

A Guide to Family Law

everyday answers



REVISED AND UPDATED



A GUIDE TO FAMILY LAW

EVERYDAY ANSWERS

Revised and Updated 2009

Michael Lynch Family Lawyers

Street Address:

Level 6, 193 North Quay
Brisbane Qld 4000

Postal Address:

PO Box 12027
George Street, Brisbane Qld 4003

Telephone: (07) 3221 4300

Facsimile: (07) 3221 9454

Email: law@mlynch.com.au

Website: www.mlynch.com.au

CONTENTS

About Michael Lynch	3
About this Book	3

SEPARATION AND DIVORCE

I have just separated! What should I do now?	4
Can I make an agreement with my spouse without having to go to Court?	6
When can I get a divorce?	8
Do I have to change my name?	8
Do I have to support my spouse?	9

CHILDREN

Who gets the children?	10
How often can I see my children who do not live with me?	12
Documenting Arrangements	13
Who has to support the children?	14
Can I change my children's name?	16
Can I take my children out of Australia?	16
Determining Parentage	17

PROPERTY

How will our property be divided?	18
What happens to superannuation?	19

DOMESTIC VIOLENCE

Domestic violence.	20
-------------------------	----

HELPFUL INFORMATION

Frequently asked questions	22
Some useful contact numbers and websites	24

ABOUT MICHAEL LYNCH

For almost 20 years Michael Lynch has specialised solely in Family and Relationship Law.

Michael is an Accredited Family Law Specialist and regularly presents seminars and media commentary on Specialist Family Law issues.



ABOUT THIS BOOKLET

This booklet is designed to help you gain a basic understanding of Family Law in Australia.

I am an Accredited Family Law Specialist practising in Queensland, therefore, this booklet has particular reference to Queensland. However, as the Family Law Act is Commonwealth legislation, this book also refers to the situation in Australia, generally.

This book provides general comments only and is not intended to give any specific legal advice.

Changes to the law occur regularly. Michael Lynch Family Lawyers will not accept responsibility for any loss or damage caused to anyone who relies on the information in this book.

No part of this book may be included in any document, circular, or statement, without the written approval of Michael Lynch Family Lawyers.

This book was first published in 1996 and has now been fully updated in this 6th Revision.

Michael Lynch LLB
Accredited Family Law Specialist

May 2009 © Copyright

I HAVE JUST SEPARATED! WHAT SHOULD I DO NOW?

1. STAY CALM

There is life after separation. The decisions you make now may have important consequences later.

Try not to make decisions in the heat of the moment.

Make rough plans that meet your needs.

Remember to keep any plans flexible.

2. SEEK EXPERT HELP

There is a list of helpful organisations at the back of this book.

3. CONSIDER COUNSELLING

4. CONSIDER MEDIATION

5. PREPARE A CAREFUL BUDGET

6. SEEK LEGAL ADVICE

Even if you and your spouse want to negotiate matters between yourselves, your solicitor will be able to give you the information you need to act in your own best interests.

Do not rely on the experience of friends and relatives who have had relationship problems. Your situation is probably different and the law may have changed since then.

7. MAKE ANY AGREEMENTS FORMAL

Once you and your spouse reach an agreement, make sure you make it formal.

A solicitor can explain the alternatives to you. This way you know that your agreement will be enforceable by the Court.

8. ASK YOUR SOLICITOR WHETHER OR NOT YOU SHOULD MAKE A NEW WILL

9. KEEP A DIARY OF ANY INCIDENTS THAT RELATE TO THE CHILDREN IF YOU ARE HAVING CHILD WELFARE PROBLEMS

10. KEEP COPIES OF ALL DOCUMENTS AND LETTERS SENT TO YOU BY YOUR SOLICITOR

Also keep all receipts and invoices that relate to your financial situation.

11. ASK YOUR SOLICITOR QUESTIONS IF THERE IS ANYTHING YOU DO NOT UNDERSTAND

12. ASK ABOUT YOUR LEGAL COSTS

Solicitors' fees may vary from firm to firm. Some solicitors send accounts after specific stages.

You may prefer that your solicitor sends you monthly accounts so that you are clear about your costs as you go along.

Sort these things out up front as it will save you and your solicitor embarrassment and disagreements later.

13. SEEK LEGAL ADVICE ABOUT WHERE YOU CAN LIVE

You may be able to obtain a Court Order that gives you occupation of your home.

14. REMEMBER TO TAKE YOUR PERSONAL PAPERS IF YOU DO LEAVE

15. GO BACK TO COLLECT YOUR BELONGINGS IF YOU NEED TO

If you need to go back to get personal items that you left behind, but are afraid, you can ask the police to accompany you.

CAN I MAKE AN AGREEMENT WITH MY SPOUSE WITHOUT HAVING TO GO TO COURT?

It is always preferable to reach an agreement.

You can try to do this through counselling, mediation or negotiation.

COUNSELLING

Counselling can help parents to work through issues of child welfare or other problems resulting from separation.

MEDIATION

A mediator is a neutral third party who arranges a meeting between you and your spouse to help you find a solution to your dispute.

Solicitors sometimes sit in on mediation sessions with their clients.

If your solicitor does not sit in on your session, you can meet your solicitor afterwards and get legal advice before the next session.

If you reach an agreement during a mediation session, you can then speak to your solicitor who will prepare the agreement in writing.

NEGOTIATION

Experienced Family Law solicitors, such as Michael Lynch Family Lawyers, try to settle matters without going to Court. They do this through negotiation.

Most matters are settled by negotiation.

WHAT SORT OF AGREEMENT DO I NEED?

The type of agreement will depend on the issue.

The most common types of arrangements are those that relate to:

- children – Consent Order or Parenting Plan;

- property settlement and/or spouse maintenance – Consent Order or Binding Financial Agreement; and
- child support – Child Support Agreement.

WHAT IS A BINDING FINANCIAL AGREEMENT?

There are three types of Binding Financial Agreements:

- before marriage – also known as a pre-nuptial agreement;
- during marriage; and
- after marriage.

As long as a Binding Financial Agreement meets the legal requirements, they are binding and will be enforced by the Court.

From 1 March 2009 defacto couples can also make a Binding Financial Agreement under the Family Law Act.

WHAT IS A RECOGNISED AGREEMENT IN A DE FACTO RELATIONSHIP?

The law regarding property settlements for defacto couples changed on 1 March 2009. Couples that separated after that date come under the Family Law Act. For couples that separated before 1 March 2009 there are two types of Recognised Agreements (under Queensland Law). These are:

- Cohabitation Agreement – created before a couple decides to live together, or during the time that they live together; and
- Separation Agreement – created after a couple separates, or when they state that they intend to separate.

WHEN CAN I GET A DIVORCE?

Family Law in Australia is based on a 'no fault' principle. The only ground for divorce in Australia is 12 months separation.

It is possible for you and your spouse to 'live under the same roof' and to still satisfy the required 12 months separation.

When calculating 12 months separation, any periods of reconciliation that are less than three months long are not counted, and do not stop a 12 month period from being calculated.

You may apply for a divorce either individually or together.

Divorce applications are handled by the Federal Magistrates Court.

A Divorce Order becomes final one month and one day after it is made. Neither person is allowed to re-marry before the Order becomes final.

In marriages where there are children under 18 years, the Court must be satisfied that appropriate arrangements have been made for their care.

Once the Divorce Order has become final, you have a deadline of 12 months in which to start proceedings for property settlement, if not finalised already. After 12 months you must apply to the Court to be allowed to start an application.

DO I HAVE TO CHANGE MY NAME?

A woman is not legally obliged to use her husband's surname when she marries. The use of the husband's surname has developed through custom.

If you decide to use your husband's surname, you can change back to your maiden name at any time you want to. This often happens after separation.

DO I HAVE TO SUPPORT MY SPOUSE?

Spouse maintenance is where a payment is made by one spouse to the other because of a significant difference in their incomes.

There is no formula to apply in determining the amount of spouse maintenance, rather there are a number of factors that the Court takes into account when deciding whether maintenance has to be paid.

Any money received from an income-tested pension or benefit is ignored by the Court when deciding if maintenance will be paid or not.

Sometimes the Court will say that maintenance must be paid for a specific period of time so that the other person can complete a training course.

Maintenance payments will end if any of the following occur:

- the person receiving maintenance remarries;
- the person receiving maintenance dies; or
- the person paying maintenance dies.

WHO GETS THE CHILDREN?

It does not matter whether parents are married or in a de facto relationship. All children are covered by the Family Law Act.

The Family Law Act has undergone changes with respect to the terms used regarding children. Prior to 1996 the terms used were “guardianship, custody and access”. Following 1996 the terms used were “residence, contact and specific issues”. All of these terms were replaced with the changes to the Family Law Act that commenced on 1 July 2006.

The Family Law Act now provides:

- A presumption that both parents have “shared parental responsibility”.
- The terms “residence” and “contact” have been replaced with the terms (who the child) “lives with” and (who the child) “spends time with and communicates with”.
- An initial obligation on the Court to consider making an Order that the child spend “equal time” with both parents, if that is in the child’s “best interests” and is “reasonably practicable”.
- “Best interests” is defined by “primary” and “additional” considerations. The “primary” consideration requires the Court to consider the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from harm.
- If the Court does not see an “equal time” Order as appropriate it must consider making an Order for a parent to have “substantial and significant time” if that is in the child’s best interests and is reasonably practicable.
- “Substantial and significant time” is defined as being time in addition to weekends and holidays, i.e. mid-week time.

Other changes introduced include:

- Parenting Plans: Plans are not registered with the Court and are not enforceable. There are special provisions regarding Parenting Plans and anyone considering entering one should obtain Specialist legal advice.
- Less Adversarial Trials: This represents a move away from the adversarial Court process towards a mediation process managed by a Judge.

- Compulsory mediation: From 1 July 2007 an Application to the Court for a Parenting Order can only be made if a certificate (of attendance) has been obtained from a Family Dispute Resolution Practitioner (mediator) unless there is family violence or another reason for exemption.

When the Court has to make a decision, the Judge does not interview the children. The Court can ask a child-welfare professional to help work out the wishes of the children.

A parent’s responsibilities are covered by three main principles. These are:

- Children have a right to know and be cared for by both of their parents.
- Children have the right to regular time with both parents. This also applies to the other people who are important to the children’s welfare and development, such as grandparents.
- Parents should share the duties and responsibilities for the care, welfare and development of their children.

These responsibilities end when children turn 18 years.

In some cases, the Court may order that an Independent Children’s Lawyer (ICL) be appointed. An ICL is a solicitor who acts on behalf of the children.

Any of the following people can apply to the Court for the care of the children:

- either or both of the children’s parents, step-parents, grandparents, guardians appointed by a Will; or
- any other person concerned with the care, welfare and development of the children.

HOW OFTEN CAN I SEE MY CHILDREN WHO DO NOT LIVE WITH ME?

What was previously called ‘contact’ is now called ‘spends time with’.

Court Orders can specify the frequency, length and type of time that a parent can spend with their children.

A parent’s time with the children is determined according to what is in the best interests of the children.

Contact is the right of the children to maintain a relationship with their parents, rather than the parents’ right to see the children.

It is usually of benefit to the children to have as much time as possible with both parents, to be able to enjoy their company and to receive their guidance, love and affection.

It is very rare for the Court to deny a parent time with their children.

If you do not see your children for some time, it may be best for the re-commencement of contact to gradually increase over a period of time.

With the changes to the Family Law Act from 1 July 2006 most Orders for parents spending time with their children now provide more time than they historically have. The law promotes the involvement of both parents in their children’s lives as much as possible.

If you live close to your children it might be possible for you to spend time with them not only on weekends but also mid-week evenings and after school. If you live interstate, longer periods of holiday time might be more appropriate.

In working out your children’s arrangements the Court can take into account the children’s wishes, but this will not be the only thing that the Court considers. The emphasis the Court places on the children’s wishes will vary depending on the age of the children.

Orders for ‘time spent with’ children can change as circumstances change. As children grow older, their lifestyles change. It is best if arrangements for children stay flexible. Many parents are able to reach agreement and to alter arrangements by agreement if circumstances change. They can do this without having to go to Court.

If you find it difficult to agree on how time is to be spent with your children, a counselling session may be helpful. After getting help from a counsellor, many parents are able to agree.

Mediation is another option.

Grandparents or other relatives can also be granted Court Orders to spend time with the children.

DOCUMENTING ARRANGEMENTS

Children’s care arrangements can be documented with either a Parenting Plan or a Consent Order.

Parenting Plans are written agreements, signed by both parents and setting out the children’s arrangements. They are not registered with the Court and are not legally binding.

If you want your agreement to be legally binding, the terms of the agreement must be drawn up as a Consent Order and filed with the Court.

WHO HAS TO SUPPORT THE CHILDREN?

Both parents are obliged to provide financial support for children until the children reach 18 years, are married or are adopted.

Financial support may also be claimed through the Court for children over 18 years, to enable the children to complete their education, or because the children are mentally or physically disabled.

A step-parent has a duty to maintain children only if there is a Court Order in force to do so.

CHILD SUPPORT

The Child Support Agency was established in 1989. Its purpose is to assess and collect child support payments.

Child support is assessed by the Child Support Agency pursuant to a formula. The formula was completely changed on 1 July 2008. And is now based on a number of factors, including:

- The income of both parents;
- The level of care that each parent has;
- The children attending state schools.

The formula also takes into account that older children cost more, via a “schedule of costs” that calculates the cost of children according to the combined income of both parents.

The Agency assessment may be departed from in special circumstances including:

- The children have special needs;
- The children are attending a private school;
- There are significant transport costs involved in ‘time spent with’ a child; and
- Either parents income cannot be easily calculated.

AGREEMENTS

There are two types of Child Support Agreement, binding and limited.

A binding agreement has strict requirements, including a solicitors certificate being signed. They can only be terminated by a further written agreement or an Order of the Court.

A limited agreement does not need a solicitors certificate however there must be a formula assessment already in place and the amounts payable under the agreement must be equal to or greater than the formula assessment.

WHAT SHOULD I DO IF I CANNOT PAY?

Get legal advice immediately if you cannot pay the required amount of Child Support. This will help you to avoid any extra costs for not paying. If you lose your job and receive an income-tested benefit, your assessment will reduce to a minimal amount.

WHO ENFORCES PAYMENT?

The Child Support Agency is usually responsible for collecting payments, unless you agree to a private collection. If arrears accrue it is possible for you to pursue enforcement of arrears through the Court, if you wish.

If you are making payments and they fall behind, the Agency may take any of the following steps:

- Ask you to produce certain documents to make clear what your financial situation is. The Agency is also able to access protected information held by the tax office;
- Contact your employer and have child support payments deducted from your wages;
- Intercept any tax refund.

If you have consistently failed to pay your Child Support, you may be prevented from leaving the country.

CAN I CHANGE MY CHILDREN'S NAME?

You cannot change your children's surname without the consent of the other parent.

If you try to do so, the other parent can apply to the Court to stop the name from being changed.

CAN I TAKE MY CHILDREN OUT OF AUSTRALIA?

There are certain times when it is an offence to take your children out of Australia. These include times when:

- there is a Court Order that relates to where the children will live; or
- there are specific issues relating to the children, contact with the other parent, or where a Court is in the process of deciding about such issues.

If you are concerned that the other parent will take your children out of the country, you should contact the Australian Federal Police. They will put the children on a 'passport watch'. A 'passport watch' is a warning list set up to prevent children from leaving Australia.

If the children have current passports, and you are afraid that they may be taken out of the country, you should apply to the Court to have their passports delivered to the Court and held for safe keeping.

If you wish to take the children overseas on a holiday and the other parent has refused permission, you can apply to the Court for an Order allowing you to leave the country with the children. The Court may put some conditions on such an Order.

DETERMINING PARENTAGE

A paternity test is a common occurrence in Family Law cases. The test involves a DNA sample being taken from the alleged father, the mother and the child, to provide evidence as to whether the alleged father is the biological parent of the child.

Paternity tests can be done in a variety of (medical sample) ways and provide extremely accurate results. The tests can be conducted during the pregnancy however in legal proceedings the testing occurs after a child is born.

If parties cannot reach an agreement for testing to occur an Application can be made to the Court seeking a direction that the testing occurs. In considering such a request the Court needs to be satisfied that there is a 'presumption of parentage'. (separate criteria)

If the Court Orders that an alleged father attend for DNA testing and he refuses then he is deemed to have failed the test and to be the father.

When a separated parent wants to register an Application with the Child Support Agency, if there is insufficient evidence of parentage then the Agency will refuse the Application. If the Agency accepts the Application but the assessed party disputes it, then the matter must be resolved by the Court.

HOW WILL OUR PROPERTY BE DIVIDED?

The Family Law Act sets out how property is divided, for married couples or for de facto couples (who separated after 1 March 2009).

For Defacto couples living in Queensland who separated before 1 March 2009 the law is set out in the Property Law Act.

WHAT IS A DEFACTO RELATIONSHIP?

A defacto relationship (includes same gender couples) and is defined as “the relationship of a couple living together on a genuine domestic basis”. A defacto spouse is able to pursue a property settlement where one of the following conditions exists:

- You have lived in a defacto relationship for at least 2 years; or
- You have a child from the relationship; or
- It would be unjust not to recognise a defacto spouse’s financial or non-financial contribution.

Defacto couples who separated before 1 March 2009 (under Queensland Law) are unable to pursue Spouse Maintenance and unable to include Superannuation as part of the property for division.

DETERMINING A PROPERTY DIVISION

The Court has the right to say how property is divided when a marriage or defacto relationship (separating after 1 March 2009) has broken up.

The Court takes the following steps to work out how property will be divided:

- The Court takes an inventory of all assets and liabilities that existed at the time of separation;
- A current value is put on the assets;
- The Court must also work out the financial and non-financial contributions both parties made during the relationship.

When deciding how the assets will be divided the Court considers each parties,

- future needs;
- future obligations;
- financial situation; and
- the cost of caring for any children from the relationship.

TIME LIMITS

A married couple can make a property settlement at any time after separation but if an Application for property settlement to the Court is to be made that must be filed within 12 months of a Final Divorce Order.

If an Application to the Court for property settlement in a defacto relationship is to be made that must be filed in Court within 2 years after the date the relationship ended.

WHAT HAPPENS TO SUPERANNUATION?

In property settlements under the Family Law Act, superannuation is defined as ‘property’.

The law regarding superannuation was changed in 2002. It provides detailed formulas for calculating superannuation in property settlements. These formulas need specialist advice. Ask your solicitor for help in these situations.

Superannuation funds can be split between spouses and rolled over as part of a property settlement.

It is not compulsory to split superannuation.

DOMESTIC VIOLENCE

Domestic violence is a widespread problem in the community.

WHAT IS DOMESTIC VIOLENCE?

Domestic violence is any of the following acts:

- wilful injury;
- wilful damage to another person's property;
- intimidating or harassing behaviour towards another person;
- indecent behaviour towards another person without consent; or
- a threat to commit any of the above.

PROTECTION ORDERS

In Queensland, domestic violence legislation covers the following relationships:

- family relationships;
- intimate personal relationships – where people are or were engaged to be married, or were previously dating and their lives have become enmeshed;
- informal care relationships; and
- marriage or de facto relationships.

All of these relationships are covered by the legislation whether the people are of the same or opposite sex.

Children under 18 years cannot seek a Protection Order or have an Order made against them in family relationships or in informal care relationships where the care involves a parent or relative.

A person who claims to be a victim of domestic violence can apply to the Court for a Protection Order.

The police have power to take a person into custody for up to four hours if they suspect domestic violence has occurred or is occurring.

Even if the application is not made through the police, the police will serve the summons on the person suspected of domestic violence.

The terms of the Order may vary according to the circumstances of each case and what the Court thinks is appropriate in view of those circumstances.

These Orders can be extended to friends, relatives, and workmates of the victim.

Once a Protection Order is made it usually lasts for two years.

If you have moved to Queensland from interstate, you can have an interstate Protection Order registered here.

FREQUENTLY ASKED QUESTIONS

1. WHAT ARE THE GROUNDS FOR DIVORCE?

12 months separation.

2. DO I HAVE TO TRY COUNSELLING?

If the marriage lasted less than two years and you want to file a Divorce Application, you will have to attend compulsory counselling, otherwise there is no compulsory requirement for counselling.

3. AFTER I AM DIVORCED CAN I USE MY OLD SURNAME?

A woman can use the name she had on her Birth Certificate (her maiden name) at any time.

4. DO WE HAVE TO BE DIVORCED FIRST, BEFORE AN ORDER CAN BE MADE REGARDING THE CHILDREN?

No. A Court can make Orders about the welfare of children even if you are not divorced.

5. WHAT ABOUT THE CHILDREN OF DE FACTO COUPLES?

All children are treated the same way by the Family Law Act.

6. WHAT IF MY CHILD IS TAKEN AWAY?

First, see a solicitor. The process is complex and you must act quickly so it is not the sort of thing you should do by yourself. You may have to apply for a Recovery Order.

7. HOW LONG DO COURT ORDERS RELATING TO CHILDREN LAST?

Orders end when the child turns 18 years, marries, is adopted, or when the Order is cancelled or changed by the Court.

8. WHAT IF A MAN DENIES THAT HE IS THE FATHER?

A medical test can be used to establish whether a man is the father. This is called a paternity test. You cannot force a man to undergo this test. It would have to be ordered by the Court. You should ask a solicitor to help you get this Order. If an Order is granted and he still refuses, then the Court can presume that he is the father, based on his refusal.

9. IN A PROPERTY SETTLEMENT IS THERE A 50/50 RULE?

No. There are many factors that are used to work out how property is divided.

10. CAN I INCLUDE OTHER THINGS BESIDES PROPERTY IN A CONSENT ORDER?

Yes. You can include spouse maintenance and arrangements for your children. You can deal with all of these issues at one time.

11. WHAT IS A PRE-NUPTIAL AGREEMENT?

Couples who are about to marry and who wish to detail and regulate their financial relationship both during the marriage and in the event of death, separation or divorce can enter a pre-nuptial agreement. Provided the agreement is completed correctly it is enforceable in Court.

SOME USEFUL CONTACT NUMBERS AND WEBSITES

LEGAL SERVICES

Legal Aid Queensland	1300 651 188
Legal Aid Queensland website	www.legalaid.qld.gov.au
Women's Legal Service (Brisbane)	(07) 3392 0670
Caxton Legal Centre	(07) 3254 1811
Family Mediation (Relationships Australia)	1300 364 277
Family Court of Australia	(07) 3248 2300
Family Court of Australia website	www.familycourt.gov.au
Federal Magistrates Court	www.fmc.gov.au

COUNSELLING

Domestic Violence Line	1800 811 811
Mens Line	1800 600 636
Crisis Care (24 hours) (Child Protection)	1800 177 135
Kids Help Line (24 hours)	1800 551 800
Kids Help Line website	www.kidshelp.com.au
Parentline	1300 301 300
Relationships Australia	1300 364 277
Kinections – Counselling Line	(07) 3435 4300
Kinections – Parenting Course	(07) 3435 4343
Break Even Service (for gambling problems)	1800 222 050

Lifeline National (24 hours)	13 11 14
Queensland Baptist Care	(07) 3550 3737
Centacare	(07) 3252 4371
Child Support Agency	131 272
Child Support Agency website	www.csa.gov.au
Centrelink	136 150
Australian Association of Relationship Counsellors Inc	www.aarc.org.au
Family Relationship Centres	www.familyrelationships.gov.au
Family Relationship Advice Line	1800 050 321

CONTACT CENTRES

Caboolture Contact Centre	(07) 5432 3720
Eight Mile Plains Contact Centre	1300 364 227
Ipswich Contact Centre	1300 854 733
Logan Contact Centre	1300 854 733
Sunshine Coast Contact Centre	(07) 5479 6971



Telephone

07 3221 4300

Facsimile

07 3221 9454

Email

law@mlynch.com.au

Website

www.mlynch.com.au

Address

Level 6
193 North Quay
Brisbane Qld 4000

Post

PO Box 12027
George Street
Brisbane Qld 4003