WILLIS & BOWRING
Solicitors

FAMILY LAW

WE'RE HERE FOR YOU AND YOUR FAMILY

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ABOUT US

Willis & Bowring was established in the Sutherland Shire in 1960 and celebrated our 60th anniversary in 2020.

Today, the firm has 2 partners, 8 employed solicitors and 14 support staff, making it one of the largest firms in the St George and Sutherland Shire region.

Located on The Kingsway in Miranda, we pride ourselves on our friendly and efficient service and appreciate the importance of client care and communication when delivering legal services.

The strength of Willis & Bowring lies in the specialised skills and experience of its individual solicitors in their own particular field of law. We offer a comprehensive range of legal services in many areas of law, including:

- Family Law;
- Conveyancing and Property Law;
- Business Transactions;
- Intellectual Property;
- Estate Planning;
- Deceased Estates;
- Estate Litigation;
- Commercial Litigation;
- Debt Recovery; and
- Local Government.

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FAMILY LAW
INTRODUCTION

Willis & Bowring have a specialised team who work principally in the practice of Family Law.

Separating from a partner is one of the most difficult times in adult life and fraught with stressful challenges that almost everyone needs help to navigate.

Willis & Bowring's Family Law team has the specialist knowledge to guide you through this time and ensure that your property settlement is the most practical and suitable outcome for you, and addresses your legal rights and entitlements, providing for your future needs both financially and pragmatically.

Our team is also mindful of the needs of your children and of the fact that they need to be protected and nurtured during this time. Our aim is to ensure that arrangements are put into place reflecting not only the Family Law Act but the day to day wishes of your individual family.

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MEET
OUR TEAM

PAMELA WOOD

PARTNER/FAMILY LAW SOLICITOR

LPAB (Dip. Law), Acc. Spec. (Family Law)
Pamela has been working within the legal industry since 1995, specialising in family law since 2004 after her admission as a Solicitor in October 2003. Pamela's experience has seen her appear as an advocate in the Local, District, Supreme Court and she now specialises in appearing in the Federal Circuit and Family Court of Australia, as a Law Society of New South Wales Accredited Specialist in Family Law, which she gained in 2011. Pamela provides a practical, sensible approach to family law, giving cost effective advice on the full ranges of issues.

Living and working in the Sutherland Shire has enabled her to understand the needs of local clients as well as the emotional upheaval that accompanies the breakdown of a family. Pamela's knowledge, experience and qualifications ensure the best outcome for her clients in their family law matter.
Contact Pamela: pwood@willisbowring.com.au

GREG MILLER

FAMILY LAW SOLICITOR

LL.B.
Greg has 30 years experience as a litigator working particularly in the areas of family law, commercial litigation and compensation claims. Greg was a senior partner of Holt & Allen, a firm established at Kogarah in 1956, before bringing his experience to Willis & Bowring in 2007. Greg's dedication to the law and his broad range of skills help his clients receive the best possible outcome in their individual situation.
Contact Greg: gmiller@willisbowring.com.au

ELENA BUZEVSKA

FAMILY LAW SOLICITOR

LLB.GDLP
Elena joined our Family Law team in January 2022. Prior to joining our team, she worked in a Sydney CBD family law practice, where she gained valuable experience in complex parenting matters involving allegations of family violence, substance abuse, mental health issues and complex property settlement matters.

Elena is passionate about building strong relationships with her clients regardless of the nature of their matter. She believes that clear communication is vital to ensuring a client's positive experience as they navigate through their matter.

Elena has extensive litigation experience in the Federal Circuit and Family Court of Australia. Elena is fluent in Macedonian.
Contact Elena: ebuzevska@willisbowring.com.au

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MEET
OUR TEAM

DEANNE KINDIS

FAMILY LAW &
ESTATE PLANNING
SOLICITOR

LLB.GDLP
Deanne graduated from the University of Technology Sydney in 2018 with a Bachelor of Laws and a Bachelor of Arts majoring in Public Relations. Deanne has also completed a Graduate Diploma in Legal Practice at the College of Law and was admitted to practice by the Supreme Court in October 2019. Practising in both Estate Planning and Family Law, Deanne can actively assist our clients in simple and complex Estate Planning for their future needs, Estate Litigation proceedings and in parenting and property matters in the jurisdiction of the Federal Circuit and Family Court of Australia. Deanne can also assist our clients in debt recovery matters in the Local Court. Deanne also speaks Greek.
Contact Deanne:: dkindis@willisbowring.com.au

KAITLIN WALKER

FAMILY LAW
GRADUATE
SOLICITOR

LLB. BComm(Management)
GDLP (in progress).
Kaitlin joined our team in September 2022 as a paralegal while she completed her law studies. Kaitlin graduated from the University of Wollongong in 2022 with a Bachelor of Laws and a Bachelor of Commerce majoring in Management. Kaitlin is currently completing a Graduate Diploma in Legal Practice at the College of Law, and will be admitted to practice by the Supreme Court later in 2023.

Kaitlin has had extensive exposure to all areas of Family Law, and assists our Family Law Solicitors in property and parenting matters, including litigated matters in the Federal Circuit and Family Court of Australia. Kaitlin is passionate about forming relationships with clients and providing a practical and effective approach to matters.
Contact Kaitlin: kwalker@willisbowring.com.au

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PARENTING

Separation is a difficult time for everybody involved, especially your children.

During this challenging time, children need support, love and contact with both of their parents and other significant people such as grandparents, unless doing so would result in children being at risk of harm.

The best interests of the children are always the most important consideration.

We encourage separating parents to work out arrangements for children amicably. Arrangements can be finalised through:-

1. A Parenting Plan; or
2. Consent Orders.

If parents can't agree, arrangements for children can also be finalised by way of a Disputed Court Hearing, where a Judge or Senior Judicial Registrar makes a final decision.

Each of the above avenues addresses matters such as:

- who the children live with;
- who the children spend time with and how much time;
- the level of communication the children has with either parent; and
- other issues, such as where the children go to school.

Certainty for the future is important for everyone

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PARENTING

Continued

Time with your children

Equal TIme

If it is reasonable, practicable and it is in the best interests of the child/children, you might consider making an arrangement that enables the child/children to spend equal time with both parents. You need to consider whether it is practical to make this type of arrangement for your child/children based upon your circumstances. You should consider amongst other things the following: The ability of you and the other parent to implement this type of arrangement; How far apart you and the other parent live as this impacts the travelling; Time and arrangements your children will experience and matters such as are your children able to attend school each day without difficulty and/or their extra curricular activities; How well you and the other parent communicate with each other to resolve any problem that comes up in relation to the arrangement; and The impact the arrangement will have on the child/children.

Substantial and Significant Time

If it is not appropriate for your child/children to spend equal time with both you and your partner, you should consider an arrangement that allows for the other parent to spend substantial and significant time with the child/children, provided this is reasonably practical and in the best interests of the child/children.

Substantial and significant time refers to the child/children spending time with both parents on a mix of weekends, holidays and regular meet days and nights. It means both parents are involved in the child's daily routine, as well as sharing in special events, such as birthdays and other events of significance.

PARENTING

Continued

Parental Responsibility - Decision making

Except where there are issues of violence or abuse, generally known as "Risk of Harm Issues", the law presumes that it is in the best interests of the child/children for the parents to have equal shared parental responsibility.

This does not mean that the child/children shall spend equal time with each parent. Rather, equal shared parental responsibility means that both parents have an equal role in making decisions about major long term issues that effect their children, such as schooling and health care. If you agree to shared parental responsibility, you will need to consult with each other and make an effort to come to a joint decision about long term issues. Day to Day parental responsibility, that is, the obligation of parents to make decisions each day for a child's welfare, falls to the parent whom they are living with or spending time with that day.

Parenting Plans

The Family Law Act encourages separated parents to work out arrangements for children between themselves without the parties having to go to Court. One of the ways in which parents can do this is by entering into a “Parenting Plan”.

What is a Parenting Plan?
A Parenting Plan is a voluntary agreement that covers the day to day responsibilities of each parent, the practical consideration of a child’s daily life, as well as how parents will agree and consult on important issues about their children. It can be changed at anytime, as long as both parents agree.

Who can make a Parenting Plan?
To be considered a Parenting Plan under the Family Law Act, 1975, the Plan must be made in writing and signed by both parents of the child. However, the Plan can include other parties such as grandparents, step-parents and close relatives.

PARENTING

Continued

What can be included in the Parenting Plan?

A Parenting Plan can be unique to anybody's circumstances. It should be practicable, simple and as clearly set out in its wording as possible. The kind of things that may be covered in a Parenting Plan may include:

(a) Who the child lives with;

(b) What time the child will spend with each parent;

(c) What time the child will spend with other people, such as grandparents, step-parents etc;

(d) How the parents will share parental responsibility and consult about decisions (like which school the child will attend);

(e) How the child will communicate with each parent or other people;

(f) What arrangements need to be made for special days, such as birthdays, Christmas, Easter etc;

(g) What process can be used to change the Plan or resolve any disagreements about the Plan;

(h) The agreement can incorporate the maintenance of the child in the same form as a Child Support Agreement; and

(i) Any other issue about parental responsibility or the care and welfare of the child.

A Parenting Plan can deal with any aspect of the care, welfare and development of a child.

PARENTING

Continued

Is a Parenting Plan a Legal Document?

To be legal, a Parenting Plan must be in writing, signed and dated by both parents. It must be made free of any threat, duress or coercion. Parents who make a Parenting Plan can ask the Court to make Consent Orders in the terms of that Parenting Plan. Once made, the Consent Orders are legally binding - they have the same effect as any other Order made by the Court. At Willis & Bowring, we can assist you with preparing a Parenting Plan and/or we can use a Parenting Plan you may already have as the basis for entering into Consent Orders. These are then lodged with the Federal Circuit and Family Court of Australia, approved and sealed by the Court. The terms of the Parenting Plan are made into Parenting Orders which are legally enforceable.

A Parenting Plan is not a legally enforceable document.

If parents end up in Court at any time after they have entered into a Parenting Plan, the Court must take the most recent Parenting Plan into account when making new Orders in relation to the child, if it is in the child's best interests to do so. The Court will also take into account the extent to which both parties have complied with their obligations in relation to the child, which may include the terms of a Parenting Plan.

The benefit of a Parenting Plan is that it allows flexibility. Parents can agree to change arrangements in a Parenting Plan without having to go back to Court.

The drawback of a Parenting Plan is that it is not legally enforceable. This means that if a parent breaches the terms of the Parenting Plan, you cannot take them to Court on the basis that they have contravened (not followed) an Order of the Court.

PARENTING

Continued

Court Orders

As previously discussed a Parenting Plan is not a legally enforceable document. To have a legally enforceable agreement Court Orders must be obtained. This does not mean that the parties need to attend Court. Instead, both parents can agree on arrangements and can submit that “agreement” to the Federal Circuit and Family Court to be made into a Court Order. These are called "Consent Orders".

If parties have entered into a Parenting Plan they may replicate this Plan into Consent Orders, giving the Plan a legal effect.

The majority of our clients reach an agreement with their partners through negotiations with them directly or with the assistance of mediation. We then help them to draw up that agreement and have it made a court order.

Going to Court

If you cannot agree on arrangements for your children, you may need to have the Federal Circuit and Family Court of Australia decide for you.

In deciding parental arrangements, the Court must always consider:-
(a) The best interests of the child; and
(b) The extent to which both parents have complied with their obligations in relation to the child.

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PARENTING

Continued

Mediation

Prior to commencing proceedings in the Federal Circuit and Family Court of Australia, the parties are required to attend Mediation or Family Dispute Resolution ("FDR"). This involves both parties attending Mediation with a qualified Family Dispute Resolution Practitioner and making a genuine attempt to resolve their parenting dispute.

If agreement is not reached, the parties receive a 'Section 60i Certificate' and are required to produce this Certificate when filing an Application in the Federal Circuit and Family Court of Australia.

There are however, certain reasons why Mediation may not be appropriate in particular cases, and the requirement on parents to attend Mediation prior to commencing Parenting proceedings can be waived.

If the matter proceeds to the Court, and the Court is to determine the living arrangements in relation to a child/children, the Court has adopted a Case Management Pathway that aims to conduct each matter without undue delay and to finalise matters within 12 months from the date of filing.

PROPERTY

Property matters can be resolved by way of formal Court Orders or alternatively by way of a Binding Financial Agreement.

Court Orders

You can apply to the Federal Circuit and Family Court of Australia for Orders for a property settlement and this may be done at any time following separation. However, the Family Law Act sets a time restriction of 12 months' after a Divorce Order is made for you to apply for a property settlement, by way of Consent or in which to commence proceedings seeking an adjustment if an agreement cannot be reached within the 12 months between you without the requirement of seeking the permission of the Court to do so.

If you can both agree on how to divide your assets you can ask the Court to make Orders by agreement, known as Consent Orders. This does not require either of you to attend Court but merely to submit your agreement, with some background information to the Court for the Court's approval.

When considering an Application for Consent Orders the Court, is obliged to take into account a number of matters to determine whether the proposed Orders are "just and equitable". It is not simply a "rubber stamping" exercise. They must review all of your financial details in light of your agreement to determine if the division is just and equitable.

Whether you agree or not, the rules governing the division of assets are complex and it is important that you and your partner seek legal advice before making a final decision about any property division.

A Court Application can be made for both Parenting and Property Orders You do not need to make two separate applications.

PROPERTY

Continued

How does the Court approach the division of Property?

There are five steps the Court will take in deciding what property Orders to make.

Step 1 – Is an Adjustment required?
Firstly, the Court considers whether it is appropriate in all of the circumstances, to make any adjustment to property interests at all. In the vast majority of cases, the answer will be 'yes' and the Court will proceed through the next 4 steps.

Step 2 - Ascertaining the net asset pool:

The second step is to identify and value the marital assets. The general rule is that all assets must be taken into account, whether they are acquired before or during the marriage (irrespective of whose name they are in) or after the separation.

The definition of “property” is very wide. It includes almost everything of value. Property includes assets of either or both of the parties such as real estate, shares, cars, jewellery, savings, furniture and superannuation. It can also include assets in the name of a third party if a spouse party has a beneficial interest in that asset.
The Court must also consider the parties’ financial resources. These are funds or assets over which a party has influence or control such as any entitlement under a Trust, future job prospects, long service leave entitlements and personal injury claims. Some times these are quantified and treated as if they are assets and in other cases they are “taken into account” in a less tangible way.

To ascertain the net asset pool, in some cases valuations need to be obtained on any real estate, or business that is held, or any superannuation interest. The valuations of these assets can sometimes be contentious or complex. There are a number of different approaches to the valuation of assets, which we may need to discuss with you at a later point when we have identified the assets. Liabilities and debts must also be identified and valued.

PROPERTY

Continued

Step 3 – Contribution as to the net asset pool:

The third step is to consider the contributions of each party to the marriage, both financial and non-financial and also to assess the contribution made as a homemaker or parent. Initial contributions such as what you bring into the marriage are relevant, as are gifts and inheritances received during the marriage. It is important to identify where money came from to buy or improve property. The source of funds for direct contributions can be funds or property owned prior to the marriage or acquired after the marriage, including monies acquired by way of earnings, profits on sale, gift, inheritances, redundancy's and windfalls. In circumstances where property was owned prior to marriage, the other spouse would not have made any contribution to its acquisition.

Non-financial contributions must also be considered and evaluated. This is contribution of a type, which may be described as being made by effort eg. the building of a home, gardening, starting a business, caring for the stock on a country property, attention to customers at a small business, or bookwork in a family enterprise. It can also be indirect, for example, if one spouse's father who is a carpenter builds a new kitchen in the family home.

Step 4 – Future needs:

When the Court has made its preliminary decision as to the division of property based on these contributions, it is then necessary for it to consider a number of secondary aspects which may be relevant. The Court will assess both parties future needs, taking into account a range of things including age, health, income, earning capacity, the property each person has, whether they have the care or support of children from the marriage under the age of 18 and the financial circumstances of any new relationship. The Court can make a further financial adjustment as a result of weighing these matters.

In addressing the future needs the Court considers whether a spouse could be trained or retrained for employment or to start a business and how long that training would take, the extent to which a spouse may have contributed to the income and earning capacity of property of the other and the duration of the marriage and the extent to which it has effected the parties' earning capacity. This might include any particular course or skill which either of the parties gave up or passed up to devote him or herself to the needs of the marriage.

PROPERTY

Continued

Step 5 - Just and Equitable:

Following steps 1, 2, 3 and 4, the final step is to stand back and consider whether the orders arrived at by the process are just and equitable.

In looking at these four steps, the Judge or Senior Judicial Registrar hearing the case has a wide discretion to put weight or importance on some items but not others. Obviously there is a subjective assessment in the valuation of the respective contributions of the parties by the Judge.

It is said that each case has to be looked at on its own facts. There are 100 or so Judges and Judicial Registrars appointed to the Federal Circuit and Family Court of Australia. They come from all types of backgrounds, male and female, from different cultural and racial backgrounds and representing a broad range of different philosophical approaches. There is a level of unpredictability in respect of contested hearings in the Federal Circuit and Family Court of Australia, even though your lawyer will generally know who the Judge or Judicial Registrar is going to be at an early stage of the proceedings. Normally lawyers can only give a range of figures between which a judgment is likely. In many cases the range may vary by up to 7 - 8%. Because of this uncertainty of outcome and the additional stress, inconvenience and legal costs associated with a defended hearing, we generally attempt to negotiate a settlement of cases at the earliest opportunity.

PROPERTY

Continued

Mediation

In appropriate cases, we suggest that parties use Mediation as a method of trying to settle their disputes. We regularly try and obtain agreement with the other solicitor to the appointment of a neutral third party who is skilled in mediation. The function of the mediator is not to give legal advice but to be a neutral impartial third party who facilitates the negotiations between you and your spouse. It is best that you both have independent legal advice as to your legal position before you go to Mediation.

There are several different forms of Mediation that range from you/and your solicitor being in the same room as your spouse/and their solicitor to each of you being in separate rooms so as not to be face to face, which is often the preferred model when family violence has been a factor in the relationship between the parties.

It is our approach at Willis & Bowring that no marital dispute should go to a defended hearing and that all effort should be made to resolve a matter either by mediation or at the initial stages of the Court process. However in some instances, some matters do proceed to Court as it is beyond the abilities of the parties to settle and as such, your case will go to trial. This will involve you and your spouse having your day or multiple days in Court before a Judge or Judicial Registrar who will make a decision as to the ultimate division of your property.

Financial Disclosure

We are required under the Pre-action Procedures, to ensure that the parties attempt to mediate or otherwise negotiate a settlement prior to filing an Application in the Federal Circuit and Family Court of Australia. The Pre-action Procedures which are Rules of the Court, also require both parties to disclose their financial documents to the other party (or their respective Solicitor). For a list of Documents that each party should provide to the other, please see the next page titled 'Documents'.

DOCUMENTS

In all property proceedings/matters entered into between parties pursuant to the Family Law Act (1975) Commonwealth, couples are required by the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 to exchange documents proving what assets and liabilities they hold jointly or individually in order to determine what must be dealt with in order to resolve and finalise a settlement between them.

There are a number of minimum documents that we require to assist us in finalising your financial matter, whether you are married or in a de-facto relationship. This includes:

- A copy of your Marriage Certificate (if relevant);
- A copy of any valuations and/or market appraisals obtained setting out the value of the home/or investment properties;
- A copy of yours and your former spouses:
- Three most recent Tax Returns and Notices of Assessments;
- Most recent superannuation statement; and
- Policies or statements in relation to any life insurance policy.
- A copy of yours and your former spouses recent bank statements or a list of bank accounts held by you and your spouse, noting the current balance held in each account and the account numbers;
- If you/your former spouse owns/directs a Company or Partnership, a copy of:
    - The Financial Statements of the company for the last 3 years;
    - The business Tax Returns and/or Notices of Assessments for the last 3 years;
    - BAS statements for the last 12 months; and
    - The Partnership Agreement (if you are in a Partnership).
- If you are part of a Trust, a copy of the Trust Deed;
- If you own shares, a copy of the most recent Share Certificate or Statement noting the quantity and value of shares held and evidence of dividends received by you;
- Registration details on any vehicle/marine vessel owned by you or your former spouse, including estimated value; and
- If any previous Orders have been made by a Court regarding violence, children or property, a copy of those Orders.

DE-FACTO RELATIONSHIPS

What is a De-Facto Relationship?

All de facto relationships, both heterosexual and same sex, that come to an end are dealt with by the Federal Circuit and Family Court of Australia

For parties to be deemed to be (or previously been) in a de facto relationship, they must meet at least one of the following criteria outlined by the Family Law Act:

- Been in a relationship of at least 2 years, or
- There is a child of the de facto relationship, or
- It is a Registered De-facto relationship (see further information below), or
- One party made substantial contributions to the wellbeing and maintenance of the family and it must be decided by the court that a failure by it to make an Order or Declaration would result in a serious injustice to the Applicant.

A de facto relationship is defined by the Family Law Act as persons who are not legally married to each other, not related by family and having regard to all circumstances of their relationship, have a relationship as a couple living together on a genuine domestic basis.

When determining whether persons have a domestic relationship, the Court has regard to:

- the duration of the relationship;
- the nature and extent of the common residence that is, their home;
- whether a sexual relationship exists;
- the degree of financial dependence or independence or any arrangements for
- financial support between the parties;
- the ownership use and acquisition of their property;
- the degree of mutual commitment to a life shared;
- whether the relationship was registered under the prescribed law of a state or territory; and
- the care and support of children and the public recognition and reputation of that relationship.

DE-FACTO RELATIONSHIPS

Continued

The law envisages that a de facto relationship can exist even if one of the persons in that relationship is legally married to someone else or is in another de facto relationship.

The Family Law Act provisions will not apply to De-Facto couples whose relationship broke down before 1 March 2009 unless both parties opt into the Federal Circuit and Family Court of Australia de facto jurisdiction. If the parties do not opt into the jurisdiction, their property matter will be dealt with under the old State legislation that is, in either the District or Supreme Courts. (However given the passing of time these situations are now extremely rare).

Registration of the relationship

A de facto relationship may also be registered, similar to a marriage, in states or territories and this will also be a clear indication that two parties are in a de facto relationship. The effect of the legislation is that if the de facto relationship exists the registration of certain relationships that are not marriages may create legal rights and obligations that are very similar to marriages, as they will virtually be in the same position as couples who marry in the event that their relationship breaks down and there needs to be an alteration of property or a consideration of maintenance to one of the parties.

From 1 July 2009, a parent of a child in a same sex relationship which has broken down can also apply for Child Support from the other parent, which is in line with community expectations.

As for married couples, the Family Law Act also allows for superannuation interests of a de facto party to be split when dividing up the couple's property, as superannuation is considered as a matrimonial asset.

DE-FACTO RELATIONSHIPS

Continued

Financial Agreements

De facto Parties can also enter into Binding Financial Agreements (see further information about these agreements on the next page).

Marriage will terminate any financial agreement which they might have entered into as a de facto couple and it is wise to enter into another agreement following the marriage. They can enter into these agreements before co-habitation, during co-habitation and after the break down of their relationship.

One of the reasons that these agreements may be set aside is if one of the parties to the agreement was not provided with independent legal advice from a legal practitioner before signing the agreement with respect to the effect of the agreement, the rights of the parties and the advantages and disadvantages at the time the advice was provided to the party making the agreement.

Limitation Period

In de facto matters there is a limitation period in which you can bring proceedings before the Court. The law states that a Financial Application can only be commenced in a de facto matter if the Application is made within 2 years after the end of the de facto relationship. The law provides for out of time Applications to be requested and granted leave to progress which is something our Team can assist you with.

If you require our assistance with any aspect of your De-facto relationship please do not hesitate to contact us on 9525 8100.

FINANCIAL AGREEMENTS

Continued

What is a Binding Financial Agreement?

Another way to resolve your Property matter is by entering into what is called a Binding Financial Agreement (BFA). One specific type of these agreements are commonly referred to as Pre-nuptial Agreements, or "Pre-nups", however the agreement can be entered into at various times, not only prior to a marriage.

A BFA is a document that is entered into when parties have reached agreement as to the division of their assets and specify that division in a legal agreement. An agreement of this nature is not forwarded to the Court for the Court's approval but it does require both parties to have independent legal advice for it to be recognised, and legally binding.
Parties can enter into a BFA pursuant to the Family Law Act 1975. Agreements of this nature outline the proposed division of assets, should the relationship between a couple breakdown, or following a breakdown that has occurred.

Types of Binding Financial Agreements:

BFAs can take the following form:

1. A Financial Agreement before you marry (often referred to as a Pre-Nuptial Agreement);
2. A Financial Agreement during the marriage (this is often an agreement that is entered into after the marriage has broken down but prior to the parties divorcing) and;
3. A Financial Agreement after a Divorce Order is made.

FINANCIAL AGREEMENTS

Continued

Pre-Nuptial Agreements

It has become more and more common to have clients consult us in relation to the preparation of a Binding Financial Agreement prior to their marriage. The aim of a significant proportion of our clients is to identify the assets held by either party and to "quarantine" them so that in the event the parties separate in the future, each party may retain the assets that they held at the commencement of the relationship and usually divide any assets acquired during the relationship between them.

It is always in a parties' best interest to enter into an Agreement of this nature, in the event that they wish to protect their assets, as an agreement like this:

- Clearly dictates the parties' intent at the time of entering to the relationship;
- Recognises the assets which are held by them; and
- Stipulates how they wish for those assets to be divided in the event that they separate.

We recommend to all clients who are considering entering into a BFA before marriage that they consult one of our family law solicitors well in advance of the marriage. It takes time and consultation with your partner and their solicitor to create a BFA that is workable. No client wants to be dealing with or signing a document of this nature the day before their wedding!

BFA's During a Marriage and after a Divorce

Both of these agreements are generally dealt with in the same manner. They involve parties dividing their assets and resources following their separation or their divorce. The effect of an Agreement of this nature, is that it stipulates the assets held by the parties and the way in which they wish to divide the assets.

De-Facto Couples can also enter into a BFA before, during or after their relationship ends.

FINANCIAL AGREEMENTS

Continued

Is a BFA Legally Binding?

For an agreement of this nature to be legally binding, the following conditions must be strictly adhered to:

- The Agreement must be in writing and signed by both parties;
- The Agreement must contain a statement to the effect that both of the parties have received independent legal advice from a solicitor as to the following matters:
    (a) The effect of the Agreement on the rights of the parties; and
    (b) The advantages and disadvantages at the time the advice was provided to the party of making the Agreement;

- An annexure must be provided in the agreement containing a Certificate signed by the solicitor providing the legal advice;

- The Agreement has not been terminated and has not been set aside by the Court; and

- The Agreement is signed, the original Agreement is given to one of the parties and a copy is given to the other.

The Court has the power to set aside one of these Agreements, if, and only if, the Court is satisfied that any one of the following has occurred:

(i) The Agreement was obtained by fraud (including non-disclosure of a material fact such as an asset help by a party); or

(ii) Either party to the Agreement has entered into the Agreement for the purposes of defrauding a creditor, or with reckless disregard to the interests of a creditor (for example, if a party enters into an agreement transferring all their assets to their spouse because they hold the belief they are about the be declared bankrupt);

FINANCIAL AGREEMENTS

Continued

(iii) The Agreement is voidable or unenforceable;

(iv) In the circumstances that have arisen since the Agreement was made, it is impractical for the Agreement to be carried out;

(v) Since the Agreement was made, a material change in the circumstances has occurred being a circumstance in relation to the care, welfare and the development of the children and as a result, the party who entered into the Agreement will suffer hardship if the Court does not set aside the Agreement (this may include an example where a child becomes very ill following the making of an Order and a parent is required to become their fulltime carer;

(vi) During the making of the Agreement, one of the parties conducted themselves in a way that is unconscionable;

(vii) The Agreement attempts to deal with the superannuation (that is described as unsplittable) under the Family Law Act.

What are the benefits of a BFA?

The benefit of a BFA is that neither party is required to attend Court or to seek the approval of the Federal Circuit and Family Court in relation to the Agreement. The Federal Circuit and Family Court does not merely "rubber stamp" Consent Order Agreements and can reject terms of settlement if they feel that the decision is not just and equitable. You overcome this hurdle by finalising your proceedings with a BFA.

In all instances Binding Financial Agreements require full disclosure. This means that parties must disclose all information in relation to assets, financial resources and liabilities. Non-disclosure can result in an Agreement being overturned at a later date.

If you require assistance in relation to the drafting of a Binding Financial Agreement, please do not hesitate to contact us on 9525 8100.

DIVORCE

Continued

How do I get a divorce?

To obtain a divorce, an Application for Divorce must be filed in the Federal Circuit and Family Court of Australia. Many people find it simpler and less time-consuming to instruct us to prepare and file their divorce papers and appear at the Hearing.

The sole legal ground of separation is that there has been an “irretrievable breakdown of your marriage” and an Application for Divorce may be filed after one year from the date of separation.

An Application can be filed in one of three ways:
1. By you alone;
2. By your spouse alone; or
3. By both of you together (Jointly).

If you file an application jointly the cost is reduced as your partner does not have to be served with the application for Divorce. However, not all parties always agree that a divorce application should be filed, and often one party will file an application without their spouses knowledge or consent.

After the application is filed, we must then locate the spouse and have them formally served with the Application for Divorce. This can be done through a 'Process Server', and we can organise this for you.

DIVORCE

Continued

Other Issues considered by the Court

When considering whether to make a Divorce Order, the Court must also consider the Welfare of any children of the relationship and the issue of the Division of Property.

Welfare of Children

- To grant a divorce, the Court must generally be satisfied that proper arrangements
- have in all of the circumstances been made for any children of the marriage under
- the age of 18 years.
- The living arrangements of the children and child support are the two most common
- considerations with which particular care and attention must be given.

Division of Property

Proceedings for the dissolution of marriage are separate to the issue of a property settlement. It is not necessary to be divorced or separated for at least one yearbefore a property settlement can be undertaken. A property settlement can be undertaken at any time after separation, (and in fact at any time during marriage).

The sole effect of divorce upon the question of property settlement is that an application for property settlement or spousal maintenance must be filed within 12 months of the date of Divorce Order being made.

Failure to file an application for property settlement and/or spousal maintenance within this 12 month period means that the leave of the Federal Circuit and Family Court of Australia has to be sought when filing an application for property settlement or spousal maintenance out of time. This is best avoided because the court does not always grant leave.

DIVORCE

Continued

How Much Does It Cost?

Solicitor's fees consist of Professional Costs and Disbursements.

Professional Costs

Our legal costs vary depending on the solicitor engaged to conduct your matter and their charge out rate. Depending on the complexity of the Divorce application, (ie if service of the documents is difficult or if a special application needs to be filed or one or more Court attendances is necessary) the legal costs may vary.

We will assist you by giving you an estimate regarding these costs when you provide us with your instructions.

Disbursements

The filing fee for a Divorce Application to the Federal Circuit and Family Court of Australia is currently $990.00. Other disbursements which may apply include:

- Postage, telephone and photocopying, estimated at approximately $110 - $150; and
- Process Server's fees, estimated at approximately $110.00.

The original or a certified copy of the Marriage Certificate must be filed with the Divorce Application. If you do not have the original Marriage Certificate a copy will have to be obtained at an approximate cost of $60.00 for a non-urgent application and $88.00 for an urgent application.

Therefore the total of disbursements, including the $990.00 filing fee, may range from the sum of $1,200.00 to $1.300.00, depending on the circumstances of each case. (NOTE however that the Court will reduce the filing fee in cases of hardship, ie, if you have a health care card.)

A NEW WILL

We recommend that you update your Will prior to finalising your Family Law property settlement and/or obtaining a Divorce Order.

What is a Will?

A Will is a legal document that sets out who you wish to receive the things you own, such as your property and possessions, in the event of your death. These people are known as beneficiaries. Your property and possessions include everything you own, such as your home, car, cash, shares, jewellery, pictures, furniture etc. Making a Will is the only way you can ensure your assets will be distributed in the way you want after you die. It is imperative that you provide us with instructions regarding your new Will.

During/prior to your Property Settlement/Divorce Order

If you pass away prior to resolving your property dispute and prior to obtaining a divorce, your assets may pass to your spouse. Your current Will may provide for them or alternatively if you have no Will and die "intestate", the rules of intestacy provide that a large portion of your estate will pass to your spouse.

You may also own your property as joint tenants. Joint Tenancy rules provide that if one of you pass away, the property automatically passes to the other (regardless of what your Will states). You can sever your joint tenancy and own the property as Tenants-in-Common (50/50 share each). This will ensure that the property is owned independently of each other (and can therefore be gifted in a Will) during your property dispute.

Following your Divorce Order being made

Section 13 of the Succession Act 2006 provides that a Will may be totally or partially void (depending on its dispositions) following a Divorce Order. This may result in a total or partial intestacy which may mean that your Estate may not be distributed in accordance with your wishes.

A NEW WILL

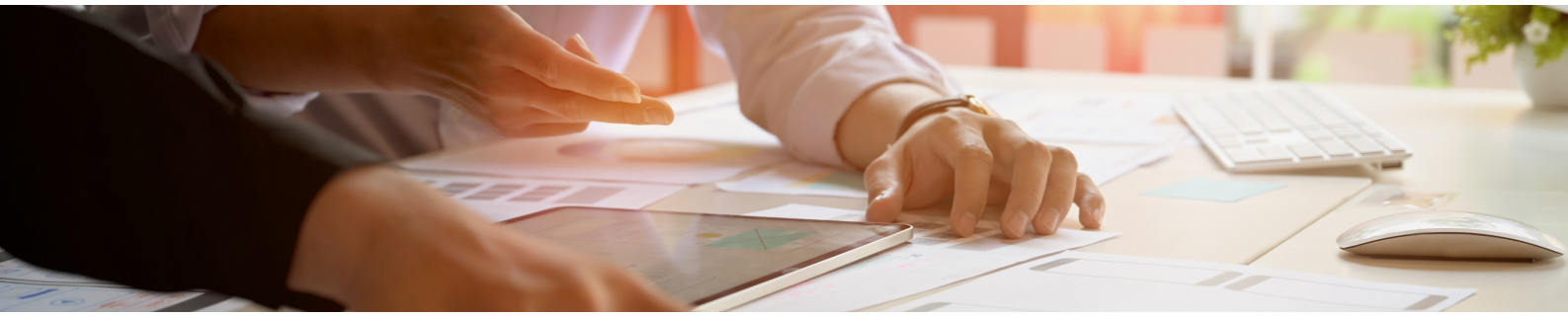
Continued

How can Willis & Bowring help me?

Having Willis & Bowring draw up your Will is in your best interests because we will:

- Make sure your Will is valid i.e. properly drawn, signed and witnessed;
- Make sure your wishes are clearly expressed in the Will;
- Advise you regarding adequate provision for your spouse and children, or for any former spouse or any dependants;
- Advise you on choosing an Executor;
- Advise you on the best way to arrange your affairs; and
- Keep the Will in a safe place.

Our Estate Planning team would be happy to assist you. Please contact us on 9525 8100 and book your appointment with Lou Polito, Jessica Calleja, Aimee Collantes and Deanne Kindis to assist you with these arrangements.



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CONTACT US

We welcome your questions in relation to your Family Law matter and invite you to telephone our office to schedule an appointment with one of our experienced Solicitors in our Family Law Team.

WILLIS & BOWRING
Solicitors