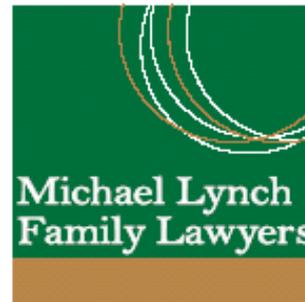


# family flyer



## 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:

- Court Forms
- Superannuation Reform
- Federal Magistrates Court
- Work Leave Entitlements
- Timing of Superannuation Assessment
- New Court Fees
- Change to the Law on Prospective Inheritances
- Discharge of Child Maintenance Arrears after Order Ceases to be Enforced
- Is a Partnership Interest Property?
- Children's Schooling

## COURT FORMS

As of the 1st of July 2000 the Family Court and the Federal Magistrates Court have replaced the Form 7 and Form 8, "Applications with a new Form 3, "Application".

The Form 17, "Financial Statement" has been substantially modified.

## SUPERANNUATION REFORM

The Superannuation Amendment Bill was introduced into Parliament in April this year.

The legislation is designed to calculate superannuation interests and enable the division of superannuation on the breakdown of a marriage. The actual division will be decided by agreement or by Court Order.

The Bill is unlikely to be passed by Federal Parliament before the middle of 2001. The Government states that it will then allow one (1) year before commencement of the legislation, to allow the Superannuation industry to prepare for the changes.

## FEDERAL MAGISTRATES COURT

The Federal Magistrates Court commenced on the 1st of July 2000. One (1) Magistrate has been appointed in Brisbane and in Townsville. One (1) further appointment is anticipated for Brisbane.

In relation to Family Law, the Court has the power to:

- make Divorce Orders;
- make procedural Orders;
- make Orders for costs;
- make Orders for the enforcement of maintenance (under the *Family Law Act*);

- determine property settlement disputes up to \$300,000.00, or greater if agreed between the parties;
- make Orders for Interim and Final Residence and Contact.

## WORK LEAVE ENTITLEMENTS

The Full Court has determined that leave entitlements of a party are to be treated as a financial resource and not as property.

The Trial Judge was found to have erred in treating leave entitlements as property by including a notional value for those entitlements in the calculation of the pool of property.

## TIMING OF SUPERANNUATION ASSESSMENT

The Full Court has allowed an Appeal by a Husband against a Court Order, adjourning the Wife's Application for Property Settlement to a date not before Parliament's determination of the pending Superannuation legislation.

The Husband's Superannuation entitlement at the Hearing date was estimated at \$100,000.00 however, the Wife submitted that upon retirement it would be in excess of \$3 million.

The Husband argued that the Judge erred in adjourning the Trial to await the change in legislation and that the Court was obliged to apply the Law as it stood at the Trial date.

The Court allowed the Appeal saying that the adjournment in anticipation of the changes Legislation should not have occurred.





## **NEW COURT FEES**

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New fees apply in the Family Court from the 1st of July 2000 (GST does not apply to these fees), they include:

- Divorce Application, now \$526.00;
- Hearing fee, now \$315.00; and
- Form 3, "Application", now \$158.00.

The Federal Magistrates Service has a filing fee for a Divorce of \$250.00 and for a Form 3, "Application" of \$100.00.

## **CHANGE TO THE LAW ON PROSPECTIVE INHERITANCES**

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The Family Court can consider in Property Settlement proceedings whether a possible inheritance by one of the parties is a financial resource.

This typically occurs if a party is named as a beneficiary under a Will but the Testator has not yet died.

Until recently, the Court's view had been that it would only consider such matters if the evidence was necessary to ensure justice and equity between the parties. This became a question of relevance.

The Court's view was that the inheritance would need to be a "probability". Such as where the Testator was old and feeble and had made a Will and had lost their capacity to change the Will. Historically, if the Court had considered a case where someone was expecting an elderly relative with property to leave it to them, the Court would have seen this as so speculative as not to treat it as relevant.

The Full Court has recently re-examined the issue and given a changed view.

The Court has stated that where there is a "possibility" of an inheritance, it may well be unjust to the other party to ignore such possibility when the Court is considering a Property Settlement and in so doing, giving justice and equity between the parties. The Court stated that if it was "a possibility and not a probability", it would be unjust to ignore the matter.

A possible inheritance may now be considered by the Court although this will depend on the facts of each case.

## **DISCHARGE OF CHILD MAINTENANCE ARREARS AFTER ORDER CEASES TO BE ENFORCED**

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Representations have been made to the Federal Government to amend the *Family Law Act* as it currently does not allow the discharge of child maintenance arrears once a Maintenance Order ceases to be in force.

If arrears of child maintenance are in place when the child attains the age of eighteen (18) years, it is often not recognised that when the Order ceases to be in force the Court is unable to vary it and unable to discharge arrears.

Recent cases have been considered in the Family Court and the determination in those cases means that no matter how appropriate it may be that such Child Maintenance Orders be discharged the Court does not have the power to deal with it. This is a clear injustice.

## **IS A PARTNERSHIP INTEREST PROPERTY?**

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The Family Court has held that a partnership in a firm of Solicitors was not property.

The evidence before the Court was that the nature of the partnership interest was that the parties were not permitted to sell or trade their interest in the partnership and goodwill was not accounted for by the partnership.

The Court held that the interest should be classified as a personal right in the Husband rather than a right of a proprietary nature.

## **CHILDREN'S SCHOOLING**

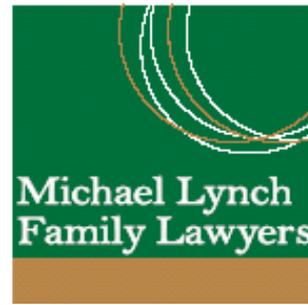
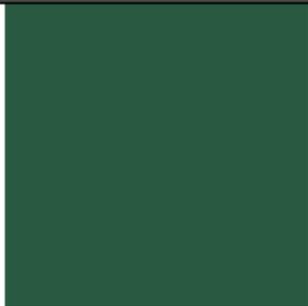
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The Full Court has recently upheld a decision for a Wife enabling her to enrol the couple's two (2) sons, aged ten (10) and eight (8) years, at a new private school.

The children had been at a previous private school, since pre-school.

The Mother had wanted the children to attend the new school but she and the Husband had agreed to the earlier school, as a compromise. The Mother proposed the change for ease of travel and personal preference.

The Full Court held there is no presumption in favour of the Resident Parent however, the views of the Resident Parent are of significant relevance. This was also based upon the decision being in the best interests of the children.



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