



family flyer



Introduction

The Family Flyer is a free community service by Michael Lynch Family Lawyers. The publication is designed to be informative and topical and to assist you in understanding the ever-changing field of Family Law.

This edition includes:

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NEW LEGISLATION - PROPERTY

Readers may have seen reports in the media recently regarding proposed changes to the *Family Law Act*, in relation to Property.

In light of the number of enquiries we have had regarding the status of these proposed amendments it seems appropriate to provide a brief overview.

The draft legislation was tabled in Parliament last month and is at a preliminary stage. It is unclear as to the final form that the changes may take.

The proposed changes address three (3) main areas, i.e.:

- portability of superannuation;
- an "equal division starting point" in property settlements; and
- the enforceability of pre-nuptial agreements.

SUPERANNUATION POLICIES

It is proposed that superannuation funds be enabled to divide superannuation policies equally. It is the Government's concern that quite often in a Property Settlement the Husband may be the only party with a superannuation policy and this may be a significant factor in a determination of property interests. Currently superannuation is preserved and cannot be realised. As a result, the Court has had to create artificial methods of trying to value those funds.

EQUAL DIVISION - STARTING POINT

The law with respect to Property Settlements is that each party is notionally treated as having a "0%" entitlement, the Court then considers "elements of contribution" and "support" factors, before determining an appropriate "percentage apportionment" between the parties.

The proposed change is for there to be a "50%/50% starting point and parties then need to produce evidence to persuade the Court as to why that "presumption of equality" should not apply.

PRE-NUPTIAL AGREEMENTS

Pre-nuptial Agreements are identified by the *Family Law Act* but are currently treated as a "reflection of intention" between parties, however are not binding upon the Court in a Property Settlement.

The proposed legislation would change this to make Pre-nuptial Agreements enforceable and for the onus of any change to shift to the party who is opposed to the Pre-nuptial Agreement.

SUMMARY

We are monitoring the progress of these amendments, as they will have a substantial impact upon all parties who may become involved in a Property Settlement in the future.

Should you have any queries regarding the proposed changes, do not hesitate to contact us. We will keep readers informed of developments in the following issues of the Flyer.

CONTACT & RESPONSIBILITIES

Following the amendments made to the *Family Law Act*, two (2) years ago, regarding children, the "responsibilities" that were encompassed by Custody, are now referred to as "specific issues".

It is frequent to see Court Orders referring to a parent having "residence and day to day care".

The Full Court has recently said that when a Contact Order is made any Sole Parenting Order in favour of the residence parent must be read down to the extent necessary to enable the contact parent to make all of the necessary decisions with respect to the day to day care of the child, during Contact.





REPORTING OF FAMILY COURT CASES

The *Family Law Act* prohibits Family Court cases being publicised.

The Government has announced that it plans to reform the prohibition on publication of Family Law matters, to strengthen the enforcement of Parenting Orders and the location of abducted children.

The Family Court will be able to publicise cases including the names of parties where there has been a deliberate and wilful failure to observe Court Orders, unless it is against the best interests of any children involved.

ADJOURNMENT OF PROCEEDINGS UNTIL SUPERANNUATION VESTS

A dilemma in the Family Court has been how it should deal with superannuation.

As it is frequently some years before a party is entitled to claim superannuation, i.e. minimum retirement age. The Court usually looks at attributing a "notional value" to the policy, in order to enable a Property Settlement to be effected between the parties.

In a recent case before the Family Court the Court determined that the Property proceedings be adjourned until the Husband's superannuation fell due, in 13 years time.

The Trial Judge required that the Husband make Mortgage payments on the home in which the Wife and children were living in the meantime.

The Trial Judge determined that it would be unfair for the Wife not to be entitled to part of the superannuation benefit when it realised.

The Trial Judge did not transfer the home to the Wife, postponing this issue until the adjourned hearing. The Court made a Sole Occupation Order in favour of the Wife.

The Appeal Court held that an Interim Property Order should have been made disposing of the parties' interests in the home, until the adjourned proceedings. The Full Court made an Order that the home be transferred to the Wife and that the Wife indemnify the Husband for that Mortgage.

REFORM FOR ENFORCEMENT ORDERS

The Government is looking at reforming the law regarding enforcement of Parenting Orders.

Enforcement of Parenting Orders currently involves the filing of a "Contravention Application", which involves the Court having to consider the making of "Penalty" Orders, such as Community Service Orders, fines, possibly changes to Parenting Orders or periods of imprisonment.

The Government states it is concerned at the increase in Contravention Applications the impact this is having upon Court resources, as well as the severity of the Court's possible penalties.

The Government states it is examining compulsory mediation and counselling intervention, that must occur prior to the Court becoming involved in such Contravention.

FEDERAL MAGISTRATES

The Attorney-General has announced that a Federal Magistracy is to be established which will undertake the less complex matters currently dealt with by the Family Court.

It is the Government's intention that these new Court appointments will address the backlog of matters that has arisen in the Family Court, particularly in relation to Interim residence and contact matters.

In the Brisbane Registry of the Family Court this will involve four (4) new Court Officers.

Although being referred to as Federal Magistrates these new appointments will sit and hear matters in the Family Court. These new appointments shall commence as from the 1st of June, 1999.

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