



# Family & De Facto Law



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# Contents



Family & De Facto Law: An Overview.....	1
Child Support.....	2
Children's Custody Issues.....	3
De Facto Property Matters.....	4
Divorce.....	5
Family Law Mediations & Arbitrations.....	6
Family Law Property Settlements.....	7
Family Violence.....	8
Financial Agreements.....	9
Same Sex Relationship Disputes.....	10
Spousal Maintenance.....	11
Surrogacy.....	12
Things to do After Separation .....	13
Terms Glossary.....	14
What Our Clients Had To Say.....	15

## About Ryan Murdoch O'Regan Lawyers

We are a general law practice which is organised into teams of specialised experts in each of our areas of law.

Our practice area teams are committed to focussing on their area of law to ensure you always have the expertise that you need.

And, unlike some other firms – who focus on only one area of law – we can offer expert solutions for all legal areas, without the need for you to search around.

As a client you can have comfort that irrespective of what problem you may encounter in whatever area of law, our teams in all our practice areas will be able to work in tandem to offer any other specialist solutions you might require – utilising the history we already know about you and / or your business.

*"Often, we meet our clients for the first time at the most stressful period in their life. Together we work to solve their personal and / or business*



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**Law Society**  
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# Family & De Facto Law: An Overview



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 Ryan Murdoch O'Regan Lawyers we can ensure that you are aware of your rights and responsibilities, assist you in family dispute resolutions (negotiations, mediations, arbitrations and court representation). We provide the best 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 is required, such as questioning and cross-examination.

Your case must also be presented to the court in appropriate language with the correct affidavits and forms attached. Because of this requirement we strongly recommended you seek legal advice from our Family & De Facto Law Team.

## 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* ("**the Act**") 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:

- 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 to hear your case.

## The plan we will develop for you:

1. Takes into account your individual circumstances – **we listen!**

2. Draws on our experience – **we are the experts!**

3. Helps you achieve the best possible outcome – **you win!**

***"Invest in the best. RMO Lawyers"***

We provide **fixed fee initial consultations** and offer **deferred fees**, in eligible cases.

We are happy to discuss payment options with you.

# Child Support

Financial support for children whose parents have separated is covered by the child support laws, which are administered by the Child Support Agency ("**Agency**").

Our expert child support lawyers provide expert advice and guidance on assessments and how it affects you, whether or not you are entitled to receive maintenance on behalf of your child / children, or are affected by an assessment to pay maintenance which you regard as incorrect or unfair given your particular circumstances.

The support a parent is liable to pay is determined by a formula which takes into account how many children are involved (including children by another relationship), the taxable incomes of both parents, the ages of the children and the time spent with the children.

The Agency website has an online calculator, as well as other useful tools such as a household budget checklist.

Child support continues until a child:

- reaches 18 years of age,
- marries or is in de facto relationship, or
- is subject to child welfare laws.

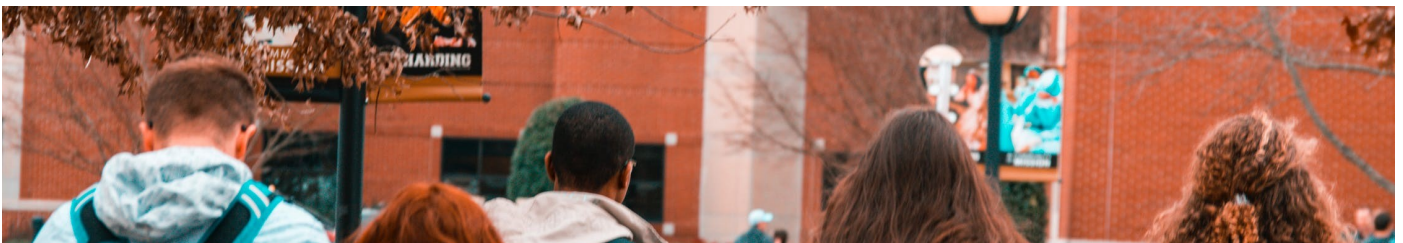
It continues until the last day of schooling if a child turns 18 whilst still at full-time school.

If a parent approaches Centrelink for assistance after a separation, Centrelink normally requires a child support application to be initiated, or a parent can lodge an application themselves.

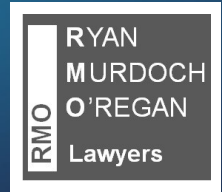
If parents have reached an agreement, they can enter into a child support agreement, which once registered with the Agency takes the place of an Agency assessment based on the formula.

These agreements are common where a parent has agreed to pay private schooling, to provide private health insurance or to contribute to medical costs.

The child support system assumes that on turning 18, a child miraculously ceases to be a financial drain. Most parents will recognize the fallacy in this, and the potential exists to seek maintenance for a child over 18 through the court system. The law requires proof of a need (usually the easy part) and an ability to pay. In practice a potential payer usually needs to have a well above average income to be at risk of an over-18 maintenance order.



# Children's Custody Issues



Hundreds of thousands of Australian children live with only one parent, and spend varying amounts of time with the other.

The law takes a subjective approach to the time a child or children spend with each parent.

There are three ways agreements or decisions are made by; a parenting plan, consent orders, or a judicial decision.

## **Parenting Plan**

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.

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.

## **Consent Orders**

If you and your partner cannot come to an agreement about the living arrangements for the child then you can apply to the court for consent orders to be made by agreement.

Consent orders are obtained by a joint application to the court, without any actual attendances in court. They have the same legal effect as parenting orders. If you disobey a consent order, it is effectively breaking the law and the court may apply a penalty to the party breaking the consent order.

## **Parenting Order / Judicial Decision**

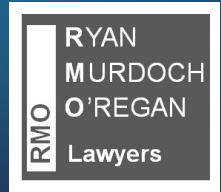
If you and your partner cannot come to an agreement about the living arrangements for the child then you can apply for parenting orders.

As mentioned, you cannot apply for a parenting order unless you have made a genuine attempt to resolve your issues outside of court. Any consent order made by the court is made in the best interests of the child.





# De Facto Property Matters



One of the major sociological changes of the past generation has been the number of couples who live together without ever having said "I do" in front of a marriage celebrant.

A de facto relationship has been described by judges as a relationship where a man and a woman live together as husband and wife without being married, and as with a married couple, a same sex couple can have property and financial claims against each other if they separate.

De facto property law also covers same sex couples.

There has been significant changes to the legislation to cater for same sex couples who do want to be married.

## **De Facto Property Settlement Claims**

De facto property settlement claims only arise in a de facto relationship if the parties have been together for two years, or have a child.

However, de facto property settlement claims may be made if there has been a substantial contribution and injustice would occur if the claim was not permitted.

Similar to property settlement claims for married couples, past contributions, both financial and non-financial, as well as future needs are accounted for to determine the appropriate division for the parties to a de facto relationship.

## **Superannuation**

Superannuation splitting is available to de facto couples, as they are with married couples.

## **Financial Agreements**

With the enactment of Part VIIIB of the Act, de facto couples may enter into financial agreements similar to those of married couples.

## **Child Support**

The carer of a child has the right to claim maintenance for themselves, but only until a child turns 12.

This right is based on a need, and is then subject to an ability to pay.

Child support and any matters relating to parenting are for the child support as well as family laws.



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.

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.

## **Filing For 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-years-old.

## **Granting A Divorce**

In order to grant a divorce the court must approve arrangements made for children to ensure that they are accounted for.

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



# Family Law Mediations & Arbitrations



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**

Family dispute resolution includes:

- mediation,
- arbitration, and
- counselling.

Family dispute resolution help couples reach agreements and resolutions without the confrontation of going to court.

These methods to resolve the family law dispute are less expensive, less formal and less time-consuming than going to court.

Family dispute resolution is handled by an independent third party experienced in family dispute cases.

It is important to note that the independent person who handles the dispute cannot give you advice on the case and you should therefore, seek legal representation from our experienced family lawyers prior to the family dispute resolution.

## **What If Family Dispute Resolution Is Not Safe For Me?**

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 from our family lawyers. In some instances, the court may exempt families from family dispute resolution if the above circumstances apply.

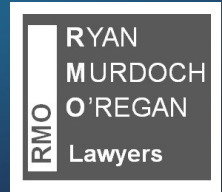
## **What If Family Dispute Resolution Works?**

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.





# Family Law Property Settlements



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 you and your former spouse cannot agree on a fair division of property outside of court, either spouse can apply to the court for a property order.

## **When Can I Apply For An Order?**

You have from the time of separation until 12 months after divorce or two years after separation from a de facto relationship, to apply for a property order, known as a property settlement.

After this period you can only apply if a late application is granted by the court due to special circumstances.

## **What Records Should I Keep?**

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.

## **What If I Have Left The Family Home?**

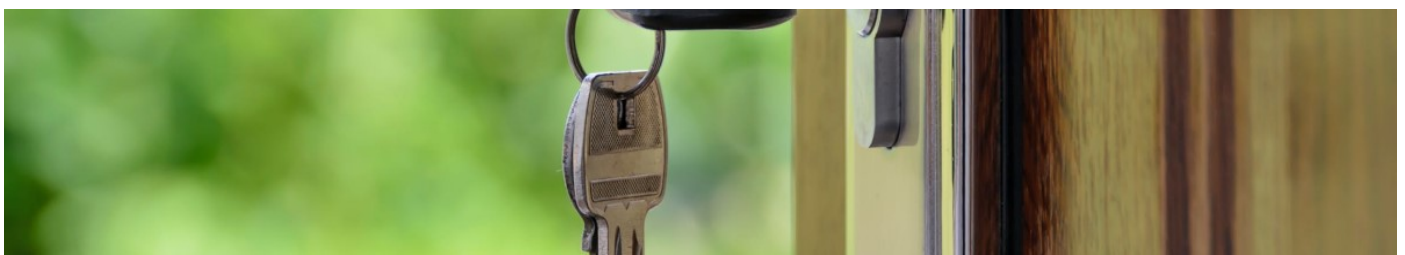
If you decide to leave the family home it does not affect your entitlement.

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.

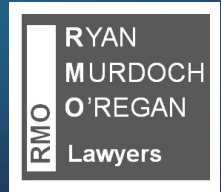
You should consult our experienced family lawyers lawyer when dividing property, especially if your name is not on any titles.

**Property can be anything of value.  
This includes:**

- any household goods,
- businesses,
- cars,
- companies,
- furniture,
- houses,
- land,
- money,
- partnerships,
- shares,
- super, and
- trusts.



# 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.

## **Protection Order**

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.

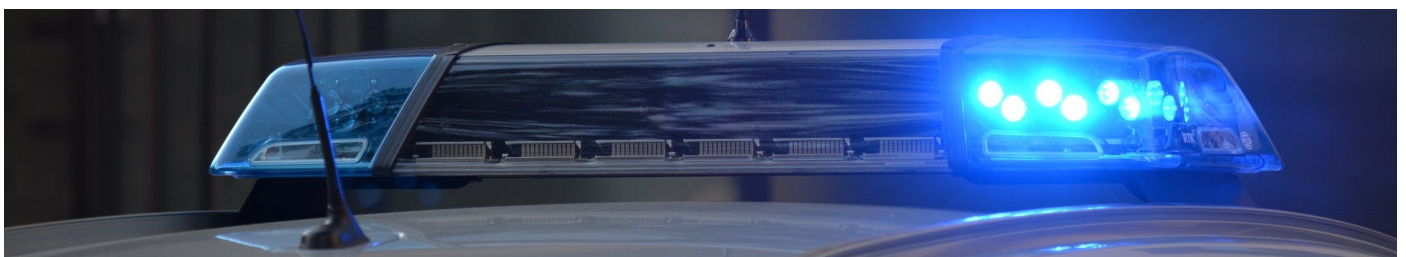
If that spouse comes into your home to visit his / her children, as ordered by a parenting order, they are not violating the protection order.

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.

Reasons you may be worried include you think 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.



# Financial Agreements



In both marriages and de facto relationships, couples can make binding financial agreements, whether before, during or after the relationship or marriage.

Most people have heard of a prenuptial agreement, which is perhaps the best known type of financial agreement.

Please note, we can only assist with financial agreement after separation.

We are unable to assist with financial agreements before or during relationships.

## **What Do The Agreements Cover?**

These agreements can cover a variety of matters:

- what is to happen if a separation occurs,
- what is to happen on a day to day basis, and
- what is to happen on the death of a partner.

If the proper formalities are complied with, such agreements will in almost all cases stop a court becoming involved and making property orders.

Obviously the benefit of a binding agreement is that if a relationship does not work out, there is no room for an argument about who gets what—that has already been agreed.

Financial agreements are very desirable where there is a big discrepancy in the financial positions of the couple, and are often used when a young couple is receiving substantial help from one of their parents.

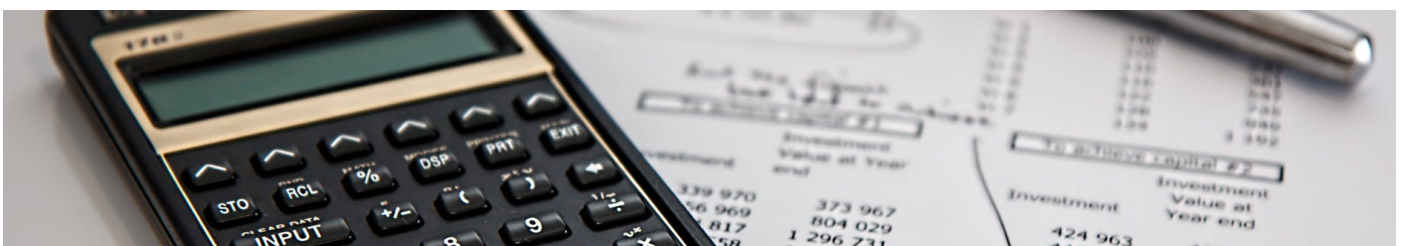
They are also important in second relationships, where both parties may have children of their own whom they want to protect financially.

No one starts a marriage or de facto relationship believing that it will fail, but the sad fact is that over a third will fail.

Having a binding agreement is not necessarily a sign of pessimism, but rather an acceptance of a possibility.

For many though, broaching the subject is very difficult, and in our experience sooner rather than later is important—presenting an agreement on the steps of the church is not recommended.

Our experienced family lawyers will expertly step you through all aspects of financial agreements, from the first phone call through to finalising the financial agreement.



# Same Sex Relationship Disputes



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 same sex relationships can be subjective at times and it is wise to consult our experienced family lawyers 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 same sex relationship / 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, and
- the involvement of children.

You must apply to the courts within the 2 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.

## **Same Sex / De Facto Relationships & Children**

Same sex and de facto couples can apply to the Family Courts to determine matters related to children. These disputes are handled in the same way as married couples.



# Spousal Maintenance



Most Australians are familiar with the term 'alimony', from reading about celebrity divorces or watching American television shows.

In Australia alimony is referred to as spouse maintenance, and is possible in both marriage and de facto separations.

Our experienced Family & De Facto Law Team can advise on making or defending claims.

## **How Do You Obtain 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, or
- old age, or
- 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 our experienced family lawyers.

## **Property Settlements & Spousal Maintenance**

It is possible to cash out spouse maintenance as part of a property settlement.

The spouse claiming maintenance receives more cash in return for waiving future maintenance rights, but if there are children involved, care needs to be taken, as an arrangement may be liable to be cancelled if they could suffer hardship.

In the ordinary suburban family situation, the usual problem is not proving a need, but rather the ability to pay. The major bread-winner, after he or she has housed themselves, supported themselves, and paid child support, will often have little ability to pay, and for that reason spouse maintenance is not the norm in middle income families.





Surrogacy laws introduced in Queensland in June 2010 mean that altruistic surrogacy arrangements are now legal throughout Australia.

Our experienced surrogacy lawyers can advise you on all aspects of surrogacy.

## **What is Surrogacy?**

Surrogacy is an arrangement whereby a woman carries a pregnancy for another couple or person.

Altruistic surrogacy simply refers to the fact that the birth mother receives no payment, reward or other material benefit or advantage as a result of the arrangement.

## **Is It Legal?**

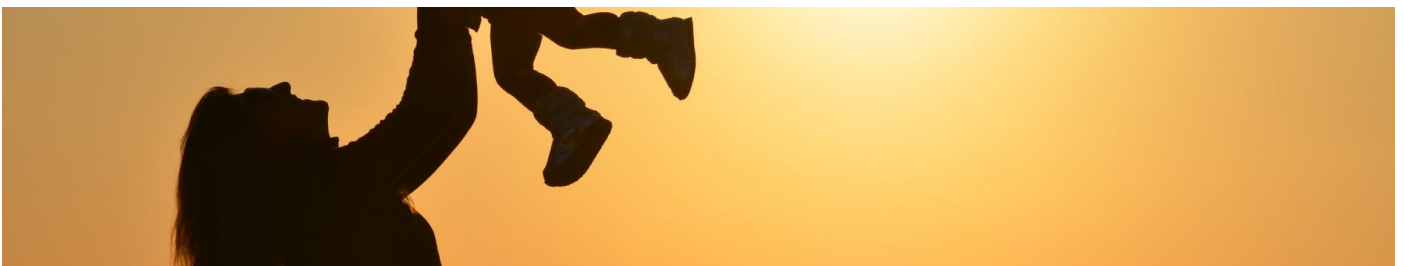
Before June 2010, altruistic surrogacy was illegal in Queensland. Since the passing of the *Surrogacy Act 2010* (Qld) ("**the Act**"), several changes to surrogacy laws have occurred, including:

- it is no longer unlawful for parties to enter into an altruistic surrogacy arrangement.
- it is, however, unlawful for parties to enter into a commercial surrogacy arrangement (i.e. one which involves payment, reward or other material benefit or advantage).
- surrogacy arrangements are unenforceable in that the birth mother or the intended parent/s may change their mind about relinquishing the child at any time before the court makes an order to transfer parentage.
- there is statutory provision for the reimbursement of reasonable costs incurred by the birth mother during the surrogacy.
- it is illegal to advertise for a surrogacy, as it is to receive fees for organising a surrogacy.

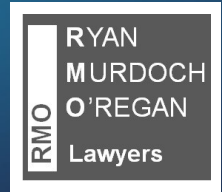
## **Who Can Enter Into A Surrogacy Arrangement?**

Any person, regardless of their relationship status, can be a party to a surrogacy arrangement.

Whether a person is single or married, heterosexual or homosexual, there is no bar on who can enter into a surrogacy arrangement, so long as the arrangement is not a commercial one.



# Things To Do After Separation



## 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.

## Updating Your Will

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.

If you need to dispute a will our Will/Estate Disputes & Litigation Team can provide "no win, no fee" arrangements, in approved cases.



# Terms 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.

**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



# What Our Clients Had To Say



*"I would like to say thank you to for all the help you have provided throughout my whole matter. You always kept me apprised of everything that was happening and kept costs as low as possible. You were very committed to getting the best outcome for me, which you did and for which I am very grateful. You did an excellent job and were very professional. CPW"*

*"I know you would say you were just "doing your job" but I want to thank you for all your assistance. Your unwavering professionalism and caring manner is exemplary. You are a credit to your profession! I wish you every success for the future. Thank you so much! TE"*

*"It is an absolute privilege to write a testimony for you, after taking over my property settlement matter from another firm of solicitors. Property settlement matters are very unsettling at the best of times, however, from the moment I met you I felt comfortable and at ease with your gentle and understanding nature towards me. Your professionalism, knowledge and communication were impeccable and I was kept up-to-date at all times. You always allowed questions to be asked and responded to them with ease. You did not sugar-coat my situation and advised me of the range which I could be looking at and I expected the worse as the day of the conciliation was drawing closer. On the day of the conciliation, you were well prepared and focussed. You were a lawyer on a mission, communication with me throughout the process. The way I described it to you was that you are a gentle soul until negotiating has to occur, then you turn into a bulldog. May I say a huge "thank you" for giving me back the peace in my body and mind as I am over the moon with the outcome you achieved for me on the day. What I have realised from this is....you get what you pay for, and more. MS"*

*"It is with sadness that I now come to the realisation that our association is coming to an end. I'm not sure if I am able to express to you how grateful I am that you have been my solicitor for the past two years. Your calming voice, your understanding of my unique situation, your care and concern, and you took the time to listen whenever I felt stressed and needed someone to talk to. I'm getting teary just writing these words. You are a wonderful person and I am blessed to have worked with you. PB"*

*"I really appreciated the direct and efficient approach to my matter and the professionalism and compassion in providing the service I needed within my budget. MG"*





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This is general advice only.  
You should seek specific advice for your particular circumstances.*