

Family & De-Facto Law



Start again. With confidence.

**S
&
Q** QUINN &
SCATTINI
Lawyers

GLOSSARY

When dealing with family law it is important to have a clear understanding of legal jargon. When it comes to legal documentation semantics are everything.

Here are a few common terms that you may hear when talking to a lawyer.

For more information about legal terminology you can consult the Australian Government's Family Law Court website.

Affidavit | A statement written by a party or witness. When you submit evidence to a court you will most likely use an affidavit. It is important to include as much as you can in an affidavit as you may not get the chance to add to it in court. An Affidavit must be authorized by a lawyer or Justice of the Peace.

Appeal | The process of challenging a decision made by the court.

Contravention | If a party does not comply with a court order they are in contravention of that order.

Court Order | A court order stipulates actions that you or another party must carry out to support a decision made by the court.

Divorce Order | An order made by the court that results in the dissolution of a marriage.

Enforcement Order | An additional order issued by the court to make a party comply with an existing order.

Family Dispute Resolution | A process where a couple who have recently divorced or separated see a dispute resolution practitioner to try and resolve their issues outside of court. Family dispute resolution is mandatory for couples applying for Parenting Orders.

Family Law Courts | The Family Law Courts of Australia consist of the Federal Circuit Court which handles most cases, and the Family Court of Australia which deals with more complex matters.

Independent Children's Lawyer | A court-appointed lawyer to represent a child and his/her best interests.

Parenting Plan | An agreement between parents about the arrangements for their child(ren). Unlike a Parenting Order the plan is not approved by the court.

Service | The process of presenting another party with court documents. Service implies that all relevant parties have been presented with the necessary documents. Documents must first be filed in accordance with the court.

A Guide to Family Law in Queensland

CONTENTS

The Family Law Courts	4
Our Family Law Team	5
Divorce and Separation	6
Family Dispute Resolution	8
De Facto & Same Sex Relationships	9
Property Division: The Family Home and Superannuation	10
Contributions & Future Needs	12
Prenuptial Agreements	13
Children Matters	14
Spousal Maintenance	16
Changing Your Name	16
Updating Your Will	17
Family Violence	18

The Family Law Courts

Most matters concerning divorce, property division and child disputes between married couples and de facto partners are dealt with under the Family Law Act (1975) in the Family Law Courts. Matters taken to court will appear before the Federal Circuit Court or the Family Court.

Matters dealt with by the Family Courts include all child-related matters, enforcement and contravention of court orders, location and recovery orders, determination of parentage, spousal maintenance and property disputes.

Most issues will go to the Federal Circuit Court; however, if a case is more complex than most, involving abuse, violence, child abduction or other difficult matters, the case may appear before the Family Court.

If you consent to have your case heard in the Federal Circuit Court you cannot withdraw your consent in order to apply to the Family Court. If the Federal Circuit Court believes your matter should be heard before the Family Court they may transfer your case.

Why we recommend you use a lawyer

Family Law is a complex and subjective area of the law. Some matters can be settled outside of court but you should still retain legal representation to ensure that you receive fair and deserved entitlements.

At Quinn & Scattini Lawyers we can ensure that you are aware of your rights and responsibilities, assist you in family dispute resolutions and provide representation - should the matter go to court.

You are free to take your case to court yourself if you wish but this could be to your disadvantage should your spouse have representation. To be successful in court a working knowledge of court processes such as questioning and cross-examination is needed.

Your case must also be presented to the court in appropriate language with the correct affidavits and forms attached. Because of this it is highly recommended that you seek legal advice.

Our People

Our Family Law Team

In society today, almost everyone has a friend, workmate or relative who has been or is going through a separation or divorce. Unfortunately, this often leads to misconceptions about rights, entitlements and likely outcomes.

At Quinn & Scattini we have an experienced Family Law team, including Accredited Family Law Specialists, and this experience is available at any of our offices to help you.

At Quinn & Scattini our lawyers will:

- Advise you not to sign anything that you don't understand
- Explain to you all of your options and the associated risks
- Estimate the expected costs
- Keep an organised record of processes; and
- Ask you for all important documentation you have received from your spouse such as letters from their lawyer, previous court orders etc.



Tim Ryan
Director

Tim Ryan is a Director and leads Quinn & Scattini's family law practice.

Like all Quinn & Scattini practice leaders, Tim is an acknowledged expert in his field and is accredited by the Queensland Law Society as a Family Law Specialist.

Tim has acted for his clients in matters involving property pools with net values ranging between that of an "average" household and one where the net value exceeded \$800,000,000. In whatever circumstance, the same high level of professionalism and diligence has been applied.

Tim specialises in all areas of Family and De Facto Law and has a particular interest and experience in complex property issues. These matters have at times involved complicated corporate and trust structures whilst representing high wealth individuals. When necessary, he has conducted intricate forensic investigation into corporate structures, sometimes involving overseas jurisdictions.

Separation and Divorce

When a relationship is failing and most importantly, you and your spouse recognise that the union cannot be recovered, separation and divorce are options that you will have to consider.

Separation is the first step in the dissolution of a relationship or marriage and while it is not formally recognised by the court, it is an important step in the divorce process. **For de facto and same sex relationships, see page 10.**

SEPARATION

Some spouses choose to continue living in the one household. This may be in the interest of the children or because neither party wants to leave the house. **Neither spouse has legal obligation to leave without a court order, regardless of who's name the house is in.**

If you do intend to file for divorce after 12 months of separation, you must be able to prove that the marriage relationship has not been active throughout the time of separation. When spouses continue to live under the one roof they should **make sure they keep evidence of separation.**

To ensure that you can prove your separation it is best to **tell a friend or family member that you have separated** from your spouse. This means that if you must prove your separation at any stage they can submit an affidavit to support your case.

Separation is not formally recognised by any legal process; legally you will still be married. In order to file a divorce application a couple must have separated and not regularly engage in marital activities such as:

- sharing a bed
- eating meals together
- sharing bank accounts
- going on social outings together
- other activities they would do as a married couple

Because separation can be a grey area it is wise to seek legal advice. A lawyer can help you organise the information necessary to prove separation should you eventually choose to divorce.

DIVORCE

When you file for divorce you are filing an application to end a marriage, regardless of fault or even consent from your spouse. In order to submit a divorce application, evidence must show that the couple has not been living together as a married couple for 12 months collectively and that they have no intention of rectifying the marriage.

If a couple has been married for less than two years they are required to see a marriage counsellor. If the counsellor feels that the marriage cannot be salvaged or that other circumstances apply then the couple may be provided with a certificate from the counsellor endorsing the divorce.

The papers submitted for a divorce application include questions regarding children under 18. In order to grant a divorce the court must approve arrangements made for children to ensure that they are accounted for.

Couples can file for divorce if they have been separated for 12 months collectively. A couple can get back together for up to three months, separate again and still apply for divorce as long as they have been separated for a total of 12 months all together.



While arrangements for children are considered in a divorce **they do not constitute a court order and are not legally binding.**

A divorce deals specifically and exclusively with the dissolution of marriage and does not cover property matters or matters involving children.

For matters involving children a couple must attend Family Dispute Resolution before they can apply to the courts for a Parenting Order. A court will not begin the divorce process until proper arrangements have been made for children in the marriage.

Family Dispute Resolution

Recent changes to Family Law have been made to ensure separating couples make a genuine effort to resolve disputes through family dispute resolution before applying for court orders regarding children (unless special circumstances apply). A court will not accept applications for Parenting Orders if they are not accompanied by a certificate from an accredited dispute resolution practitioner showing that you have attempted to resolve your matter outside of court.

Family dispute resolution includes mediation, arbitration and counselling. Family dispute resolution help couples reach agreements and resolutions without the confrontation of going to court. They are less expensive, less formal and less time-consuming than going to court.

A family dispute resolution is handled by an independent third party experienced in matters of family disputes. It is important to note that **the independent person who handles the dispute cannot give you advice** on the matter and you should therefore, seek legal representation prior to the family dispute resolution.

In some instances, when there is a history of violence or abuse within a family, dispute resolution may not be appropriate or safe. In these circumstances it is highly recommended that you seek legal advice. In some instances the court may exempt families from family dispute resolution if the above circumstances apply.

If you and your partner can reach an agreement through family dispute resolution you can use a Parenting Plan to record the terms of your agreement or you can apply to the Family Court for Consent Orders.

If you have tried to reach agreement through family dispute resolution and feel that a court order is necessary go to page 13 to read about Parenting Orders.

Separating couples must make a genuine effort to resolve disputes through family dispute resolution before applying for court orders regarding children

De Facto and Same-Sex Relationships

A de facto relationship can exist between two people, of the same or opposite sex, who are neither related by family nor legally married to another, who have been living together in a genuine domestic relationship.

The area of family law regarding de facto and same sex-relationships can be subjective at times and it is wise to consult a lawyer when separating from your partner. **Even though you are not married you may be entitled to the rights of a married couple when it comes to Parenting Orders, property settlements and financial disputes.**

As of March 1, 2009 couples in a de facto relationship can apply to the Federal Circuit or Family Court to have matters or disputes decided, as would a married couple. You must be able to prove that your relationship qualifies as de facto. The court will base your qualification as a de facto couple on the following factors:

- Duration of your relationship
- Living arrangements
- The existence of a sexual relationship
- Financial relationships, sharing and any dependencies
- The ownership and use of properties
- Commitment to the relationship
- Whether the relationship is registered
- The involvement of children

You must apply to the courts within the two years after the dissolution of your relationship otherwise you will require the court's permission to file matters.

To ensure that you can prove the validity of your relationship and therefore be entitled to the partial or full rights of a married couple you should consult a lawyer.

De facto relationships and children

De facto couples can apply to the Family Courts to determine matters related to children. Both the Federal Circuit and Family Courts deal with children matters for de facto couples in the same way they handle disputes between married couples. You should consult a lawyer if you and your partner cannot reach agreement.

Your relationship must have dissolved after 1 March, 2009 for the courts to deal with your dispute under new legislation

Property Division: Simple & Complex

Much like with Parenting Orders, a couple should make an attempt at dispute resolution outside of court before they request a property order. Reaching agreement outside of court means less time, money and stress for both parties.

Both parties should exchange all documentation relating to the property they are trying to divide.

If you reach agreement with your former-spouse then you can record your agreement in a Binding Financial Agreement or as a Consent Order of the Court. This way you can prevent any further property disputes. If the couple cannot agree on a fair division of their property outside of court, either spouse can apply to the court for a Property Order.

You have from the time of separation until 12 months after divorce or 2 years after separation from a de facto relationship, to apply for a property division or settlement. After this period you can only apply if a late application is granted by the court due to special circumstances.

It is important to keep record of superannuation statements, tax returns, bills and other financial records to help you prove your contributions to the relationship. When dividing up property the most valuable assets tend to be the family or relationship home and superannuation.

Property can be anything of value including:

- Companies
- Trusts
- Money
- Shares
- Superannuation
- Houses
- Land
- Cars
- Businesses
- Partnerships
- Furniture
- Any other household goods

The Family Home

When allocating real estate in a property settlement the division will be affected by how many properties are owned, who is the primary care giver of any children involved and also who's name any properties may be in.

If the couple owns enough real estate to make an equal division without selling the family home, usually one spouse will be awarded the family home – ordinarily the primary care giver if children are involved. If there is no way to fairly divide real estate, such as one person buying out the other, then the family home must be sold.

If you decide to leave the family home it does not affect your entitlement. It may even be advised that you leave the home and take what you feel is a fair share of items from the home if you feel it may be difficult to get them later.

You should consult a lawyer when dividing property, especially if your name is not on any titles. Your partner may try and sell the home and a lawyer can help you stop them from doing so and ensure that you get your fair share in court.

A lawyer can also help you with stamp duty exemption, which applies to the transfer of vehicles and property between your former-spouse after a separation.



Superannuation

Your superannuation is treated as property for the sake of property division. Both you and your former spouse will need to fill out a **Superannuation Information Form and Declaration** to indicate the total value of your superannuation fund(s).

The courts are able to split superannuation into separate funds or allocate a payment to go to another person when the policy is paid out.

Law concerning the division of super funds is very complex and we highly recommend consulting with a lawyer.

Contributions and Future Needs

If you decide to take your matter to court the courts will decide what share each person gets based on two factors: their contributions (both indirect and direct) to the marriage and their future needs.

Contributions

Direct Contributions are items such as wages or income contributed throughout the relationship, work done to a real estate property, work done in building or maintaining a business and inheritances of either partner.

Indirect contributions are considered to be contributions such as raising any children or maintaining the family household.

Both contributions play an important role in the decision of the court. In some cases indirect contributions may be considered just as important and homemakers may receive an equal share in the property division.

A lawyer can help you make sure all of your contributions are accounted for— especially if the majority of your contributions are indirect.

Future Needs

A person's future needs are based on the age and health of the person, whether they will be supported by others in the future (maybe parents or a new partner), whether they are supporting children and their ability to take care of themselves.

When the court takes into account which spouse is supporting any children, child support or spousal maintenance will weigh in on the decision.

The weight of supporting children on the decision may be affected by child support or spousal maintenance. It is important to consult a lawyer to ensure you receive your full entitlement.

Pre-Nuptial Agreements (BFAs)

A prenuptial agreement is formally known as a Binding Financial Agreement (BFA). The term BFA is preferred, because even **people who are already married are still able to enter into a BFA**. The purpose of a BFA is to provide parties with some financial certainty should their relationship break down.

Those who enter into a BFA are essentially 'opting out' of the Family Law Act and the way this legislation affects the resolution of property matters.

You cannot enter into a BFA without the consent of your partner. If your partner does not wish to enter into the agreement neither you or a court can force them.

There are many reasons for entering into a BFA; these include:

- To protect the assets of one or both parties to the relationship
- To prevent future arguments over money
- To keep all of the current assets, liabilities and financial resources of each party separate and distinct.

If both parties agree, each will have to obtain separate and independent legal advice. You cannot both seek the advice of the same lawyer.



Children

Decisions about parents' responsibilities and duties are made in the best interest of the child, based on the Family Law Act. What the parents want is also taken into account but ultimately the court will make a decision about a child's care based on the child's best interest. **Before you can apply for a divorce order you must be able to show that you have made appropriate arrangements for any children you have under the age of 18.**

When making decisions about a child's living arrangement after a separation you must seriously and reasonably consider custody arrangements that are in the child's best interest. Where the child will go to school, their recreational activities, religious orientation and cultural influences may depend heavily on where and who they live with.

Parenting Plans

If you and your partner can come to an agreement about the living arrangements for the child then you can fill out a Parenting Plan. A Parenting Plan stipulates where the child will live, schooling, holidays, medical matters and who the child sees.

A Parenting Plan helps you and your former spouse be clear about the arrangements for the child. You can also update and change your Parenting Plan if the situation changes and both persons agree to the change.

A Parenting Plan is not legally binding. If you want your agreement to be legally enforceable you can apply for Consent Orders. If you and your partner cannot reach an agreement through family dispute resolution then you can apply for a Parenting Order.

Parenting Orders

As mentioned, you cannot apply for a Parenting Order unless you have made a genuine attempt to resolve your issues outside of court. Any Parenting Order made by the court is made in the best interests of the child. According to the Family Law Act, arrangements that include both parents with shared responsibilities are best for the child.

When the court makes a decision about a child they will consider what benefits the child gets from interacting with both parents and whether either parent presents any physical or psychological risk to the child. The court will also consider:

- What the child wants, depending on his/her maturity;
- How the separation of the child from certain relatives will affect him/her;
- The child's relationship with both parents and relatives; and
- How living with either parent may affect the child's culture and lifestyle.

The court will also assess which living arrangement is best for the child based on:

- Each of the parent's ability to support the child;
- How willing the parents are to support an ongoing relationship between the child and the other parent;
- The parent's available time and resources to have a meaningful relationship with the child; and
- The likelihood that the Parenting Order may lead to further applications or disputes in relation to the child.

A child is not allowed in a court room therefore, the court may rely on the word of friends or family members who can vouch for the child. The court may appoint an independent children's lawyer to represent the child and his/her interests.

Once a Parenting Order is in place both parents must adhere to it. You may need to encourage your child to spend more time with the other parent in order to conform with the order. If you or the other parent do not follow the Parenting Order a contravention application can be lodged stating that one parent has not been adhering to the order.



After Separation or Divorce...

Spousal Maintenance

In order to obtain a court order for maintenance, you have to be able to prove that you are unable to support yourself properly because of:

- illness
- old age
- an inability to work or because you are supporting children

You must also be able to prove that your former spouse can afford the support payments.

You can arrange spousal maintenance at the time of a property settlement. Payments can be arranged to be paid in a lump sum or periodically. Periodical payments can be organised with the Child Support Agency.

Time limits apply so it is best to promptly consult a lawyer.

Changing Your Name

If you are over 18 you can generally use any name you like as long as it is not offensive or intended for illegal or dishonest purposes. When you divorce or separate you may want to change your name if you no longer wish to use your partner's name. You are not obligated to do so. If you wish to return to your maiden name or birth name it may be necessary to show proof of the name in a birth certificate.

Changing Your Child's Name

If you separate or divorce and wish to change the name of any children you had with your former spouse you will need the former spouse's permission in most instances. If the child is able to comprehend the meaning of a change in name then the child should be consulted.

If you cannot get consent from the other parent you can apply for an order to the Federal Circuit Court and plead your case. As with all matters relating to Children, the court will decide whether changing the child's name is in the child's best interest.

Wills

A Will is a document that clearly sets out your wants and wishes in the event of your death. It is important to keep an up-to-date Will. If you die without a valid Will your property will be given to your most immediate family. If you do not have a family your property will go to the government.



Quinn & Scattini have a specialised Wills & Estates team lead by Accredited Specialist Russell Leneham.

If you need to dispute a Will our team can offer you “No Win, No Fee” in approved cases.

A lawyer can help you create a strong will that may help your wishes to be carried out in the event of your death, and ensure that your assets are distributed as you wish and your children are accounted for.

After Separation or Divorce

When you separate or divorce you should update your will. If you remarry your Will automatically becomes void unless you state your intention to remarry at the time that you wrote the Will. If you divorce, any assets or power left to your former spouse is void unless you state otherwise.

De facto or Same-Sex Relationships

If you are in a de facto or same-sex relationship it is important to have an updated Will to ensure your partner receives your property should you die.

If you have been in a relationship for two years or a total of two years or over three years then your partner may have the same rights as a married spouse. By keeping an updated Will you ensure that your partner is accounted for.

For Your Children

Updating your Will is important to ensure that your children are taken care of and/or your assets distributed as you wish, should you die.

A lawyer can help you write your will to ensure that you satisfy your obligations to provide adequately for your children. If you are the primary care giver to your children (they ordinarily live with you), you can state in your Will who you would like the children to live with in the incident of your death.

Unfortunately there is no way to ensure that your wishes made in your Will are carried out after your death. Your former partner may still apply for a Parenting Order and other parties may contest your Will if they feel they did not receive fair entitlements.

Family Violence

Family Violence is constituted by actions or intentions of a person towards a family member or their property that causes the family member to be scared or concerned for their safety.

You do not need to be physically hurt to get protection from someone who is conducting acts of family violence towards you or a member of your family.

If there is violence happening you should consult the police. The police have the power to arrest a person, confiscate weapons or file for a protection order on your behalf.

A protection order can stop a person coming into your home or confronting you at work or in transit, or getting close to members of your family.

If you are in the process of applying for any family law order or are currently adhering to a family order you should make the court aware at the time you apply for a protection order.

It is important to note that protection orders are dealt with through state legislation and family orders through federal legislation. Based on the constitution, federal legislation trumps state legislation.

This may affect you if you have a protection order against a former spouse who has visitation rights to his or her children. If that spouse comes into your home to visit his or her children, as ordered by a Parenting Order, they are not violating the protection order.

Protection Orders

In Queensland, a restraining order is referred to as a protection order. An application for a protection order against your spouse will be taken into account at the deciding of a Parenting Order. Protection orders should be taken extremely seriously as they may affect your former spouse's chances in court. Protection orders can be done two ways: they can be either court ordered or by consent.

A court ordered protection order means you or the police have applied to the courts, the alleged offender has not consented to the order and the courts have therefore issued a protection order.

A consented protection order is where the alleged offender has agreed to the order, but does not have to admit fault. A consented order will not be considered heavily by the court when deciding on a Parenting Order.

If a court-ordered protection order is in place the court may review the circumstance in which the order was granted and this may affect the court's decision.

Injunctions

You can apply to the Federal Circuit Court for an injunction if you are worried that you former spouse may try to interfere with property regarding your pending property settlement or may try to remove children from a jurisdiction regarding your pending Parenting Order.





Delivering Solutions Since 1974

Brisbane

Level 2, 102 Adelaide Street
Brisbane
Tel (07) 3222 8222
Fax (07) 3221 5350

Gold Coast

Level 1, 2406 Gold Coast Highway
Mermaid Beach
Tel (07) 5554 6700
Fax (07) 5554 6900

Beenleigh

99 George Street
Beenleigh
Tel (07) 3807 7688
Fax (07) 3807 7514

Ipswich

55 Limestone Street
Ipswich
Tel (07) 3202 3177
Fax (07) 3202 3695

Caboolture

1 King Street
Caboolture
Tel (07) 5499 3622
Fax (07) 5495 6582

Cleveland

141 Shore Street West
Cleveland
Tel (07) 3821 2766
Fax (07) 3821 2083

Jimboomba

Shop 1, 689 Cusack Lane
Jimboomba
Tel (07) 5540 3940
Fax (07) 5540 3233

1800 999 529

www.qslaw.com.au

mail@qslaw.com.au

**Individual liability limited by a scheme approved under professional standards legislation.
This is general advice only. You should seek specific advice for your particular circumstances.**