



# 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:

- Medical Examination Order
- Court's Power to Explain Reasons to Child
- Recent Relocation Case
- New Statutory Declaration Form
- Third parties in the Family Court
- Family Court Forms

## MEDICAL EXAMINATION ORDER

In a recent Family Court case, a Husband has been successful in obtaining an Order that the Wife undergo a medical examination in order to obtain a Report about her health.

In Property and Spouse Maintenance proceedings between the parties the Wife had given evidence of health problems which she claimed "impacted significantly on her earning capacity". The Husband successfully argued that he should be able to test the Wife's claims and supporting evidence, by obtaining a Report from a doctor of his choice.

The Family Court held that its power to make such Orders is incidental and necessary to the exercise of the power to make Property and Spouse Maintenance Orders and so directed that the Wife undergo such medical examination.

## COURT'S POWER TO EXPLAIN REASONS TO CHILD

The Family Court recently held that it had the power to see a 12 year old child in Chambers to explain proposed Orders and Reasons before delivering its judgment in Residence proceedings.

The Father had opposed this course of action arguing that the Court did not have power. The Court held that such an interview is within the inherent power of the Court. Australia's signing of the UN Convention on the Rights of the Child gives rise to a legitimate expectation that the Court will exercise powers with that Treaty. The rights of children set out in the Convention include the right to seek, receive and impart information.

## RECENT RELOCATION CASE

A Federal Magistrate recently considered a Mother's Application to relocate from Wollongong to Kingscliff, in northern New South Wales (an 11 hour trip by car).

The facts were:

- The Father was 36 years and the Mother was 34. They met in 1996, married in 1998 and separated in May, 2003.
- There were 2 children, a boy aged 5 and a girl aged 3 at the time of Hearing.
- Following separation the Father had Contact with the children each alternate weekend and Wednesday evening.
- The Mother formed a new relationship and wanted to live with her new partner at Kingscliff. The Mother also stated that she wanted to leave the Wollongong area because she felt a lack of privacy from the Husband and others who had taken an interest in their marriage failure, as the respective families were close.
- The Court Counsellor agreed that moving away was desirable for the Mother's wellbeing in addition to her desire to be with her partner.
- The Father opposed the move. The Mother stated that she would not relocate without the children. The Mother applied for a compassionate transfer in her employment to the North Coast and this was approved.
- The Mother had no family in Kingscliff.





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The Court stated that neither of the parties bears an onus to establish that a proposed change (to an existing situation) will promote the best interests of the child. The decision must be made having regard to the whole of the evidence relevant to the best interests of the child.

The Court approved the Mother's relocation and provided Contact to the Father each second weekend of the school term (with flights between Coolangatta and Sydney) and blocks of 2 weeks and 1 week over the Christmas school holidays.

### NEW STATUTORY DECLARATION FORM

A new Statutory Declaration Form recently came into effect.

The new form is the first time the Commonwealth Statutory Declaration has been changed in 45 years.

A Statutory Declaration is a written statement declared to be true in the presence of an authorised witness.

### THIRD PARTIES IN THE FAMILY COURT

The Family Law Act was amended on the 17 December, 2004, giving the Family Court power to make Orders binding third parties.

The amendments give the Court power to bind third parties where such Orders are necessary in property settlement proceedings.

The amendments override an essential aspect of the High Court decision in *Ascot Investments (1981)*. The amendments enable the Court to require a third party creditor (example, bank or financial institution) to have one party to a marriage substituted either wholly or partly for the other party, in relation to a debt owing by the other party.

It also enables the Court to require a company to register a transfer of shares owned by one party to a marriage to the other party.

These powers can only be exercised in limited circumstances, including:

- The Order must be reasonably necessary to effect the appropriate property division.
- If the Order concerns a debt of a party to the marriage, "that is not foreseeable at the time that the Order is made, that to make the Order would result in the debt not being paid in full".
- The third party must be accorded procedural fairness.
- It is just and equitable to make the Order.
- The Order must take into account the taxation effect on either of the parties or the third party, the social security effect, the third parties administrative costs and the capacity of the party (to the marriage) to repay the debt after the Order is made.

### FAMILY COURT FORMS

Various Family Court Forms have been revised. From 31 January, 2005, the new Form 11 must be used.

From 31 March, 2005, 13 Forms have been amended, including the Form 1 and the Form 1A.

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