spouse.

You will not need to attend the hearing if there are no children under the age of 18.

Can I oppose a divorce application?

If the grounds for divorce have been satisfied, there are very few opportunities to 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 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. It is important to note that the granting of a divorce order does not finalise arrangements about the division of property, spousal 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 your divorce order becomes effective (one month and one 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, you will need to make an application for leave to be granted by the court for you to apply out of time, which can be costly and is not always guaranteed.

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

De Facto Relationships

Amendments to the Family Law Act in March 2009 allowed de facto couples to access the federal family law court system for property and maintenance matters. Previously, couples in de facto relationships were reliant upon the state jurisdiction in order to resolve their property settlement disputes.

A person is in a de facto relationship with another person if:

- they are not legally married to each other;
- they are not related by family; and
- having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

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; and
- access and divide superannuation entitlements as part of a property settlement.

The Federal Circuit and Family Court of Australia 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 two years;
- there is a child of the de facto relationship;
- 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 included recognition of financial agreements between de facto couples under the Family Law Act.

Parenting Matters

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 orders 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 his or her 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.

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 places 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, intended to help families deal co-operatively and practically with relationship difficulties and separation.

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".

When determining "what is in a child's best interests", the law says the starting point for this concept is 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. In some circumstances, the court may find that one parent should have sole parental responsibility for the child, however, this is generally only applied when there has been abuse of the child or family violence.

It is important to note that the 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 a child 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 a child benefits from a meaningful relationship with both of his or her parents, provided this does not put the child at risk of harm.

The Act specifically requires parents and courts to consider the child 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 interests 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. They will also consider methods in which any risk can be mitigated, for example, by limiting the length of visits or having some level of supervision.

The objectives of the Family Law Act 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 fulfil 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 primary considerations are:

- 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.

The court will give greater weight to the need to protect the child from harm if this conflicts with the benefit to a child in having a meaningful relationship with both parents.

Additional considerations

The additional considerations to be taken into account are:

- 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 fulfil, 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); and
  - the likely impact any proposed parenting order 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; and
  - 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; and
- any other fact or circumstance that the court thinks is relevant.

How are a 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 (ICL) or requesting the preparation of a family report.

An 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; and
- request reports from counsellors, doctors and other professionals who interact with the 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 his or her 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 is 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 courts, including the 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. 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 children, 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 nights 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 businesslike 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.
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; and
- 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; and
- 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 as 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 judge 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 centred;
- demonstrate stability in their personal circumstances and parenting decisions;
- provide a safe, secure and stable environment for their child;
- 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 Buckley we are committed to our clients embracing the above ideals, and will discuss with you the importance of putting yourself in a position emotionally 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 who are simply 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.

Then Chief Justice of the Family Court, Diana Bryant, has previously 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 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 when 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 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 regard 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 to 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 videoconferencing?
- 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.

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

The payment of child support is regulated by Services Australia, the government agency responsible for assessing, collecting, and transferring child support payments. 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:

- by the application of a statutory formula found in the child support legislation by Services Australia;
- by agreement between both parents 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 Services Australia following separation but, if a parent is in receipt of some form of government benefits, there is likely to be a requirement imposed by Services Australia 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 Services Australia.

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, Services Australia will use the statutory formula which takes into account the following:

- the incomes of both parents (including notionally adding back certain income 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 as set by Services Australia.

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 Services Australia 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 or receive, you can access the online child support estimator. Remember that the estimate is just that and should not be relied upon without making a formal application for assessment with Services Australia.

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; a process we can assist with. Alternatively, an application can be made to Services Australia 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 the 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; or
- 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
  - their responsibility to maintain a resident child, which significantly reduces their capacity to support the child support child.

The "Parent's guide to child support" is a helpful Services Australia website which provides information to help parents understand the child support scheme. However, 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 appropriate advice for your circumstances.

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 for both parties.

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, extreme 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 stages:

1. **Valuing your joint property**

The first stage involves determining the net value of all property. This is irrespective of whether property is held legally by you, by your former partner, or by both of you jointly. Property includes any asset or interest you hold, such as 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 stage 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 the 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 will not 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 often find that the contributions of each party have been equal. This can be altered by any significant distinguishing contribution on your part or your partner's behalf.

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 who generated an income to support the family.

3. The "future considerations" adjustment

The third stage 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;
- your 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 is important to note that there is no presumption of equality - that is, no one automatically gets 50% of the property pool.

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

- the parties were in a similar financial position at the 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 are examples of factors that could 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 and relationships (between 1 to 5 years), the courts tend to more closely examine what contributions were made to each asset and by whom. As a result, a party can often 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, not only 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 an early 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 court order or binding financial 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 matter.

Spousal Maintenance

When a relationship (marriage or de facto) ends, a party may be entitled to claim spousal maintenance. Spousal maintenance is financial support paid by a party to a relationship to their former spouse in circumstances where they are unable to adequately support themselves.

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/or
- 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. These include:

- where one party has the care and control of a child or children;
- the age and state of health of one of the parties; and
- 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 account 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
- who the children live with.

It is important to remember that, even if one party is unable to adequately support themselves, 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.

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 two years of the date of separation if you were in a de facto relationship.

It is important to obtain timely advice if the issue of spousal maintenance and your right to receive, or liability to pay, spousal maintenance may arise following your separation.

Financial Agreements

A financial agreement is a contract between parties to a relationship. These contracts can be made before, during, or after matrimonial and de facto relationships.

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. In other words, the agreement can deal with:

- how the property or financial resources of either or both spouses, including superannuation, is to be dealt with; and/or
- the future maintenance for either spouse.

Requirements for a "binding" financial agreement

To be "binding", the requirements of sections 90G or 90UJ of the Family Law Act must be satisfied. For a "planning" financial agreement, the agreement must also address how you and your spouse's needs and circumstances may change over time.

One of the most important aspects of a financial agreement is that both parties must receive independent legal advice, and arrange for their respective solicitors to sign a statement annexed to the agreement confirming that the relevant advice was provided. It is therefore necessary for both parties to engage separate legal representation before a financial agreement can be entered into.

What are the risks?

Financial agreements have historically been set aside by the courts for:

- duress;
- lack of independent legal advice;
- lack of comprehensive disclosure of financial information and documents;
- inadequate legal advice;
- poorly prepared or incorrectly executed agreements; and
- failures to otherwise comply with the legislation.

This list is not exhaustive. It can be both difficult and costly to seek to set aside a financial agreement in the future on one of the grounds set out above and, on the other hand, equally costly and less certain to enforce the financial agreement.

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

Why are some family lawyers reluctant to prepare "planning" financial agreements?

A financial agreement entered into prior to marriage or prior to 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.

Several court decisions have brought about a degree of uncertainty regarding the ability of family law practitioners to make these agreements binding and not liable to being set aside at a later point.

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. At Best Wilson Buckley, our team of specialist family law solicitors can assist to prepare these agreements in appropriate circumstances.

Alternatives to Court-Based Dispute Resolution

There are some very strong options for resolving family law 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. It is recognised, however, that 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. Some of the more prevalent options are explored below.

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, practising 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. 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. 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.

Best Wilson Buckley has practitioners 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 be used later 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 to 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.

Best Wilson Buckley boasts a team of mediators that are able to act for both legally represented and self-represented parties in reaching an agreement in relation to any family law matters in dispute.

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. It is not required for property settlement orders.

FDR requires parents to make a "genuine effort" to resolve disputes relating to parenting matters. Some exceptions apply in situations involving family violence, 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 later be documented. During FDR, parties can also discuss and try to reach an agreement about other matters including property settlement proceedings.

FDR can occur through various government funded agencies such as the Family Relationship Centre, Relationships Australia, Centacare, CatholicCare, or UnitingCare. There can be waiting lists for government funded FDR providers and you should consider making enquiries about private FDR services as well. Fees for private FDR practitioners vary and our team can assist you in finding an FDR practitioner and obtaining cost estimates on your behalf.

FDR practitioners are also able to issue section 60I certificates. It is a requirement of the Family Law Act that prior to commencing court 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.

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 litigating 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 the process;
- being less formal than court proceedings before a judge;
- not having to wait for the court to allocate hearing dates as arbitrators are usually private;
- arbitrators 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.

Formalising an Agreement

Many people believe that litigation is inevitable in a relationship breakdown. This is not the case. At Best Wilson Buckley, 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.

Parenting

There are two options for formalising arrangements that have been agreed in relation to parenting matters for your children, being parenting plans and parenting orders made by consent.

Parenting plans

Parenting plans are an effective and inexpensive option, especially in the short-term and in amicable situations where both parents agree to the arrangements. A parenting plan can be used to formalise agreed arrangements for the everyday as well as special arrangements. They are also often used where an unexpected occasion arises, where arrangements are needing to be changed, or where there may be urgency in formalising arrangements.

For an agreement to be classed as a parenting plan, it must be in writing, signed by each party (preferably on each page), and dated. It is always a good idea for both parties to have a copy to refer back to. Parenting plans are often drawn up with the assistance of a family dispute resolution practitioner, mediator or family lawyer. They can also be drawn up by the parties themselves and are not submitted to the court for approval.

Parenting plans, while a useful method of formalising parenting arrangements, can have a significant legal impact on your matter, currently and into the future, and it is for this reason that legal advice on the force and effect of any plan is highly recommended.

Consent orders

A more formal option for documenting agreed parenting arrangements is in the form of consent orders. These typically work in much the same way in that the arrangements are largely agreed, or negotiated by the parents (and their family lawyer as needed) in the first instance. Consent orders can then be ratified by the court, upon the court being satisfied that they are in the best interests of the child, to become a legally binding and enforceable document. This has the benefit of the terms being able to be enforced in the event there is a serious breach down the track that cannot be resolved amicably for whatever reason.

Consent orders are the preferred option for most family lawyers as they provide legal foundation to the arrangement and the safety of being able to take further action down the track if needed. Enforcement options are not typically available in cases

where the parenting plan in place was not formalised by the court. However, consent orders are less flexible than parenting plans, as they are in effect until the child/children turn 18 years of age, unlike a parenting plan that can be reviewed. They can only be varied upon proving to the court that there is a significant change in circumstances.

Property and spousal maintenance

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 drawn in the sand", you could be exposed to your spouse trying to make a claim some time 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.

Consent orders

The first manner of formalising an agreement in relation to property settlement is by application for consent orders. To obtain consent orders, it is necessary for both parties to complete the relevant application for consent orders form and lodge this jointly with the court, together with the signed minutes of consent orders that you propose. 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;
- how you have agreed to provide for the maintenance of a party (if any); and
- how the agreed division might affect your financial position.

Upon lodging the application, a judicial officer of the court will consider the information provided and decide whether the order can be made and if 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.

It is important to note that a consent order is not immediately binding when signed. The orders must be filed in the court and it is not until the orders are granted by the court that they will become binding.

Financial agreements

The second way of formalising an agreement in relation to property is by 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. Financial agreements can be used by both married parties and parties in a de facto relationship.

A financial agreement is binding from the time that it is signed by the last party and can be used to extinguish a party's right to claim for spousal maintenance. It therefore can be quicker to enter into a financial agreement rather than incur the delay associated with having consent orders considered and made by the court.

There is no external review of a financial agreement and the terms of the agreement do not have to be “just and equitable”.

Whilst a financial agreement does not require the court’s approval, each party is required to obtain independent legal advice from a solicitor in relation to the effect of the agreement and how it might affect their rights before the document can be signed by them.

Importantly, property transferred between spouses in accordance with a financial agreement or court order is generally exempt from stamp/transfer duty. We can work closely with your accountant and financial planner to ensure that any agreement is drafted in the most tax effective way.

In summary, you can document your property settlement:

- by consent order;
- by financial agreement; or
- by a combination of both consent orders (in relation to property settlement) and a financial agreement (in relation to spousal maintenance).

Best Wilson Buckley can assist you to determine which method is best for you and provides you with the best protection.

Surrogacy

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

What is a surrogacy arrangement?

A surrogacy arrangement is an arrangement between a woman (the birth mother) and her partner/spouse (if applicable) 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 her partner/spouse if she has one) 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:

- all of the parties to the surrogacy arrangement (birth parents and intended parents) must be at least 25 years of age when the surrogacy arrangement is entered into;
- mandatory counselling for the parties to a surrogacy arrangement is required prior to the birth parents entering into the surrogacy arrangement with a specially qualified fertility counsellor; 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 the birth parents 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.

Best Wilson Buckley have experience assisting parties in entering into surrogacy arrangements and have successfully obtained orders transferring parentage and parental responsibility.

Paternity

On occasion there may be some doubt 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 to:

- establish exactly who the parents of a child are;
- 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.

Child support and paternity

Prior to Services Australia (the government agency responsible for assessing, collecting and transferring child support) accepting an application for child support, it is necessary to establish who the parents of the child are and therefore who is 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 Services Australia 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.

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

Services Australia has no legal power to make decisions about paternity; it is a matter for the court. The court 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 a DNA paternity test) whether you, the paying parent, are 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 Services Australia 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 to repay previously paid child support.

Child Safety and Child Protection

The Queensland Department of Child Safety, Youth & Women (DCSYW), or other similar state-based child protection agencies, may become involved with a family following a notification being made to them by another parent, a mandatory reporter (such as a teacher, doctor, psychologist, or child care provider), or other concerned person.

When the DCSYW contacts any parent, the initial reaction may be to not assist in the assessment or investigation. While there can be concern, and often the assessment of the DCSYW may not be the same as the parent's assessment, it is important that information is sought. You need to know what the allegations are. How are they being looked at? Are the children going to be spoken to separately? Does the DCSYW have a plan in place? What is the next step?

There are many options available to the DCSYW, and if you are in this situation it is very important that you get specific advice in respect of your matter at the earliest possible opportunity and during each step. Some of the options that may be available are:

Safety plan

This is a document usually occurring after discussion with the DCSYW and sets out both a clear position (from the DCSYW) about the identified risks and the steps that can be taken to minimise risk. If the plan is appropriate and able to be complied with, the DCSYW may either try to put in place a longer term plan, or they may determine the unacceptable risk is no longer unacceptable and cease involvement with the family. These plans can last for six months or less, and do require a parent or caregiver to agree to the plan.

Intervention with parental agreement

This is very similar to a safety plan in that it requires the parents to agree, states the "worries" of the DCSYW, and things that need to be done by the family to protect the child. An intervention with parental agreement can go for up to 12 months, and are usually prepared with involvement of the parents.

Child protection application made to the Children's Court

This involves an application to the court, and there are many different applications that can be sought by the DCSYW. The DCSYW can only make an application if there is an unacceptable risk to a child, and the plans or agreements above have not minimised the risks enough. The applications can be made very urgently and, if one is likely to be made, urgent advice should be sought as to how best to manage the situation.

Long term guardianship order

If one or more short term (two years or less) orders are made, the DCSYW can then determine that they need to seek a long term guardianship order. This will continue until the child is 18 years of age, unless it is revoked earlier.

With matters that involve the DCSYW, it is very important to have early advice. If you get advice early, you will be made aware of the steps the DCSYW will be likely to take.
Child protection orders also have an impact on family law orders made in the Federal Circuit and Family Court of Australia. This is important to seek advice about as well, again at the earliest possible occasion.

While family law certainly includes child protection law, it is its own specialised area. Many family lawyers do not work in this area, and we recommend you always seek information and advice from a lawyer who is appropriately trained and experienced in this very different area of law. Best Wilson Buckley boast a team of experienced child safety and child protection family lawyers who are available to help you navigate through this complex and emotional area of the law.

Domestic and Family Violence

The term “domestic and family violence” is given a broad definition in the eyes of the law. It includes physical, sexual, emotional, psychological, or economic abuse and other threatening or coercive behaviour that seeks to dominate or threaten the safety of someone else.

Everyone has the right to live without fear of violence and abuse, and the law provides legal protection for those in violent relationships. A domestic violence order (DVO), as it is known in Queensland, seeks to limit the behaviour of a person who may be violent towards you such that they are well behaved toward you and anyone else that is named on an order. Once an order is made, it is considered a serious criminal offence if the order is breached.

Who can apply for a DVO?

The law enables anyone to apply for a DVO if they are experiencing violence provided they are in a “relevant relationship”. A relevant relationship is defined as:

- an intimate personal relationship (i.e. between a married or de facto couple);
- a family relationship (i.e. between a parent and a child or a relative over 18 years of age); or
- an informal care relationship (i.e. where one party depends on the other for assistance in daily activities).

If you are experiencing violence in a relationship, you may wish to:

- apply for a DVO to help stop the violence; or
- ask the police to apply for an order on your behalf against the perpetrator of the violence (known as a police application).

How do I apply for a DVO?

If you are making a private application, you can apply for an order at your local magistrates court. If you seek the assistance of the police, you can do so at your local police station.

If you believe the normal application process will not protect you soon enough and that your safety is at immediate risk, you can make an application for an urgent temporary protection order. An urgent court date is set after the time of applying and a temporary protection order may be issued before the other party is given notice of your application. The next court date will allow for the other party to attend and respond to your application.

If your matter is not urgent, you will be given a future court date and the other party will be notified of your application and the date to attend court. The responding party has three options. They can:

- consent to your application;
- consent on a without admissions basis; or
- oppose your application.

If a party to a proceeding consents to an order on a without admissions basis, they are agreeing to an order being made but not necessarily agreeing to the allegations made in the application. Where a party opposes the application, a further court date will be set for a hearing and the matter may be set down for trial to test the evidence and allegations made. The court may also provide dates for when your court material needs to be filed and served on the responding party, and you may require the assistance of a lawyer and barrister at your hearing.

What happens if an application for a protection order has been made against me?

If you are named as the respondent in an application for a protection order, you will be served with a copy of the order by the police. If a temporary protection order has been made, you will also be provided with a copy of that and the terms will be explained to you. It is important that you fully understand any restrictions made by the order. Having a protection order in place, be it a temporary or final order, is not a criminal offence. However, if a protection order is breached and you are charged with breaching an order and found guilty, then this is a criminal offence. As such, it is very important that you are aware of and understand the terms of any order made against you, even if you disagree with the allegations being made.

Just because someone has made an application against you, it does not necessarily mean an order will be made. For an order to be made, the magistrate must be satisfied that:

- you were in a relevant relationship with the aggrieved (as described above);
- there has been an act of domestic violence committed by you against the aggrieved; and
- it is necessary and desirable for an order to be made.

If you contest the application made against you, there will be a trial held in order for the magistrate to determine the matters listed above. If ultimately it is found that these elements have been met, then the magistrate will consider what conditions should be placed on the order and the duration of the order. A standard order is generally in place for five years. If an order is not made, the application can be dismissed.

If you do not necessarily agree with the facts as alleged in the application, however, you nevertheless consent to an order being made, you may wish to consent to an order on a “without admissions basis”. Before doing so, you should obtain legal advice so as to be sure that the terms of any order are not excessively restrictive or will not create problems for you in other areas, for example, in regards to parenting matters or your ability to work in certain roles.

No one deserves to live with domestic violence. Everyone should be able to feel safe and happy within their home. If you do not feel safe, we recommend that you consider your options and whether you need to contact the police or a lawyer to discuss your situation. Best Wilson Buckley can assist with making an application, or responding to one made against you, and can provide you with legal representation in court.

Useful Sites

- Brisbane Domestic Violence Service – 07 3217 2544; https://www.bdvs.org.au
- Community Legal Centres Australia – https://clcs.org.au
- DVConnect – 1800 811 811; http://www.dvconnect.org
- Family Relationships Online – 1800 050 321; https://www.familyrelationships.gov.au
- Federal Circuit and Family Court of Australia – https://www.fcfcoa.gov.au/
- Kids Help Line 24 hours – 1800 551 800; https://www.kidshelpline.com.au
- Legal Aid Queensland – 1300 65 11 88; www.legalaid.qld.gov.au
- MensLine Australia – 1300 789 978; https://mensline.org.au
- Queensland Courts – Domestic and Family Violence – https://www.courts.qld.gov.au/going-to-court/domestic-violence
- Relationships Australia – 1300 364 277; https://www.relationships.org.au
- Rural Women's Outreach Legal Service – 07 4616 9700; http://www.tasclaw.com.au/rural-womens-outreach-legal-service
- Services Australia – Centrelink – https://www.servicesaustralia.gov.au/individuals/centrelink
- Services Australia – Child Support – https://www.servicesaustralia.gov.au/individuals/child-support
- Services Australia – Separated Parents https://www.servicesaustralia.gov.au/individuals/separated-parents
- Toowoomba Children's Contact Centre – 07 4638 0035; https://www.tccc.org.au
- 1800RESPECT – 1800 737 732; https://www.1800respect.org.au