

FAMILY Flyer



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No. 155

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ILLEGAL SURROGACY

While non-commercial surrogacy became legal in Queensland last year, commercial surrogacy still remains illegal. It was recently reported that two Queensland couples could now be facing criminal charges after the Family Court discovered the couples had paid overseas surrogate mothers to have two sets of twins.

The couples were found out when they applied to the Family Court for parenting Orders for the children that were born in Thailand. The Judge granted each couple 'equal and shared responsibility' for the children, he did not however rule whether either of the couples were the legal parents of the children. Although there were concerns about the international surrogacy arrangements, the Family Court needed to give foremost consideration to the 'best interests' of the children.

'Altruistic surrogacy' involving the mother being paid only for her medical expenses is legal, however any expenses paid beyond that are considered a commercial surrogacy.

Q & A

Q: My 8 year old daughter lives in North Queensland with her Mother, while I live in Brisbane. At what age can my daughter go against her Mother's wishes and decide to live in Brisbane with me?

A: When it comes to determining parenting arrangements, one of the most important considerations under the *Family*

Law Act is determining what is in the child's 'best interests'. A 'child's wishes' are 1 of these considerations. There is no set age at which your daughter can decide to live with you, however Family Law cases indicate the age is about 12. In some cases the Court has given weight to the wishes of children less than 12 years of age, however the Court will look at the maturity of a child and the strength of the child's views.

ORDERING GOOD BEHAVIOUR

The Court has recently had to consider an Application by a Mother seeking an injunction that the Father not be permitted to consume alcohol during any time that the child spends time with him.

The Facts:

- A Consent Order was already in place providing for the 8 year old child to live with the Mother and spend time with the Father each alternate weekend from 6.00pm Friday until 6.00pm Sunday.
- In the original Court case the Father had provided an undertaking that "without admitting the necessity for the undertaking the Father undertakes to not consume alcohol when the child is in his care", however this undertaking was not included in the final Order.

- The Mother subsequently commenced a new Court Application seeking an Order preventing the Father from consuming alcohol while the child was with him and from 12 midnight the previous day.
- The Mother alleged a history of domestic violence by the Father, based upon his excessive alcohol consumption.
- The Father said that such an Order was unnecessary, however he was prepared to consent to an Order that he not “consume alcohol to excess”.
- The Father did not deny that he consumed alcohol on a daily basis, including when the child was in his care, but said that it did not affect his capacity to care for the child.

Court Found:

- The Court found that the Mother had not adequately made a case for the imposition of an Order preventing the Father from consuming alcohol while the child was with him.
- The Court accepted that the Father regularly drank alcohol but there was insufficient evidence to show that the effect of his consumption of alcohol had any impact on his capacity to care for the child.

Court Ordered:

- The Mother’s Application was dismissed.

- The Federal Magistrate also dismissed the Father’s proposal that he “not consume alcohol to excess”. The Court was concerned that even though such an Order might appease some of the Mother’s concerns it also raised the possibility of more conflict or litigation between the parents about the meaning of “excess”.

SUPERANNUATION PAYMENTS

In a property settlement, superannuation is ‘property’. Naturally, superannuation can take different forms depending upon the circumstances of the member, e.g. it could be a lump sum or a pension, such as a life pension, fixed term pension or an allocated pension.

It is important to not only identify the form of the superannuation, but also to attribute a value to it. The Family Law Regulations provide formulas for this process.

When a superannuation fund is being paid out, known as the payment phase, (in simple terms) the value is calculated by first determining the gross value and then deducting any amounts payable under previous payment splits, such as splits from previous marriages.

What if super can only be received by way of lump sum? In this case, the gross value at the date of the interest is to be the withdrawal amount to the member at that date.

What if the super is being paid as an allocated pension? In this case, the gross value at the relevant date is to be the withdrawal benefit at that date, however this may be less than the balance on the member statement due to exit fees payable on withdrawing from the fund.

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