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FAMILY
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Welcome

This booklet is designed to provide you with important information aimed at giving you a working understanding of how the Family Law jurisdiction in Australia works.

The booklet should serve as a handy guide for you if ever you find yourself with a Family Law problem arising out:-

- your marriage; or
- de facto relationship; or
- where there is a child but no on going relationship.

It will also allow you to refer at any time to the wide ranging legal services with which we can assist.

The team at Byrne Legal Group

1. Separation

- 1.1 It may feel like it but **you are not alone**. Separation is no doubt a most emotionally demanding time for you. However, many people have been through this experience and hundreds of people have access to the Family Law jurisdiction on a daily basis. And so, although your decision making may be compromised and although you may feel like you don't know where to start, there is a body of tried and tested practice, procedure and law all aimed at achieving:-
- (i) a parenting regime that is the best interests of your child or children; and
 - (ii) helping you get the most just and equitable outcome possible in respect of property settlement.
- 1.2 Your **obtaining professional legal advice** early can save you a lot of time and in many cases avoid the loss of money and opportunities to improve your overall position. Final separations and the stresses and decision making that attend them do not always occur between 9am and 5pm Monday to Friday. A practitioner who can guide you at any time to help you make the best decision is a valuable advantage.
- 1.3 **Agreements made “out of court” between the parties** are a most desirable outcome, be it for parenting or property however, for the agreements to be binding on the parties and enforceable they must be made formal in the ways set out in this guide.
- 1.4 **Parenting problems, if they are ongoing should be diarised** until resolution has been achieved. This is important because

allegations against another party are far more effective if they are particularized.

- 1.5 **For property matters, financial records are essential.** Make sure that you have a copy of your financial records, going back three years if possible. Tax returns, bank statements, credit card statements, financial records for businesses will all be essential in preparation of your case. If you are being denied access to your documents or have left without them, have your lawyer assist you in rectifying that situation as soon as possible.
- 1.6 **Your choice of lawyer is a critically important decision.** Experience in the Family Law jurisdiction and competence are threshold essentials in any choice. Further, you must feel that you have connected personally with your lawyer and that they are someone who you can trust in their ability and

2. Options for Resolution - PARENTING

- 2.1 **For Parenting matters**, regardless of whether a child or children are born in a marriage, de facto relationship, or in circumstances that do not fit either of those categories, an Order can be achieved essentially in one of two ways, specifically:-
 - (i) by the Order of a Court at the end of a trial of the matter; or
 - (ii) by Consent agreed between the parties.

Certainly, once a matter has been commenced by way of the filing of proceedings in Court, the parties may, as a third

alternative, hand up to the Court, Consent Orders achieved at any point in time during the course of the matter to be considered by and then made by a Federal Magistrate.

- 2.2 **Consent Orders** are clearly applicable in relationships where there is, at the outset, a good deal of agreement or the potential for agreement. In such a case, a party, usually with the assistance of a lawyer, can enjoy the savings in time, money and raw emotional angst that come with the preparation and finalization of an Application for formal Consent Orders and Minutes of Consent.
- 2.3 **The good news** for everyone is that even if you cannot fairly describe your relationship as enjoying a good deal of consensus between the parties, the statistics in this jurisdiction have the law of averages well and truly in your favour that the matter will settle by way of consent rather than proceeding all the way to trial for determination by a Federal Magistrate or Family Court Judge.
- 2.4 **The threshold requirement before filing initiation proceedings** for Parenting Orders is that the parties participate in a **Family Dispute Resolution Conference**.
- 2.5 Lawyers do not attend these conferences. The parties, with an accredited resolution consultant, try to come to a parenting agreement on all, or some of the points in contention between the parties. At the conclusion of the conference, if it has not been successful, the Practitioner will issue the parties with a Section 60 I Certificate which is a pre-requisite to filing in the vast majority of parenting cases. (An exception is where the relationship has been the subject of domestic violence. A s 60 I certificate is not required in order to file proceedings.)

3. Parenting – Important matters

- 3.1 **Custody & Access.** Those words have now been superseded. Twice in fact. In 1996 they became RESIDENCE & CONTACT. In 2006 the terminology changed to “**Lives With**” and “**Spends Time With and Communicates With**”.
- 3.2 Along with that latest change in wording came **a legal presumption of Shared Parenting Responsibility.** That means that a Court in considering what Order to be made, has to give consideration to equal time spent between both parents if equal time is in the child's best interests and reasonably practical.
- 3.3 **An alternative to Courts, and of course to parties negotiating,** is the concept of **substantial and significant time** – that is, time in addition to weekends and holidays.
- 3.4 As mentioned in the section immediately above, **the threshold requirement before filing initiation proceedings** for Parenting Orders is that the parties participate in a Family Dispute Resolution Conference. Where that conference, or in deed any alternative negotiation yields an agreed outcome which is reduced to writing, that document is known as **a Parenting Plan.**
- 3.5 A **parenting plan** is not the document that gets filed in the Court and it **is not enforceable.** Your legal representative will be able to assist you efficiently recast your parenting plan into **Minutes of Consent** which can be filed in the Court with an **Application for Consent Orders.**

- 3.6 **Where a parenting dispute is characterized by high levels of conflict**, disagreement and conflicting versions of matters to be considered in a parenting application a judicial officer will often want a view of the situation less subjective and emotive than that of the parties. A judicial officer will not involve the children in the participation in Court proceedings but rather utilizes what is known as a **Family Report** drawn by a child welfare professional such as a child psychologist or social worker.
- 3.7 **The preparation of a Family Report**, whether that be a step jointly agreed upon by the parties or commissioned at the Order of a judicial officer, will involve the parties attendance on the child welfare professional who will consult with the parties and the children and perhaps observe interaction between the children and the parties and any other relevant, significant third parties.

4. Options for Resolution - PROPERTY

- 4.1 **Essentially, there are 3 ways in which you can formally finalise property proceedings.**
- (i) by the Order of a Court at the end of a trial of the matter; or
 - (ii) by Consent as agreed between the parties with Consent Orders filed in the Court; or
 - (iii) by way of a Binding Financial Agreement.
- 4.2 Certainly, once a matter has been commenced by way of the filing of proceedings in Court, the parties may, as a further alternative, hand up to the Court, Consent Orders achieved at any point in time during the course of the matter, to be considered and then made by a Federal Magistrate.

4.3 **Where through NEGOTIATION there is agreement reached between the parties** as to the division of the property of the relationship, Consent Orders or a Binding Financial Agreement are clearly applicable. In such a case, a party, usually with the assistance of a lawyer, can enjoy the savings in time, money and raw emotional angst that come with the preparation and finalization of

- an Application for formal Consent Orders and Minutes of Consent; or
- a Binding Financial Agreement.

4.4 Either:-

- Court sealed Consent Orders; or
- a Binding Financial Agreement (which does not get filed);

can achieve, in the same way as does the Order of a Court, relief from stamp duty for a party acquiring any real property from the other party as part of the property settlement.

4.5 **The good news** for everyone is that even if you cannot fairly describe your relationship as enjoying agreement between the parties at the outset, the statistics in this jurisdiction have the law of averages well and truly placed in your favour, that the matter will settle by way of consent or a binding financial agreement rather than proceeding all the way to trial for determination by a Federal Magistrate or Family Court Judge.

4.6 **If the matter settles at any time after proceedings have been commenced**, it is probably fair to say that most such matters will be finalized by way of Consent Orders.

4.7 As to whether one uses the vehicle of Consent Orders or Binding Financial Agreement, both documents essentially have the same effect. (The three types of Binding Financial Agreements accommodate those made:-

- before a marriage;
- during a marriage; and
- after marriage.)

4.8 **The law for de facto couples in relation to property settlements** by way of a Binding Financial Agreement is essentially identical to that for married couples. Separations that occurred prior to 1st March 2009 still fall under the jurisdiction of Queensland property law legislation however, even in those circumstances, parties can choose to “opt in” to the (Australia wide) family law jurisdiction.

4.9 Another method used effectively used by many parties who see the clear benefits in avoiding Court litigation if possible, is a private mediation. Usually the parties, through their legal representatives, will agree on a mutually respected mediator and then, with their representatives attend on the mediator for a mediation of the matter. The mediator will provide advice to both parties. That advice might include:-

- cases of a similar nature in which the mediator has been involved or which the mediator has seen the Court apply to a matter;
- weaknesses and risks in certain points within each party’s case/argument;
- patterns of reasoning applied by judicial officers in determination of matters generally and specific

issues within a matter such as inheritances or superannuation benefits.

- 4.10 At the conclusion of a successful mediation, the parties have a choice of using a Binding Financial Agreement or an Application for Consent Orders and Minutes of Consent in order to finalise the matter formally.

5. The way a Court divides property

- 5.1 The Court assesses the net assets of the marriage or de facto relationship. It looks at the assets and the liabilities to establish a net pool; even if that net amount is a notional amount. The pool will include superannuation of both parties.
- 5.2 The second step is that the Court will look at the respective contributions of the parties. Those contributions, predictably enough, will involve contributions made before, during and after the relationship. Further, the contributions of the parties are not just the financial contributions but also non financial contributions and contributions to the parenting of the children.
- 5.3 For the third step the Court looks to the future needs of the parties. This will involve looking at many factors including:-
- the general financial situation of a party;
 - that party's prospects from the perspective of financial position,

prospects of employment, health, age and other factors;

- future needs of that party;
- future obligations of that party;
- the costs associated with a party's looking after children of the relationship.

That third step, if applicable to a case, may well see a Court adjust the percentage split of the net assets that was achieved after step 2. For example, the Husband of a 20 year marriage, who is still the primary carer for 3 children aged between 16 and 10 could expect a significant adjustment given his on going obligation as residential parent, to care for and provide for the children of the relationship.

5.4 Having made the "future needs" adjustment, the Court then stands back and assesses the overall division to see if it meets the legislatively enshrined criteria of being "just and equitable".

5.5 Usually the answer will be in the affirmative. Sometimes, the percentage arrived upon after consideration of the first three steps has to be reviewed.

6. Divorce – 10 things you should know!

- 6.1 **Divorce** is of course, a pre-requisite to a party remarrying.
- 6.2 **Other than for that,** it is probably fair to say that it is of a secondary importance to resolving the Parenting and Property issues in a relationship.
- 6.3 **A deadline** in fact will start to operate on any property proceedings if a divorce is granted. The parties will then have 12 months from the date of the Decree Absolute in which to seek assistance from Courts in the family law jurisdiction in property settlements. Any attempt to bring such application out of time must be preceded by an application to the Court showing why the Court should assist.
- 6.4 **Applications for Divorce can be made jointly or brought by one of the parties.**
- 6.5 **Where there are children of the marriage under the age of 18, a Court will want to be satisfied that satisfactory arrangements are in place for their parenting and its various aspects.**
- 6.6 **There is only one ground for Divorce in Australia since 1975, and that is "irreconcilable differences" evidenced by 12 months separation.**

- 6.7 **It is possible for a couple who have lived separately but “under the same roof” to satisfy the 12 months separation however, a greater amount of evidence is required.**
- 6.8 **A Divorce becomes final one month and one day after it is made.** At the hearing of the divorce, a Decree Nisi is made. One month and one day later the Court issues the Decree Absolute.
- 6.9 **Remarriage is only lawful after the issue of the Decree Absolute.**
- 6.10 **Divorce Applications are commenced and heard in the Federal Magistrates Court.**

7. Child Support

- 7.1 Intuitively and rightly so, the law imposes a positive obligation on both parents to provide for the financial support of a child or children until they attain 18 years of age.
- 7.2 Child Support can be quantified by agreement between the parties; - a child support agreement, or as assessed by the Child Support Agency.

7.3 Child Support Agreements, predictably, afford the parties a good deal of flexibility in coming to an enforceable agreement as to the quantum and or nature of child support.

7.4 The alternative, - a Child Support Assessment is undertaken by the Child Support Agency pursuant to a not altogether simple formula. Component factors within the formula include the parties respective incomes and the amount of time a child or children spend with a particular parent.

7.5 The assessment itself can be departed from in certain circumstances including:-

- where the children have special needs;
- significant transport costs are involved for the paying parent in spending time with the children;
- private schooling fees are being met;
- the calculation and/or estimation of the income of one or both parents from year to year is elusive and difficult.

7.6 A receiving parent can be paid by the paying parent or, if that regime is encountering issues, the Child Support Agency will also act as collector of the monies on behalf of the receiving parent.

- 7.7 A change of financial circumstances, for instance an adverse change, allows a party to apply for a reassessment.
- 7.8 Usually, people dislike shocks of a negative nature and so it is always prudent for a paying parent to inform a receiving parent of any bona fide change of circumstances that is going to see the overall amount of child support payable reduced.
- 7.9 In high conflict separations assertions of changes of circumstances and counter-assertions of “bogus” claims for re-assessment are the only forum in which matters are aired. A competent lawyer, especially when both parties are represented, can often intercede in the situation and get the payment of child support back on track.
- 7.10 Allowing arrears to accumulate is foolhardy in the short, medium and long term. Arrears attract interest and in some cases legal costs. If you encounter difficulty for any reason in meeting child support payments, you should obtain legal advice before the arrears and interest accrue to unmanageable levels.
- 7.11 The Child Support Agency is a sub agency of the Australian Taxation Office. The Agency has long arms and access to intelligence at levels well beyond the appreciation of most people. We have acted for clients who have allowed allowed arrears to accumulate to amounts approaching \$100,000. Such a situation can have significant negative ramifications for a paying party and a receiving party. The legal system assists the diligent, not the tardy; and so difficulties incurred

in the area of child support should not be relegated to the “too hard” basket.

7.12 Measures available to the Child Support Agency to collect arrears include

- accessing your private financial records with the ATO;
- contacting your employer to have child support payments deducted from your regular wage/salary;
- intercepting tax refunds from the ATO;
- Applying to prohibit your departure from Australia.

8. Spousal Maintenance

8.1 Spousal Maintenance is usually applicable in a situation where there is a significant difference in incomes. A payment is made by one spouse to the other, usually for a fairly limited period.

8.2 It is incorrect to think of spousal maintenance as on going benefit one might expect (or an ongoing burden one may have to confront).

8.3 A couple of examples may serve to illustrate.

- (i) The Wife has left a farming property which continues to achieve a good income. She has left with the

clothes on her back and say, a vehicle, The Husband remaining on the property may be ordered to pay spousal maintenance to the Wife until, for instance, the property settlement is achieved and the Wife has some money on which she can live and move on with her life.

- (ii) The Husband has left the marital home and it is no longer viable or practical for the Husband to work doing general duties in the Wife's successful hairdressing salon. The Husband has an aptitude for hairdressing and, for any number of reasons, might clearly be best suited for that type of future employment. The Wife may be ordered to pay spousal maintenance of enough money to significantly assist the Husband in a 12 month accelerated apprenticeship or course of training so that he can become equipped with the means of earning a living.

8.4 In determining whether an order for Spousal Maintenance is appropriate, the Court will have close regard to the need of the party making the application and the capacity of the other party to pay a sum of spousal maintenance.

9. Paternity Testing

- 9.1 Where paternity is in dispute between parties, a medical test can be administered to establish paternity. One party does not have a legal right to force the other to undergo the test. Compulsion can only be achieved by application to the Court.
- 9.2 If, after being made the subject of an Order of the Court, a father continues to refuse to undergo the test, the Court will use that refusal as a basis to presume that the subject male is in fact the biological parent.

10. Domestic Violence & Family Law

- 10.1 Sadly, a number of separations are visited by the social problem of domestic violence. Domestic Violence can have ramifications in proceedings for **Property Settlement** and **Parenting**.
- 10.2 Married relationships and de facto relationships are two forms of relationships which unquestionably attract the application of the Domestic Violence Family Protection Act.
- 10.3 The party who has been the subject of domestic violence is called the Aggrieved whereas the other party is referred to as the Respondent.

10.4 The Aggrieved and the Applicant are usually one and the same person however, it is not uncommon for a police officer who attended a domestic violence incident to be the Applicant for an Order in favour of the Aggrieved.

10.5 Whether one is an Aggrieved or a Respondent, a domestic violence application is a serious matter and, as one might reasonably expect, legal advice can be of the utmost assistance to a person prosecuting or defending such an application.

10.6 Domestic Violence involves any of the following:-

- (i) **Willful injury;**
- (ii) **Willful damage to another's property;**
- (iii) **Intimidation or harassment of another;**
- (iv) **Indecent behaviour towards another without their consent;**
- (v) **a threat to commit any of the above.**

10.7 The process that applies to the parties is as follows:-

1. **The Applicant completes a protection order application (DV1 form) available at the local Magistrates Court and files it at the Court.**
2. **If an Urgent Temporary Order** is sought, application can be made through the Registrar of the Court or the police. The Magistrate will determine whether the circumstances justify the imposition of an Urgent Temporary Order on the Respondent (who, in such circumstances might not even be aware that such an application is being made.)

3. ... **back to the DV 1 form; after it is filed**, police will serve a copy on the Respondent. The form will be endorsed with a "return date" in Court in about 2 or 3 weeks time.
4. **At the first return date, whether or not an Urgent Temporary Order was granted**, a Respondent will have three options.
 - (i) **If the Respondent agrees to an Order being made**, the Magistrate can finalise the matter there and then by granting a final Order.
 - (ii) **A Respondent can agree to an Order being made on the basis that the allegations are not admitted by the Respondent.** The Aggrieved's consent is required for this type of Order to be made. It is certainly possible that there will be absolutely no difference between an Order made in circumstances of 4 (i) or 4 (ii).
 - (iii) **A Respondent can ask the matter be set down for a hearing** so that the Respondent can defend himself or herself against the allegations with a view to proving that either the allegations are not true and/or that there is no likelihood that the domestic violence will occur again in the future.
5. **If the Respondent requests that the matter be set down for a hearing**, a date will be allocated for the hearing in about 4-6 weeks. At the hearing, the Magistrate will hear evidence from the Aggrieved and any relevant witnesses and, usually, also hear evidence from the Respondent and any relevant witnesses. When all of

the evidence has been heard the Magistrate will make a determination as to whether a Domestic Violence Protection Order should be made.

6. **Parties can self-represent or use a legal representative** whether they are an Aggrieved or a Respondent. Where a police officer is the Applicant, a police prosecutor will run the case for the Applicant and the Aggrieved.
7. If an Order is made against a Respondent, that does not of itself give the Respondent any entry on a criminal record. **The situation only becomes a “criminal” matter if the Protection Order is breached.**
8. It is often the case that a Protection Order is made for a period of **two years** however an Aggrieved is entitled to submit any reasons why the period should be shorter than that.
9. As with all civil disputes – and that’s what a contested domestic violence application matter is, **there is a possibility that the situation is one where an agreement can be reached between the parties without proceeding to a hearing/trial** of the matter. Such situations are best left for negotiation by a lawyer who is expert in this area.