

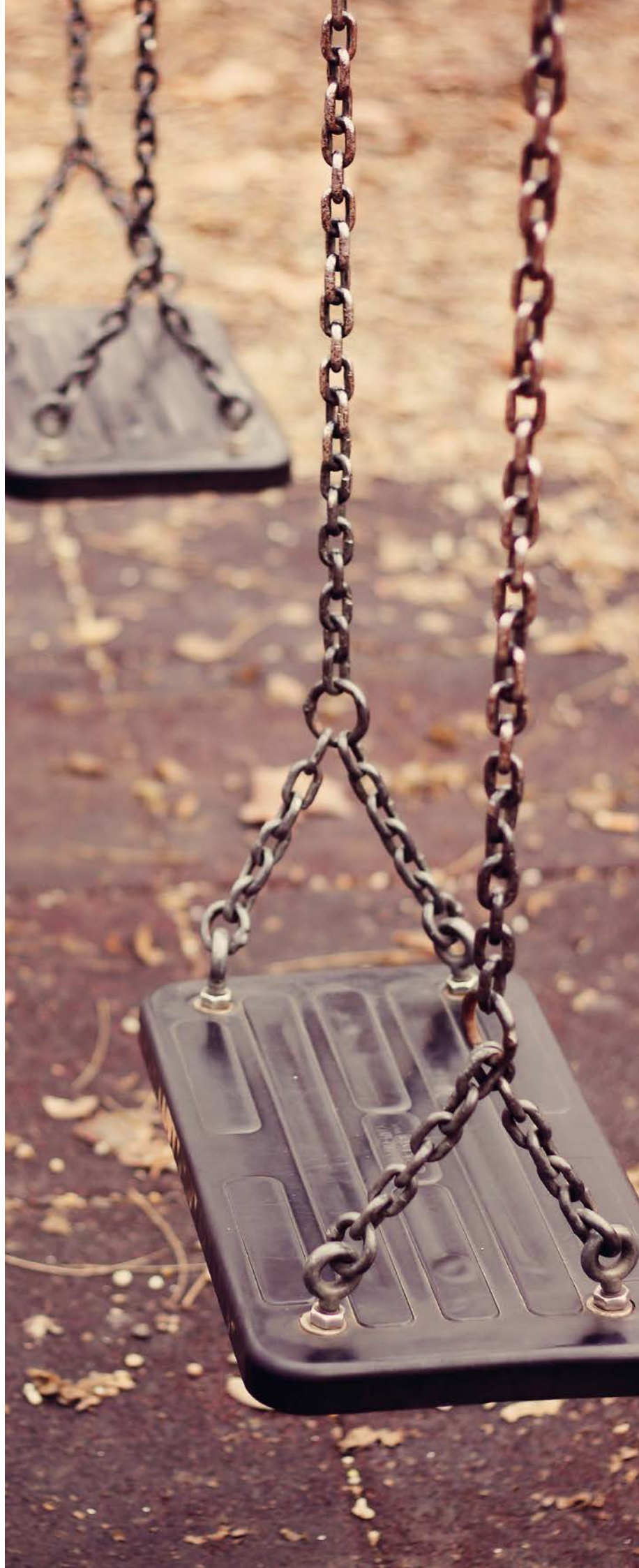
# FAMILY LAW

## A BRIEF GUIDE

### KNOW YOUR POSITION AND MINIMISE THE PAIN

This Guide is designed to give you a brief snapshot of Family Law in Victoria and Australia, in particular –

1. The Basics
2. Children
  - a. Child Support Under the Child Support Agency
  - b. Child Support Agreements
  - c. Parenting
3. Financial Separation
  - a. The 3 Basic Options
  - b. Binding Financial Agreements
  - c. Minutes of Consent Orders
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4. Spousal Maintenance
5. Mediation
6. Divorce
7. Binding Financial Agreements as a Pre Nup
8. Intervention Orders
9. Injunctions and Restraining Orders
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# **KNOW YOUR POSITION**

If you become one of the unfortunate many who must navigate their way through this legal space, it is important to know your position as best you can, based on your circumstances.

From knowing the legal playing field, you can then decide the best way to move forward to conclusion and be in the best position possible to move on thereafter.

What follows is a brief commentary on some of the main areas that are dealt with in the Family Law space, for your review and use as you deem fit.

We hope you find it useful.

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# 1. THE BASICS

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## EVERYBODY GET COUNSELLING!

This is not so much a legal comment as a practical recommendation - everyone involved should get counselling – both of the parties, either together or separately, and potentially children as well.

The psychological side of getting through a separation or other family law issue is by far and away the most difficult aspect.

**You may wish to visit [www.relationships.org.au](http://www.relationships.org.au) or call 1800 050 321.**

By comparison the legal side of things can be easy.

The law lays out a clear frame work of the process to finalise matters between parties. It is then simply a matter of how co-operative and amicable the parties are, and their desire to conclude things efficiently and cost effectively, or otherwise.

## AUSTRALIA IS A 'NO FAULT' JURISDICTION

Since 1975 when The Family Law Act came into existence, if one party wants to end a relationship, it ends, without regard to any fault of one party or the other.

From there, resolution of a parties' affairs is not affected by any one party's behaviour, save for behaviour that may affect childrens' custody, or the future needs of a party.



## 2. CHILDREN

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The primary focus of the Family Court is children. Their welfare transcends all other considerations of the Court.

### A. CHILD SUPPORT UNDER THE CHILD SUPPORT AGENCY

Under the Child Support (Assessment) Act 1989, every parent has a primary duty to maintain their child or children. Child support is assessed and collected by the Child Support Agency (CSA), which is part of the Australian Government Department of Human Services.

In practice, this means that where there is a significant difference in incomes of the parents, legally the parent with the higher income who is not the primary carer of children, must contribute a sum of money on a regular basis to the welfare of the children.

Child Support payments are assessed using a formula considering amongst other factors the respective parent's income and the time that the children spend with each parent.

You can go onto the Department of Health and Human Services website for more information and use the Child Support calculator to get an estimate of child support payments.

### B. CHILD SUPPORT AGREEMENTS

Parents are not obliged to use the CSA and are perfectly entitled to reach their own arrangements regarding child support. If the parties want the arrangements to be formalised then they can enter into a Binding Child Support Agreement.

These are especially relevant if parents want to formalise non- periodic payments like school fees or health insurance payments which are not usually covered by a periodic child support assessment.

Binding Child Support Agreements can only be entered into where both parents are represented by solicitors who will need to give advice about the Agreement and sign a certificate certifying that they have given advice on the advantages or disadvantages of entering into the Agreement.

It is very difficult to discharge a Binding Child Support Agreement once it has been signed off.





## C. PARENTING

The presumption under law is that each parent has equal shared responsibility for their children when they are below the age of 18. This is still the case even after divorce, separation or remarriage.

This presumption can be altered when there are reasonable grounds to conclude that it is not in the best interests of the child to have equal shared parental responsibility.

Situations where this might occur are due to one parent's inability to properly care or provide for the child because of illness, financial position or not being close enough to the child (lives interstate or in another country).

Parenting matters cannot be dealt with in a Binding Financial Agreement (see section 7).

A separate agreement must be made. The main three options are:

1. The parents work together to make a parenting plan – either through counselling, mediation or otherwise;
2. A consent order is made that the Court approves; or
3. The Court makes an enforceable parenting order.

These options are summarised as to their advantages and disadvantages briefly below.

### Parenting Plans

This is a written agreement that lists the parenting arrangements for the children.

This is the best option, being the most cost effective, efficient and low stress, and it means you do not have to go to Court.

The downside is these agreements are not legally enforceable – so they can be 'messed with' and subject to change, where there is no Court order to say otherwise.

It remains the preferred option as it allows both parents control and flexibility as to the arrangement and does not involve legal fees and costs.

### Consent Orders

This is a written agreement that a Court has approved. It is therefore legally enforceable. It may be the result of a Parenting Plan that was previously in place (if at all) or completely different depending on the circumstances.

There is legal recourse for a parent if the other does not comply and it is difficult to amend as it will involve legal costs and fees. Importantly with consent orders both parents agree to the plan.

### Parenting Orders

These usually are made when parents cannot agree on the arrangements for their children.

The Court makes these orders to safeguard the best interests of the children, and will take into account various factors when making a parenting order.

The two main factors are:

1. The benefit the child will have by having a meaningful relationship with both parents and other important people like grandparents and;
2. The child is protected from both physical and psychological harm. The Court will also look at which parent can provide for the best interests of the children.

The Court will try not to separate siblings unless it is necessary for the child's welfare.

The opinion of the children can be considered as well, particularly if they are older.

# 3. FINANCIAL SEPARATION

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## THE THREE BASIC OPTIONS

There are three (3) basic methods to attain a split -

1. Binding Financial Agreement - entered into after being advised by separate lawyers;
2. Application and Minutes of Consent Orders at Court - effectively like a Binding Financial Agreement but paperwork is lodged with and approved by Court; and
3. Court action.

The first two are by agreement, the latter is where you are unable to agree the split and so are requesting the Court (i.e. the Judge) to do so on your behalf.

### 1 BINDING FINANCIAL AGREEMENTS

If you amicably agree a split at a level with which you are comfortable, i.e. getting agreement with your ex at an agreed % each, and which assets may be retained by each or otherwise sold, a relevant Binding Financial Agreement can be prepared (cheaper, quicker but less certain - there are a list of reasons for why a Binding Financial Agreement might be later overturned, set out in the Family Law Act).

### 2 MINUTES OF CONSENT ORDERS

Alternatively, the parties can create an Application and Minutes of Consent Orders for the Court (costlier, longer yet completely certain).

Calculation of the % split starts at 50/50 for any relationship of substantial duration, then is affected by a range of factors including

1. what each party brought into the relationship at the start,
2. what each party contributed during the relationship,
3. relative ages of the parties,
4. what qualifications, skills and experience each party has attained,
5. ability to earn future income,
6. the size of the asset pool,
7. the future needs of the parties (any health issues etc), and
8. what is generally regarded as fair and reasonable in all the circumstances.

At the end of the day it is a subjective assessment - an 'art' not a 'science'.

### 3 COURT ACTION

You of course want to avoid this third method, being the most expensive, time consuming and stressful.

Court action can be commenced by either party at any time.

Once commenced, the other party must respond, and then a defined process is followed towards a final Hearing if necessary, with steps along the way including but not limited to any applications for any specific interim orders like parenting, spousal maintenance, sale of any property and so forth, full financial disclosure, and mediation.

It is of course the most expensive option, is drawn out, and has the other disadvantage of taking control away from the parties – at a final Hearing the Court will ultimately make decisions as it deems appropriate, regardless of the wishes of the parties.



# 4. SPOUSAL MAINTENANCE

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Spousal maintenance payments are separate to Child Support payments.

Where one party earns substantially more than the other, there is a legal responsibility for the person with the greater income to financially assist the other ex-partner if they cannot meet their own reasonable expenses from own personal income.

It is subjective and specific to each couples' circumstances.

If agreement cannot be reached on amount, an application can be made to the Court, who will consider the relative capacity to pay and needs of the party making the application.

They will also consider the age and health of the parties, the arrangements for the care of children, as well as the physical and mental capabilities of the parties for employment.

An application can be made at any time after separation. However as for a property split, there is a 12-month period after any divorce, within which an application for spousal maintenance should be made.

Otherwise, as for a property split, you must seek leave of the Court to bring an application and prove that there are special circumstances why you should be allowed 'out of time'.

For a de facto relationship, the time limit for making an application for spousal maintenance is two years from the date of separation.

Spousal maintenance may be paid on a periodic basis for a specific period, such as until the children are old enough to attend school and the parent who is seeking the maintenance can resume paid employment, or to provide time to study and re-train to obtain employment.

It is common to settle the matter of spousal maintenance by way of a capitalised lump sum payment, rolled in with the property split, to avoid the need for ongoing payments.

Spousal maintenance ceases on the death of the receiving party, remarriage or upon the death of the person making the maintenance payments, depending on the circumstances. If there is a change in the financial circumstances of either party, then the order may be varied.

# 5. MEDIATION

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Family Law Mediation is widely supported by those who seek the benefits of parties being able to resolve their financial and child-related disputes in a controlled environment, with the assistance of an independent third-person Mediator.

Mediations can be arranged with or without lawyers prior to commencing proceedings, and indeed can be conducted during proceedings with or without lawyers as well, although once litigation has commenced, usually lawyers are involved leading up to and during Mediations.

If proceedings are commenced, then the law requires a mandatory Mediation in any event. If one is elected to be conducted at Court, then these are performed at no charge by a Court Officer. Otherwise the parties can elect to pay for private Mediation, agreeing on a mutually selected Mediator.

Mediations are conducted in an as informal and relaxed manner as possible, parties do not need to be in the same room, and whatever is said or conveyed, stays with the Mediation and if settlement is not achieved, does not affect later proceedings.

The Mediators engaged are usually very experienced Barristers, or professionally trained people with legal backgrounds. The good ones have a very high settlement ratio.

A properly organised Mediation enables all areas of a dispute to be analysed and resolved without the need for lengthy and expensive litigation.

It can achieve a timely and cost-effective settlement and is a recommended option by MCP.





# 6. DIVORCE

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## FIRSTLY, DID WE GET PROPERLY MARRIED?

Before you apply for a divorce you must ensure that you were married validly (S 51 Family Law Act 1975 (Cth)). A marriage will be declared void if it was a marriage of bigamy, a marriage between close relatives, the requisite formalities were not adhered to, one party did not consent due to fraud or duress or either party was too young (both parties must be 18 years old unless a Court order has been issued – s 11 Marriage Act 1961 (Cth)). Certain marriages performed overseas will also not be recognised in Australia. If a marriage is declared void, then it is deemed to never have existed under Australian law.

## SEPARATION

The only way to get a divorce is if your marriage has irretrievably broken down. You must be separated for at least 12 months and there must be no reasonable chance of getting back together. If the Court believes that there is a reasonable chance of you resuming cohabitation, they will not grant the divorce.

## SEPARATION UNDER ONE ROOF

You can still live under the same roof and be separated for the purposes of your divorce application. One or both parties, however, must honestly believe that the marital relationship will never be resumed. It is possible to resume living together as husband and wife once during this period, for up to three months. If this period is less than three months and you end up separating once more, you will still be able to apply for a divorce.

## MARRIAGES UNDER TWO YEARS

The Court will not grant a divorce if it is filed within 2 years of the date of marriage. The exception to this is if you have both attended counselling and produce a certificate to the Court to this effect under. If only one party undergoes this counselling, the other can apply for a leave of Court to bypass this requirement.

## CHILDREN

The welfare of any children is one of the Court's utmost priorities. The Court will not grant your divorce unless the welfare of your children and their continued development is guaranteed. It is likely that you will be asked to attend Court if your children are under the age of 18. The Court must be convinced that a stable situation is in place for the children before the application will be approved.

## THE DIVORCE APPLICATION

A divorce application can be obtained from the Family Law Courts website ([www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)). There are certain documents that must be attached to this application, such as your marriage certificate and proof of citizenship. In certain situations, affidavits will also need to be completed, for example saying that you were separated even though living under the same roof.

This application can be completed by one party or together. If you file it by yourself, it will then be served upon the other party and a Court date will be set.

# 7. PRE NUPS

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Commonly known as a 'prenuptial agreement' or 'prenup' a Binding Financial Agreement (BFA) is the technical name within the Australian legal system. With more than 50% of marriages ending in separation, these are important in protecting your assets in the event your relationship breaks down. These agreements can be made before, during or after a marriage or de facto relationship.



## WHY MAKE A BFA?

There are many advantages to entering a BFA particularly if you have already been through a divorce. The major advantages include

- Decisions made whilst both parties are happy in the relationship are likely to be more reasonable than when the relationship has broken down;
- Can reassure people that their partner is in the relationship for the right reason by blocking their access to certain assets or funds;
- If the relationship does break down, costs of the separation are greatly reduced if an effective BFA has been put in place; and
- A BFA is helpful in estate planning, ensuring that upon death your Will will operate as intended.

**Scope:** A BFA can cover most issues relating to property. Common things that are dealt with by a BFA are:

- How property acquired before, during or after the marriage or relationship are divided,
- How money acquired before during or after marriage or relationship is divided, and
- Whether there will be an ongoing payment by one party to the other.

## LEGAL EFFECT OF A BFA

If a BFA is valid, it removes the Court's jurisdiction to issue orders about the distribution of assets which would otherwise be governed by the Family Law Act 1975 (Vic). The BFA does not have to be lodged with the Court when it is made, rather only when applying to enforce the BFA through the Family Court.

## REQUIREMENTS FOR CREATING A VALID BFA

The BFA must be in writing and both parties must sign it. Each party must obtain independent legal advice about the Agreement prior to signing it. This advice must detail how the BFA will affect their rights and the advantages and disadvantages of signing one of these Agreements. A signed statement to this effect must be provided by each legal practitioner and attached to the BFA. All parties must have their own copy of the Agreement.

## ALTERING THE AGREEMENT

The BFA can be altered, although all the above requirements must be met again to ensure that it remains an enforceable, valid Agreement.

## TERMINATING THE BFA

It can be difficult to terminate a BFA unless both parties consent to it. Otherwise, if the BFA complies with the above requirements it is a binding and enforceable Agreement against both parties.

**Voluntary termination:** Each party must sign a 'Termination Agreement.' Before this occurs, however, each party must get another document from their lawyers saying that they have been given independent legal advice as to the merits of terminating the BFA.

**If both parties cannot agree to terminating or altering the Agreement:** The Court can amend or terminate the BFA if you can prove either that dishonesty was involved in making the Agreement; the Agreement is no longer practical to enforce; there has been a dramatic change in the care and welfare of any children or the other person has acted in an unconscionable manner.

# 8. INTERVENTION ORDERS

**These are designed to provide you with protection from family or domestic violence.**

Under the Family Violence Protection Act 2008 'family violence' is broadly defined and covers behaviour including:

- Threats;
- Physical and sexual abuse;
- Psychological abuse;
- Economic abuse;
- Damage to property or threats to damage property;
- Harm to pets; and
- Behaviour which is coercive or controlling which puts a family member in fear for their own or another's safety and wellbeing. Exposing children to family violence is itself family violence.

If you or children have been victims of family violence you should immediately decide whether an Intervention Order is appropriate.

Usually the quickest and most efficient way to progress an Interim Intervention Order, is to simply contact your local Magistrates Court.

The Magistrates Court has the power to make Intervention Orders which may include conditions prohibiting the perpetrator of the family violence (known as the respondent) from attending where you live or work or go to school, prohibit the respondent from contacting you or the children, prohibit the respondent from having a third party contact you or the children, revoke firearms licences, require the respondent to undergo counselling and so on.

If an Application for an Intervention Order has been wrongly or inappropriately brought against you, you may wish to defend it, or try and reach an agreed negotiated resolution.



# 9. INJUNCTIONS & RESTRAINING ORDERS

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The Family Court is frequently called upon to make injunctions and restraining orders in both property and parenting disputes.

There are clear guidelines as to when the Court will impose an injunction or restraining order on someone.

For example, regarding property matters, generally the Court must be satisfied that there is a real risk and evidence that one of the parties intends to squander or waste assets to frustrate the property settlement of the other party.

In parenting matters, the types of injunctions that are commonly sought include:

- a restraining order that prevents a parent from moving the residence of a child;
- a restraining order that prevents a parent from travelling interstate or overseas with a child;

- a restraining order that prevents a parent from altering a child's school, name or other important detail;

- a restraining order that prevents parents from contacting, approaching or communicating with each other.

In property matters, common types of injunctions that are sought include:

- a restraining order that prevents one party selling, transferring or dealing with items of property such as bank accounts or chattels;
  - a restraining order that prevents one party from dealing with business assets, other than in the ordinary course of business;
  - a restraining order that prevents one party from occupying a particular property.
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# 10. TOP TEN FREQUENTLY ASKED QUESTIONS ABOUT FAMILY LAW

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## 1. Can I get child maintenance if my ex works for cash?

The Child Support Agency can only calculate child maintenance payments based on tax returns and other information provided by the parties.

## 2. What if my ex won't let me see my children?

Should a Parenting Plan not be agreed, either by direct agreement of the parties or via mediation, you have no choice but to bring a proceeding in the Court.

## 3. How does an Intervention Order work?

These are determined by the Magistrates Court system, in conjunction with the Australian Police. You will be assisted by calling or visiting your local Court or Police Station.

You should obtain one at any time that you fear for your personal safety, or for the safety of your children.

## 6. How long do we live together before we are considered de facto?

Generally, a couple must have been together in a de facto relationship for two years before they can legally make a claim for a property settlement against their former partner.

The definition of a de facto relationship is that the parties were in a 'domestic relationship' and living together on a genuine domestic basis.

Determining whether a de facto relationship exists the Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate in the circumstances of the case. There are a range of applicable factors listed in the Family Law Act.

## 5. When can I make an agreement with my partner about Financial Separation?

The Family Law Act allows such an Agreement to be made prior to, during or after marriage – whether after separation or divorce.

## 6. Should I cancel my Will when I separate?

Yes, because if you don't divorce or marry again, your ex may still inherit from your Will, and you may not be happy about this!

Wills automatically cancel on marriage, and on formal divorce.

## 7. What is considered in a Financial Separation?

In short, the Court is empowered to consider whatever it deems fit – including Family Trusts, Super, businesses and so forth, care for children of course, initial Contributions, Contributions during the relationship, future earning capacity, future needs of the parties, and financial resources outside the names of the parties. Just about anything!

## 8. Can I get spousal maintenance if I was de facto?

Yes. The law applies similarly, as if you are married.

## 9. Same sex relationship – does it make any difference?

It makes absolutely no difference. At law you are treated equally regardless of gender.

The definition of 'de facto' also include same sex couples, as well as heterosexual couples.

## 10. Can I be a same sex parent?

The short answer is yes. The longer answer is there are complexities around this and specialist advice is needed in each case.

## WHERE TO FROM HERE?

You may complete our Instruction Sheet, and/or meet or telephone first to discuss your circumstances and have your queries answered.

All contact is confidential.

All initial meetings are without charge or obligation. We are happy to help you understand the options available to you in this space.

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