



MACKAY REGIONAL COMMUNITY LEGAL CENTRE Inc.

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# Family Law & Domestic Violence



# ACKNOWLEDGEMENT OF COUNTRY

MRCLC acknowledges the Traditional Custodians of the land on which we work and live.

We recognise their continuing connection to land, water and community.

We pay respect to Elders past, present and emerging.





# DISCLAIMER

The content in this publication is intended only to provide a summary and general overview on matters. It is not intended to be comprehensive, nor does it constitute legal advice.

We attempt to ensure that the content is current, but we do not guarantee its currency.

You should seek legal or other professional advice before acting or relying on any of the content in this publication.

This presentation is current as at 14 December 2021.



# ABOUT THE MACKAY REGIONAL COMMUNITY LEGAL CENTRE INC.

- ▶ Free and confidential legal advice and assistance throughout the Mackay, Whitsunday and Isaac Regional Council areas.
- ▶ 1 hour appointments available between 9:00am – 4:00pm Monday to Friday, either by telephone or in person. Legal advice evenings twice per month.
- ▶ Monthly outreach to Sarina, Cannonvale, Proserpine, Bowen and Moranbah.
- ▶ MRCLC operates the following programs:
  - Domestic Violence Duty Lawyer at the Mackay Magistrates Court.
  - Mental Health Review Tribunal Representation Service – referrals received from LAQ
  - Elder Abuse Prevention and Support Service (EAPSS) – work with RAQ to deliver legal advice and information to people aged 60+ and 50+ for Aboriginal and Torres Strait Islander people at risk of experiencing or experiencing Elder Abuse within the Mackay Regional Council area.
  - Queensland Statewide Tenant Advice and Referral Service (QSTARS) – MRCLC works with Tenants Queensland to provide residential tenants with legal advice and assistance.
  - Generalist legal service, including family law, employment, debt, consumer and neighbourhood disputes. MRCLC does not provide advice on criminal law, conveyancing, migration or commercial matters.

# OVERVIEW

New Court  
Structure

Parenting  
Matters

Property  
Settlement

Divorce

Domestic  
Violence

# New Court Structure

## Previously

1. Family Court of Australia
2. Federal Circuit Court of Australia



**(Merged on 1 September 2021)**

**Federal Circuit and Family Court of Australia (Divs 1 and 2)**

# PARENTING



# Types of Arrangements

## Informal Agreements

- No documented agreement
- No court involvement

## Parenting Plans

- In writing – signed and dated by both parents
- Not legally enforceable
- Can be changed at any time by agreement
- Can alter the effect of an existing court order

## Court Orders

- Consent Orders
- Orders made by the court when parties cannot agree – Initiating Application



# Shared Parental Responsibility

Parents have “parental responsibility”

- ▶ All the duties, powers, responsibilities and authority which, by law, parents have in relation to children
- ▶ All things related to the care, welfare and development of the children
  - ▶ Education
  - ▶ Health
  - ▶ Religion and culture
  - ▶ Names
  - ▶ Living arrangements

# Equal Shared Parental Responsibility

The Court presumes that it is in the best interests of the child for the parents to have equal shared parental responsibility

## **UNLESS...**

There are reasonable grounds to believe that a parent has engaged in:

- Abuse of the child, or of another child who was a member of the parent's family, or
- Family violence

To obtain sole parental responsibility the court must be satisfied (by evidence) that it would not be in the best interests of the child for the parents to have equal shared parental responsibility

# Time

- ***Equal Time***

If equal shared parental responsibility, the Court must consider whether the child spending equal time with each parent would be in the best interests of the child, consider whether this is reasonably practicable and if it is, consider making an equal time order (s 65DAA(1))

- ***Substantial and Significant Time***

If spending equal time isn't appropriate, the Court must consider whether the child spending substantial and significant time with each parent would be in the best interests of the child, consider whether this is reasonably practicable, and if it is, consider making such an order. (s 65DAA(2))

# BEST INTERESTS OF THE CHILD

In deciding whether to make a particular parenting order, a court must regard the **best interests of the child as the paramount consideration.**

When making a parenting order the court must act in accordance with the child's best interests being the paramount consideration, but also ensure that the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.

# FAMILY DISPUTE RESOLUTION “FDR”



FDR must be attempted before a party can commence proceedings in the Federal Circuit and Family Court of Australia – each party will receive a certificate (valid for 12 months)

- If there is an exception to FDR (allegation of abuse, risk of abuse if delay, family violence, risk of family violence), the party must file an 'Affidavit of non-filing of Family Dispute Resolution Certificate'

# Consent Orders

- ▶ Both parties sign the Application for Consent Orders and Minutes of Consent
- ▶ File in the Federal Circuit and Family Court of Australia
  - ▶ Application for Consent Orders
  - ▶ Minutes of Consent (the draft Orders)
  - ▶ Notice of child abuse, family violence or risk
- ▶ Pay the filing fee of \$170
- ▶ Once Orders are sealed by the court they are binding and enforceable.

# When parents disagree

The Applicant files:

- Initiating Application
- FDR Certificate, or an affidavit of non-filing of FDR Certificate
- Notice of child abuse, family violence or risk
- Parenting Questionnaire (new)
- Genuine Steps Certificate (new)
- Undertaking as to disclosure (new)
- Copy of any Protection Orders
- Affidavit (if seeking interim/interlocutory orders)

Pay filing fee – either \$365 or \$490 depending on Orders sought

# Contraventions

- ▶ If a person intentionally contravenes an order or makes no reasonable attempt to comply with the orders, an application for contravention can be made to the court.
- ▶ File an Application for Contravention and an Affidavit.
- ▶ Range of remedies available.



# Property Settlement

## Limitation Periods

- ⦿ **IF MARRIED:** A person can apply for financial orders from the Court at any time up to 12 months from the date their divorce becomes final (without leave of the court).
- ⦿ **IF A DE FACTO:** A person may be able to apply for property orders from the Court up until 2 years from the date of separation (without leave of the court).
  - ⦿ Definition - couple living together on a genuine domestic basis, plus other circumstances to be considered

# Property Settlement Options

## Informal Agreement

- Not legally binding





## Binding Financial Agreement

- Needs to be drafted by a Solicitor
- Independent legal advice is required to be provided to each party
- Legally binding

## Court Orders

- Consent Orders
- If cannot agree - Initiating Application

# 4 Step approach

- Step 1  Determine the Property Pool
- Step 2  Contributions (Financial and Non-financial)
- Step 3  Future needs
- Step 4  Just and equitable

# Superannuation

- ▶ Super split or payment flag.
- ▶ Splitting super does not convert it to a cash asset i.e. it is usually retained until retirement age is reached
- ▶ Superannuation can be allocated by a formal written agreement, Court Order or Binding Financial Agreement.
- ▶ A de facto partner / spouse can obtain the current balance of their partner's superannuation by providing Form 6 Declaration & Superannuation Information Request form to the Superannuation Fund plus the fund's fee.

# SPOUSAL / DE FACTO MAINTENANCE

An order can be sought for spousal maintenance.

- ▶ If one party is unable to support themselves adequately, then the other party to the marriage or de facto relationship is liable to maintain them to the extent they are reasonably able to do so.
- ▶ Spousal maintenance ends when either party dies, or the recipient remarries/commences a de facto relationship.

# Binding Financial Agreements

- ▶ Drafted by a Solicitor
- ▶ Parties need to obtain independent legal advice
- ▶ Can be set aside by the court

# Consent Orders

- ▶ Both Parties sign the Application for Consent Orders and Minutes.
- ▶ File in the Federal Circuit and Family Court of Australia
  - ▶ Application for Consent Orders
  - ▶ Minutes of Consent (the draft Orders)
- ▶ Pay the filing fee of \$170
- ▶ Once Orders are sealed by the court they are binding and enforceable.

# No agreement

## Applicant files -

- ▶ Initiating Application
  - ▶ Financial Statement
  - ▶ Financial Questionnaire (new)
  - ▶ Genuine Steps Certificate (new)
  - ▶ Undertaking as to Disclosure (new)
  - ▶ Affidavit (if seeking interim orders)
  - ▶ Copy of any Protection Order
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- ▶ Pay filing fee - either \$365 or \$490 depending on Orders sought
  - ▶ General rule is that each party bears their own legal costs



# DIVORCE

- Irretrievable breakdown of the relationship evidenced by being separated for 12 months –
  - ‘Separation under one roof’ is OK
- Joint or sole application
- Filing fee is \$940. Reduced fee is \$310.

# DOMESTIC AND FAMILY VIOLENCE

## *Domestic and Family Violence Protection Act 2012*

DV means behaviour that is:

- ▶ physically or sexually abusive
- ▶ emotionally or psychologically abusive
- ▶ economically abusive
- ▶ threatening
- ▶ Coercive, or
- ▶ In any other way controls or dominates another and causes them to fear for their safety or wellbeing (or of someone else).

# Apply for a Protection Order

Apply to the Magistrates Court



Police Application  
(incl a Police Protection Notice)

Private Application

Private applications can be made by:

- an aggrieved (i.e. the person experiencing DV)
- an authorised person for an aggrieved
- a person acting under another Act for an aggrieved
- a party to a child protection proceeding

# Protection Order

Court can make a DVO if satisfied:

- ▶ Domestic or family violence has occurred
- ▶ That a relevant relationship exists, and
- ▶ An order is necessary or desirable to protect the aggrieved from domestic violence

DVO initiating applications table from the Queensland Courts website

Location	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22 YTD (to 31 Oct 2021)
Mackay	784	755	720	823	776	244

# Protection Order Conditions

- ▶ **Mandatory Condition**

- ▶ **Extra Conditions**

- ▶ Ouster Condition
- ▶ Not approach where the aggrieved resides, works, or a school.
- ▶ Condition relating to recovery of undisputed personal property
- ▶ Locating
- ▶ Approaching
- ▶ Contacting
- ▶ Social Network
- ▶ Protection of unborn child

# Offences

- ▶ **Contravene DVO:** where the respondent breaches a condition of a DVO. A conviction in relation to this offence is recorded on a defendant's criminal history.
- ▶ **Domestic and Family Violence (DFV) related offences** (flagged offences): Effective 1 December 2015, criminal offending that occurs in the context of DFV can be recorded by way of a notation under the *Penalties and Sentences Act 1992*. This helps to ensure that the patterns of behaviour of those who commit acts of DFV are clearly evident to police officers and courts.
- ▶ **Non-fatal strangulation:** Effective 5 May 2016, choking, suffocation or strangulation in a domestic setting is a stand-alone offence under the *Criminal Code 1899*, with a maximum penalty of 7 years imprisonment.
- ▶ When sentencing an offender for a domestic violence offence, a court can make a protection against an offender on its own initiative.

# Offences cont.

- ▶ Non-lethal strangulation can cause serious and potentially critical damage with few or no obvious signs on the body.
- ▶ Health records can be important in securing convictions and keeping victims safe.
- ▶ Coercive control is to be criminalised from 2024 in Queensland.

## Strangulation offences

Table 14. Strangulation offences, by court level

Court	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22 YTD (to 31 Oct 2021)
Magistrates Court	876	834	676	592	834	321
District Court	206	874	716	586	588	295
Supreme Court	<5	10	9	7	17	<5
Total	<1,090	1,718	1,401	1,185	1,439	<620

## Contravene DVO charges lodged in the Magistrates Court

Location	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22 YTD (to 31 Oct 2021)
Mackay	526	497	496	695	1,011	228

Tables from the Queensland Courts website.

# QUESTIONS

