



A Guide to Divorce and Separation

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Introduction



Ending a relationship or marriage is an emotional and often heartbreaking process. It can be confusing and it's not a great time to be making important decisions without guidance.

Despite the heartbreak and emotions, tough decisions need to be made. It's crucial that you understand every step of the legal process and your rights. That's the purpose of this guide.

We've designed the guide to help anyone going through a relationship breakdown to understand each stage of the process and ensure you are prepared.

There are many factors to be considered. Among these are parenting agreements, financial support, property settlement and the divorce.

This guide is not designed to replace legal advice. One of the friendly Family Law specialists at WMD Law will be happy to assist when you need that advice.

Hopefully once you have read this guide you will have a firm understanding of the process ahead, your rights and the information you need to proceed.



The Process

Understanding the separation and divorce process will help you to navigate the various stages.

There are three main stages of a separation and divorce. Everyone copes with the various stages in different ways, don't be afraid to ask for help if you are feeling overwhelmed. There are many counsellors and support networks that will be able to make the transition much easier for you.

It's important to note that separating de facto couples (including same sex couples) usually have the same legal rights as married couples, in regards to property and financial settlements.



SEPARATION

The first step in the process is the legal separation. Whilst this may commence from the time that one of you leaves the home, you can still be living under the same roof and be legally separated. You will need to make some decisions at this stage about practical issues concerning your children and your assets.



PARENTING ARRANGEMENTS FINANCIAL/PROPERTY SETTLEMENT

The quickest and cheapest way to settle financial and parenting arrangements is without going to Court. That is done through the drafting of binding Consent Orders, which requires both parties to agree on the terms. These agreements are separate to the actual divorce.

When you are unable to agree on a financial settlement or parenting arrangements the Courts will need to be involved. We will discuss this in detail shortly.



THE DIVORCE

A couple can lodge the divorce application after they have been separated for 12 months.

The first step is completing the Application for Divorce. The second step is the Court hearing and you may not have to attend Court.





Separation

Separation is generally a tough time for all parties. Emotions are high and there is a lot to consider. Before deciding to move out of the family home it's a good idea to establish a firm understanding of your financial position and legal rights.

Most importantly get early advice. You will need to document all income sources and amounts. Next document all debts, insurances and expenses. Then consider all costs associated with moving out, setting up a new home and removalists etc. It's a good idea to prepare a budget. It may take some time for a financial settlement to take place, so ensure you will be able to cover the costs of leaving the family home. But even if you have no idea about the finances, getting early advice will mean that you are prepared to act in a way which will protect your interests. Whether they are related to property or children and it will prevent you being taken advantage of.

Below we have put together some things for you to consider:

- If you have children, where will they live and who will take care of them?
- How will you and your former partner support yourselves and your children?
- Who will pay outstanding bills or debts?
- Who will stay in the house?
- How will the rent or mortgage be paid?
- Who will pay any loan repayment?
- What will happen to any joint bank, building society or credit union accounts?
- What will happen to the house, car, furniture and other property?

Before separating seek legal advice.

A lawyer will ensure you understand your legal rights and responsibilities. They will protect your interests and explain cost effective options to help you reach an agreement with your former partner without Court proceedings. If you are even contemplating a separation then you should talk to a Family Law specialist, and we encourage you to contact our office today.



PARENTING ARRANGEMENTS
FINANCIAL AND
PROPERTY SETTLEMENT



Parenting Orders

When children are involved, a separation can be hard for them to understand, particularly if their parents aren't communicating.

Each parent has full parental responsibility for their children until they reach 18, unless a Court orders otherwise.

This does not change simply because you separate or remarry. If your children are under 18, try to remain focused on their best interests, putting aside any ill feelings toward your partner. This approach will save you time, money and most importantly, be easier on your children.

If there is a history of domestic violence it may not be possible to communicate with your partner, please refer to the Family Violence section on page 11 for more information.

Parenting Agreements need to be made and where possible, we recommend working with your partner directly to establish:

- When the children will be living with you.
- When they will be living with your partner.
- How much time they will spend with grandparents, family members or other interested parties.
- Any educational issues such as where they will attend primary or high school.
- Any other aspect of children's welfare, care and development.

Once agreements are made these can remain informal or be formalised through Consent Orders made by the Family Court. We find it is usually advisable to have an agreement formalised to minimise the chance of disputes arising in the future. If you are unable to reach an agreement you can apply to the Family Court or the Federal Circuit Court to make orders concerning your child or children.



The Family Law Act sets out a number of important principles in relation to children:

- Children have the right to know and be cared for by both of their parents.
- Children have a right to spend time and communicate on a regular basis with both of their parents and other people who are significant to them.
- Parents jointly share duties and responsibilities regarding their children.
- Parents should agree about the future parenting of their children.
- Children have a right to enjoy their culture.
- When the Court is asked to make decisions about children, it must regard the best interests of the child as being the paramount consideration.



Custody & Access

Rather than the terms “custody” and “access” the Family Court in Australia prefers terms that are more child focused. Instead the Court refers to where a child lives and who they spend time with.

This is the reason parenting orders are some times referred to as “residence” or “lives with” and “contact” or “spends time with” orders.



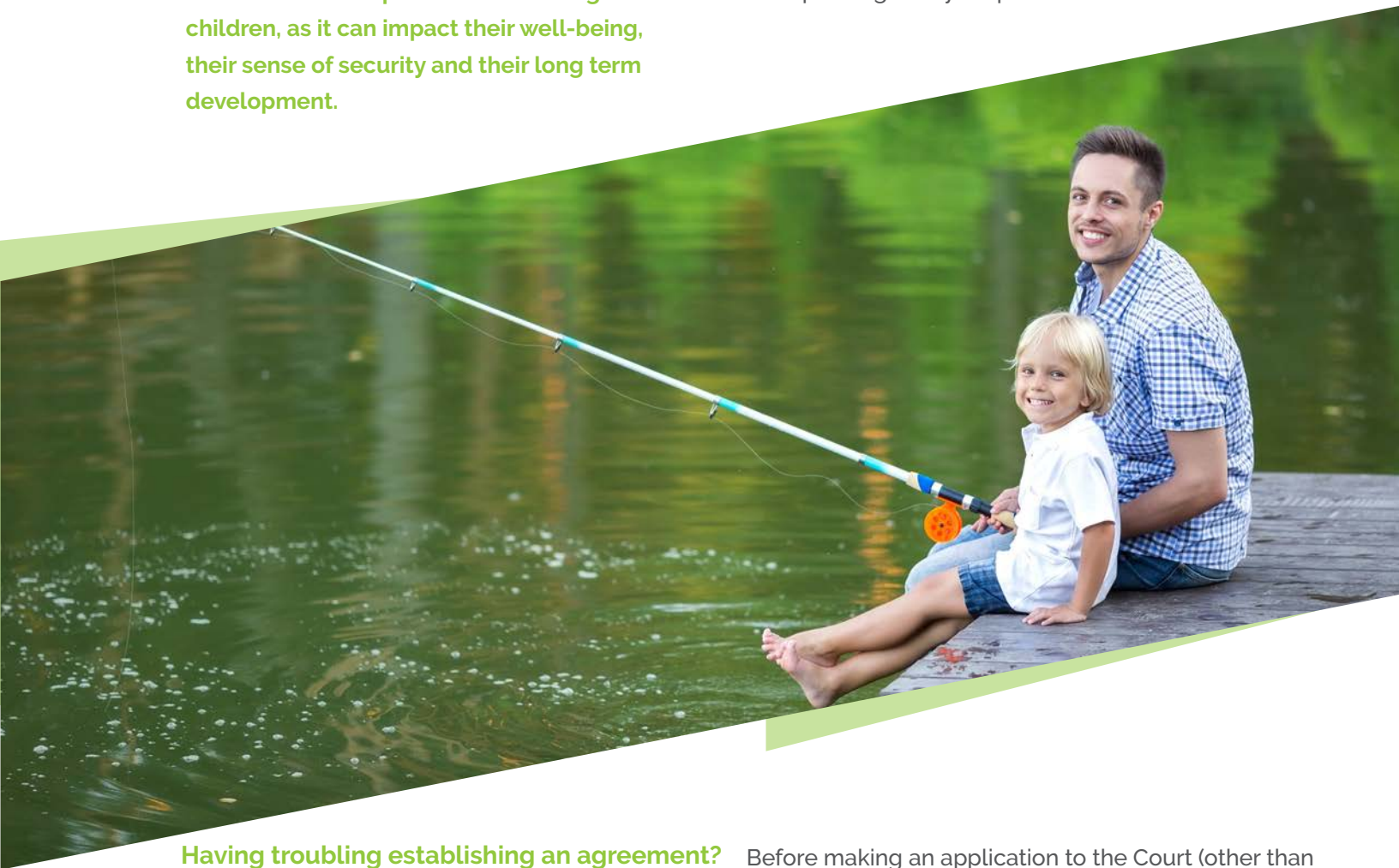
The Court aims to:

- Ensure 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.
- Protect children from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence.
- Ensure that children receive adequate and proper parenting to help them achieve their full potential.
- Ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.

Parenting Disputes

It's not unusual for parents to have differing views on what is best for their children when they are in the midst of a relationship breakdown. It's important that disagreements don't occur in the presence or hearing of the children, as it can impact their well-being, their sense of security and their long term development.

Be mindful of how these disputes can impact your children. Every child is different and will react to a family breakdown in a unique way. Try to consider your children and their feelings when speaking with your partner.



Having troubling establishing an agreement?

Often we see an imbalance of power between parties. This may be due to one party having a greater share of financial resources, one party having greater time with the children, or because of a history of violence or intimidation in the relationship.

Legal representation can assist to remove that inequality and prevent the baggage resulting from a broken relationship from impacting on a resolution of parenting disputes.

Before making an application to the Court (other than in exceptional circumstances, such as where there is family violence or urgency) parties are obliged to make a genuine effort to resolve matters themselves.

The Family Court has set out the steps which parties are to take in an effort to resolve matters by agreement, these are known as pre-action procedures.

In most cases this involves attending mediation and obtaining a certificate from a family dispute resolution practitioner, certifying that a genuine effort has been made to resolve a parenting agreement.

Domestic/Family Violence

If you are in a situation of domestic or family violence, it's important that you tell the appropriate authorities so that you can be protected during separation and any related proceedings.

There is a myriad of legal protection on offer to victims of family violence, including:

- Apprehended Violence Orders and Apprehended (Domestic) Violence Orders.
- Exclusive residence orders or injunctive orders preventing contact between parties.
- Supervised time with children by independent parties or by a contact centre.
- Shuttle mediations to enable parties to mediate without coming face to face.
- Assistance of security officers who will stay with you during Court attendances.

The Court is obliged to protect children from the consequences of family violence. They must ensure when making orders concerning children that they have regard to any allegations of family violence along with any apprehended or family violence order made, so as not to expose a person to an unacceptable risk of family violence.

The Court may make apprehended or family violence orders which allow parties to come into contact with each other only for:

- Transfer of a child spending time with a parent or other person as provided by the Family Law Act, or
- Enabling parties to attend family counselling, dispute resolution, consultant meeting or other Court events during family law proceedings.

Legal Assistance



WMD Law can assist you to ensure that any issues of family violence are adequately addressed and where necessary brought to the attention of the Court. In many cases family violence can have significant consequences upon the outcome of parenting matters. In some cases family violence can result in payment of compensation to victims through the Family Court in property matters or result in one party receiving a larger share of assets as a consequence of their contributions being made more arduous as a result of the violence.

In most cases where family violence is, or has been present, an inequality of bargaining power between disputing parties can result. Legal representation can assist to remove this inequality and enable a settlement to be reached through negotiation.

Child Support

The Child Support Agency (CSA) is part of the Commonwealth Government and their role is to provide assistance and support to separated parents and to ensure the financial well-being of their children. The CSA conduct assessments for separating parents to determine the correct amount of Child Support to be paid.

To complete a child support assessment, the CSA look at: each parent's income and their combined income; how much time each parent cares for the child; the child's age; and the average costs of supporting a child of that age. The costs of supporting a child are based on research into what parents are spending on children in Australia and change each year to keep up with current costs and incomes.

The CSA has the power to enforce assessments through garnishing wages for non-complying parents, accessing funds in bank accounts and they can also prevent overseas travel in extreme cases.

It is possible to object to a Child Support Assessment once it has been made. However, there are only certain grounds that the CSA will hear objections upon. In some circumstances if you are not satisfied with the response the CSA provides to your objections you may be able to appeal that decision. An appeal may be lodged with the Social Security Appeals Tribunal (SSAT) or an Application may be made to the Family Court if related proceedings are otherwise being conducted there.

The SSAT will hear appeals on the CSA's decision including upon the following:

- A refusal to make an Assessment;
- A refusal to change an assessment based on certain discretionary factors;
- To accept or refuse a child support agreement;
- To terminate a limited financial agreement; and
- A refusal to accept an objection out of time;
- The decision as to the particulars of a child support assessment, namely:
 - The adjusted taxable income of each parent;
 - The amount a parent necessarily needs from that income for self support;
 - The child support income of each parent;
 - The split of care for the particular child between both parents;
 - The costs of each child; and
 - The annual rate of child support.



Child Support Agreements

The Child Support Agency supports parents making agreements privately regarding their child support payments. If they decide to prepare a formal agreement then this is referred to as a Child Support Agreement.

A Child Support Agreement can be negotiated prior to, at the same time or after the finalisation of any property settlement between parents. To be enforceable a Child

Support Agreement must contain a Certificate of Independent Advice signed by a lawyer for each party to the agreement. It's a good idea to seek legal advice early, prior to negotiations to ensure you reach the best possible outcome and your interests are protected.

A Child Support Agreement may be registered with the Child Support Agency and the Child Support Agency can then be utilised to enforce the agreement in the same way that it would seek payments required under a normal assessment.



Property Settlement

A major element of a relationship breakdown is deciding how the finances, property and debts will be divided between parties. This extends to jewellery, superannuation, business interests and all debts. A property settlement can be completed prior to a divorce, but application to the Court must be made within 12 months of a divorce order once it has come into effect.

Your property settlement will depend on your individual circumstances and will likely be different from others you may have heard about. There are many options which may involve one party remaining in the family home for the children, selling up assets to obtain money to start over, or accessing a share of your partner's superannuation to provide for you in retirement.

In more complex matters, finding an expert in asset tracing and unravelling complex financial arrangements involving trusts and companies may be required. It's a good idea to talk to a Lawyer early in the process to obtain an accurate opinion of your entitlements and set out your options for how to obtain what you are entitled to with minimum stress and expense.

If a couple is able to agree on how all assets and finances will be divided then an application to Court can be made to obtain final orders by consent, without either party ever stepping foot inside a courtroom. We find this is the ideal for most separating couples and strive to bring finality for all clients in this way. We are able to prepare these types of applications without another Lawyer being involved if your partner does not want to engage their own Lawyer.

For more complex matters, a Binding Financial Agreement can be drawn up which does not require any application to Court. Each party will need separate legal representation and the requirements of the Family Law Act relating to such agreements must be strictly adhered to.

We can assist to tailor the right outcome for your circumstances in order to promote ongoing positive relationships as well as save money in legal costs.

When couples are unable to come to an agreement, they can apply to the Court for Court Orders. Prior to doing this certain steps need to take place and a qualified Family Lawyer will be able to advise you on the correct process.



When conducting a property settlement the Family Law Act sets out the matters that are to be taken into account. The following factors are relevant in determining your entitlement:

- The identification and valuation of your assets, liabilities and financial resources.
- The contributions made by or on behalf of each party, financially (such as assets owned at the outset, income earned and monies gifted, loaned or inherited from one party's family) and non-financially (such as the care of children, home-maker duties, maintenance or renovations of property).
- Each party's needs for the future given such things as their age, health, financial resources, care of children and ability to earn.

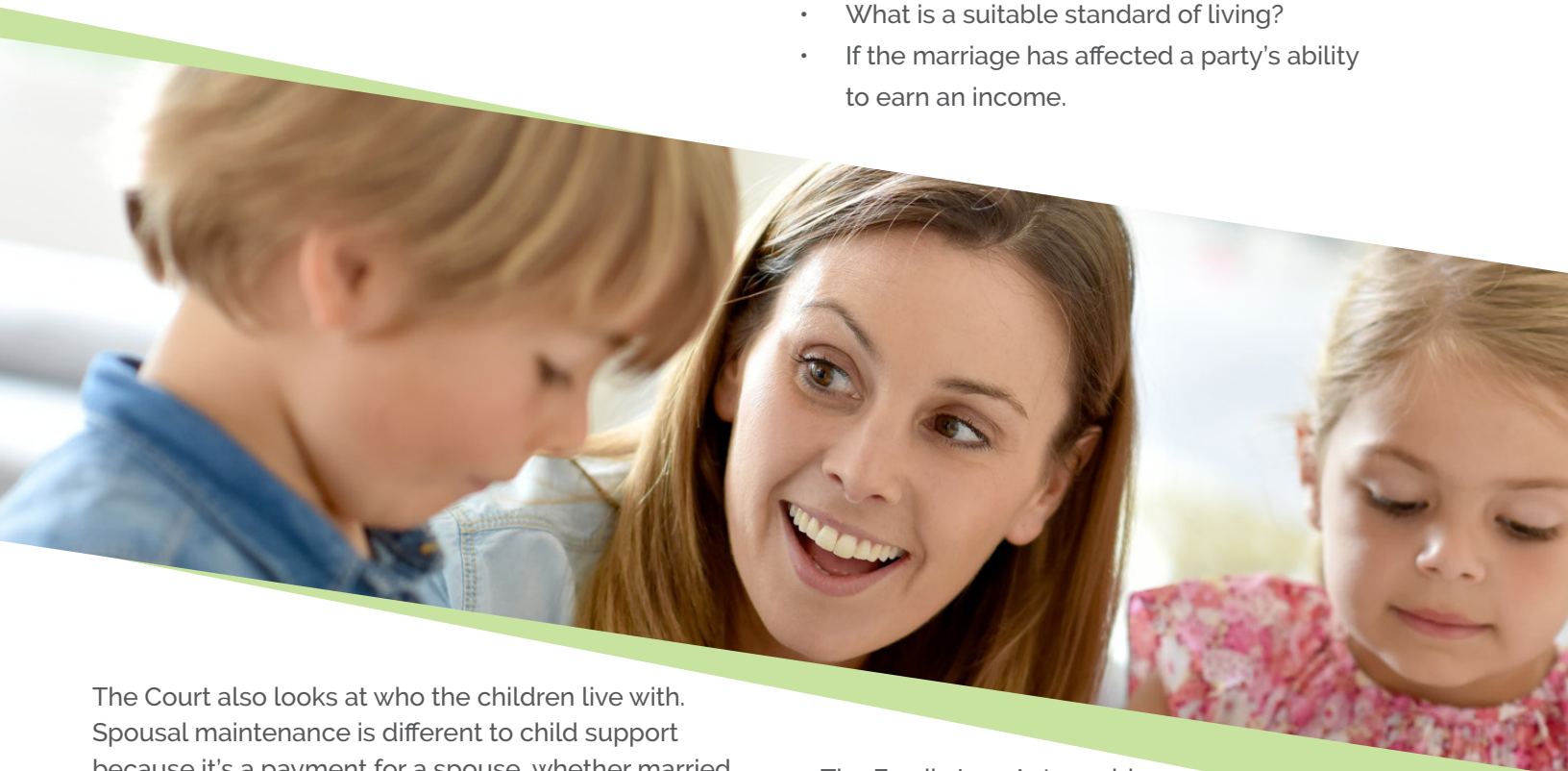


Spousal Maintenance

The Family Law Act provides that a person has a responsibility to financially assist their spouse or former de facto partner, if they cannot meet their own reasonable expenses. This obligation can continue beyond separation and in some circumstances divorce.

The most significant factors the Court will consider when deciding whether to order spousal maintenance are:

- Age and health.
- Income, property and financial resources.
- Ability to work.
- What is a suitable standard of living?
- If the marriage has affected a party's ability to earn an income.



The Court also looks at who the children live with. Spousal maintenance is different to child support because it's a payment for a spouse, whether married or de facto. It's paid in addition to, or separate to, the property settlement.

The Court considers the need of a person to receive financial support from their spouse/partner. They will decide if those needs are reasonable, the capacity that the other partner/spouse has to pay spousal maintenance and whether it is appropriate that there be orders to make such payments.

Often people do not have enough money to live at a reasonable standard when their relationship breaks down, while their partner goes on without financial burden. When people separate one party often stops paying for expenses such as the home mortgage, utilities, credit card debts, car maintenance and registration or children's school fees.

The Family Law Act provides a mechanism to address this inequality, where one party can receive regular payments from their former partner usually until a property settlement is achieved, and sometimes even far beyond that time. These payments, known as spousal maintenance, can even be made in a lump sum.

Spousal maintenance is often overlooked in many applications which can be an expensive oversight. Ensure you speak to a Lawyer and understand your entitlements.



The Divorce

Divorce

A divorce is the dissolving of a marriage and does not include the financial settlements or parenting agreements that we discussed earlier.

In order to apply for a divorce you and your spouse must have been separated for twelve months and meet one of the following criteria:

1. Be an Australian citizen.
2. Have lived in Australia for 12 months before making an application.
3. Be lawfully present in Australia and consider it to be your permanent home.

A divorce application can be made by either party individually or by both parties jointly. When the divorce application is being made individually it's vital the documents are served on the other party in accordance with the rules of the Court.

When there are children under 18 and it's not a joint application the person applying for the divorce must attend the Court hearing.

At the conclusion of a successful hearing the Court will issue a Divorce Order which is to take effect and terminate the marriage one month and one day later. The Court will issue a Divorce Order and a Certificate that it has taken effect to each party.

If either party wishes to apply for property or maintenance orders this must be done within 12 months of the date upon which a Divorce Order takes effect, otherwise permission of the Court will be required to commence proceedings. Property orders, maintenance or parenting orders can otherwise be sought by consent or otherwise at any time prior to a divorce.

The Divorce Process





About WMD Law

Why choose one lawyer when you can access an elite pool of specialists.

WMD Law is an elite law firm. We provide the services you would expect from a city team, in the heart of the Sutherland Shire and along the South Coast. We've hand-picked a team of Lawyers that can cover every aspect of law. This means that clients can access the best advice across all legal areas.

It's the diverse expertise of our team that allows our clients to achieve the best possible outcome. Often divorces don't neatly fall under one category, they usually cover Family Law but can also span Property Law, Criminal Law and even Commercial Law if a business is owned jointly. At WMD Law, our legal teams work together to ensure our clients receive the best advice across all legal disciplines.

WMD Law is dedicated to providing:

- Earnest face to face advice;
- A team of specialists to cover any issue;
- The most cost-effective resolution to your matter;
- Timely advice and a hands-on approach;
- The legal foresight to sidestep risk;
- Only the best lawyers and specialists;
- A client-focused service, personalised for you.

WMD Law has the big picture in mind when handling your matter. Our lawyers have the foresight needed to help you sidestep risk and unlock opportunities well into the future.

*If you're separating or divorcing, you'll want us on your side of the table.
Call one of our Family Law specialists today on 9525 8688
for a confidential discussion.*

Family Law Team



Greg Dickson heads the family law team and was among the first lawyers in New South Wales to become an Accredited Specialist in Family Law. His experience can help you overcome the effects of concealment of property and the disposal of assets. Greg practices extensively in commercial and general litigation. Greg's experience in this area has been of invaluable benefit to clients involved in complex family law property matters involving trusts or family companies.



Kevin Dwyer is a seasoned negotiator and also works extensively on resolving Family Law and De Facto Relationship matters. He has a proud record of settling relationship disputes and extensive experience in conducting Family Court hearings including sensitive matters involving domestic violence and child abuse. Kevin's mathematical prowess and clinical approach to financial matters is of enormous benefit to clients with complex property disputes.



Louise Allery is a member of our South Coast team. Her practice at WMD Law takes advantage of her commercial and finance law background, however she now focuses primarily on Family Law. She can provide advice and assistance to resolve all property and parenting issues. She is available to see clients in Batemans Bay, Bega, Merimbula and Eden.



Amanda Doring is an Accredited Specialist with extensive experience in conducting complex Family Law property settlements involving corporate and trust structures and drafting Binding Financial Agreements. As an Independent Children's Lawyer, she is able to represent children in proceedings before the Family Court and Federal Circuit Court of Australia. As a Nationally Accredited Mediator and registered Family Dispute Practitioner Amanda prides herself in working with parties to resolve their Family Law dispute so as to avoid the stress and anxiety of litigation.



Lisa O'Leary another of our Accredited Specialists in Family Law, assists clients with property settlement and parenting disputes arising from the breakdown of marriages or de facto relationships. Where necessary, Lisa conducts Family Law matters through Family Court and Federal Circuit Court proceedings or by alternative dispute resolution procedures. Lisa also has experience in commercial litigation and criminal defence proceedings which equips her to advise upon and deal with all aspects of complex family law disputes.



Jessica McKinley has practical experience in divorce, parenting disputes and property matters and can assist clients with property settlement and the division of assets, parenting arrangements, binding financial agreements, child support and spousal maintenance. Jessica provides a practical and sensitive approach with her clients in resolving their disputes and assists the family law team with case management, preparing Court documents and briefing Counsel for Family Court and Federal Circuit Court proceedings.



Taylah Stuart has experience in parenting and property matters, including matters concerning ADVOs, spousal maintenance and child support departure orders. She assists with drafting Court documents, briefing Counsel and case management.



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