Level 2, 15 Bentham Street
Adelaide, South Australia, Australia 5000
T + 61 8 8231 0088
F + 61 8 8231 0355
E reception@gropehamiltonlawyers.com.au
www.gropehamiltonlawyers.com.au

GROPE HAMILTON LAWYERS

FAMILY LAW – FREQUENTLY ASKED QUESTIONS (FAQ)

If you have a family law issue, please contact our firm for expert help.

Q1. I separated from my husband last month and would like to apply for a divorce. Can I do this now?

In order to apply for a divorce, you and your spouse need to have been separated for a period of 12 months with no prospect of reconciliation. If you were married for less than two years prior to separation, then other criteria need to be met as well.

Divorce in Australia is "no fault" which means that there is no need to prove that one spouse caused the marriage break down. In some cases, you will not even have to attend court.

We can assist you to obtain your divorce and remove the stress of having to fill in the paperwork and navigate the court system.

Q2. My ex-spouse/partner and I separated about 18 months ago now. We have not yet discussed property settlement. Is there a time limit?

- For **married** couples, the time limit is one year from the date of divorce.
- For **defacto** couples (including same –sex couples) who separated after 1 July 2010, the time limit is two years from the date of separation.
- For **defacto** couples (including same-sex couples) who separated prior to 1 July 2010, other rules apply. Please contact us to discuss these.

Yes, time limits do apply. Once the time limit expires, the court does not have to hear any application subject to, in some circumstances, the court choosing to grant an extension of time.

If you are involved in a matter that you believe may be "out of time", we strongly encourage you to seek urgent legal advice from us about your position.

Q3. My ex-spouse/partner and I have come up with our own agreement for property settlement. I don't want to go to the trouble of getting court orders; can we just draw something up between ourselves?

An agreement drawn up between you and your partner (even if witnessed by a JP or put in the form of a document such as a statutory declaration) is **not** a binding or final property settlement. Seeking to rely on a "home-made" agreement is extremely risky. The risk is that one or both parties will later decide to go back on the agreement and seek more of the assets that the other party expected to be able to keep. Because a "home made" agreement **is not binding or final**, a court does not have to enforce it.

However, if you and your ex-partner/spouse have reached an agreement for your property settlement, our family lawyers can assist you to get a consent court order from the Family Court of Australia with minimal fuss and without you even needing to attend at court. This will give you the peace of mind of a final property settlement.

Q4. I was in a same-sex de facto relationship for three years, but we have now separated. Can I apply for a property settlement?

Yes. Under the Family Law Act 1975, same-sex couples fall within the definition of a "de facto relationship". For a de facto relationship (same-sex or otherwise) to fall under the Family Law Act 1975, one of the following criteria must be met:

- The couple must have lived together for at least two years; or
- There is a child of the de facto relationship; or
- A person has made substantial contributions and a failure to make an order for property settlement would result in a serious injustice to that person; or
- The relationship was registered under a prescribed law of a State or Territory.

If you separated before 1 July 2010, other legislation applies and we can advise you further.

We also have experience in assisting clients with property settlement and children's/parenting matters arising from the breakdown of same-sex relationships.

Q5. My marriage has ended and we have two young children. My ex says that I have to give him half time with the children but I'm not comfortable with that. What can I do?

A fundamental principle of family law is that children have a right to know and spend time with each of their parents. This is the case apart from in exceptional circumstances where it can be demonstrated that this is not in the children's best interests.

The focus of the court when making decisions about parenting arrangements is to make a decision that is in the *best interests of the child,* not on the "rights" of the parents. However, this does not mean that the children must spend equal amounts of time with each parent.

Often, it can be demonstrated that equal time is not in the best interests of the children, and that another arrangement would better meet the needs of the children.

Sometimes, it is possible to negotiate the terms of consent court orders that are in the best interests of the children, although in other cases court proceedings may be inevitable.

We can provide you with sensible and thoughtful advice and effective legal representation to help you achieve resolution of your parenting matter.

Q6. My marriage has ended and my partner won't let me see the children. What can I do?

A fundamental principle of family law is that children have a right to know and spend time with each of their parents. This is the case apart from in exceptional circumstances where it can be demonstrated that this is not in the children's best interests.

Whatever the reasons for the situation, if you are being prevented from spending time with your children it is important to seek legal advice as a matter of urgency. Allowing time to pass might damage your chances of achieving a favourable outcome.

In situations of this nature, there are a variety of potential avenues to take including mediation and court proceedings.

Q7. My partner/spouse and I have recently separated. The police were called and I have been served with an Intervention Order and have a court date coming up. Meanwhile, I'm not allowed to contact my ex or see our children. What can I do?

An Intervention Order is an order made in the Magistrates Court of South Australia that places restrictions on the behaviour of one person (the "defendant") towards another person or people ("the protected persons"). It can have a significant flow-on effect in family law court proceedings, especially in proceedings involving children. Intervention Orders were previously known as "restraining orders".

If you have been served with an Intervention Order, legal restrictions have been placed on you. For example, you may not be permitted to make any contact with your ex-partner or spouse or your children. This is often a very distressing and stressful situation where you are already trying to cope with a relationship breakdown.

We strongly recommend that you urgently contact us for advice. We can represent you in the court proceedings, and assist you to defend the application for the Intervention Order, or to have it revoked, or to have the Order made or varied so as to be in the least possible restrictive terms.

It is important to remember that breaching an Intervention Order (even an interim order that you have not agreed to) is a serious and jailable criminal offence.

Q8. I was in a long marriage that has now ended. My ex-spouse has a lot of superannuation but I have very little. Is there a way to get some of her superannuation for myself?

Under the Family Law Act 1975, superannuation is treated as an asset of the marriage (or the de facto relationship). The law allows for superannuation to be split in some fashion between the parties.

For example, the court has the power, if it considers it to be just and equitable to do so, to make an order that gives one party part of the other party's superannuation. In some cases, one party might be ordered to receive half or more of the other party's superannuation.

Q9. My partner/spouse and I are happy in our relationship; however I had a lot of assets before we commenced our relationship and want to protect these in case of separation. Is there a way to achieve this?

Under the Family Law Act 1975, it is possible for couples in a relationship to obtain a Binding Financial Agreement. These are commonly known as "pre-nuptial agreements" although they are not only used by couples who are planning to marry, but also by de facto couples and by couples who are already married.

A Binding Financial Agreement provides for the division of property in the event that the couple later separates. The agreement does not have to be a fair agreement in the eyes of the law. That means the agreement can provide for one person to keep all, or most, of the property.

There are numerous and complex strict legal requirements that apply in order for a Binding Financial Agreement to be legally binding. Careful legal drafting is required. A home-made document will definitely **not** be sufficient.

Key legal requirements include that each party must have obtained independent legal advice about the agreement and each party's lawyer must sign a statement confirming the provision of that advice.

If you are thinking of entering into a Binding Financial Agreement, it is essential that you receive legal advice and take the time to think over the consequences of an agreement of that type for you.

Q10. What about binding financial agreements and pre-nuptials?

If you are about to marry or enter into a de facto relationship you may not want, for many reasons, to leave it to the courts to determine how your property will be divided between you and your spouse or partner if you separate in the future.

Binding Financial Agreements can set out how such matters will be resolved and take away the right of each party to apply to the courts for a financial settlement.

You may have children from a previous relationship and want to ensure that your property interests are not going to be affected as you enter into another relationship. You may wish to have some certainty about what will happen if the relationship ends.

We have drafted many Binding Financial Agreements for previous clients and we are also happy to provide independent advice to those who are asked to sign a Binding Financial Agreement by their partner or spouse.

Binding Financial Agreements need to be drafted with great care and by someone who is fully aware of the legal requirements for such agreements to be binding. You should not enter into any financial agreements without the advice of an experienced family lawyer.

Q11. What about post separation wills and estate planning?

If you separate, you need to think about the need for a new will.

Grope Hamilton Lawyers can assist clients with wills and estate planning when they are entering into second and subsequent relationships.

Sometimes, this will involve entering into a Binding Financial Agreement with a new partner or spouse to ensure assets pass to your children from a previous relationship when you die.

Working out how to provide for your current spouse and children and for children from previous relationships upon your death can be very complicated.

The ultimate distribution of your superannuation or pension entitlements may also be a factor.

We have experience working with financial planners and accountants to ensure the right documentation is prepared to reflect your wishes.

We can also draft Powers of Attorney (appointing someone to look after your finances) and Advance Care Directives (appointing someone to make medical and other personal decisions for you) to ensure all aspects of your end of life plans are in order.