



# 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:

- Free Book - A Guide to Family Law
- DNA Testing - Obtaining a Court Order
- Getting documents from a third party
- Relocation - Court Orders contrary to the Family Report
- How is Superannuation treated in a Property Settlement?
- Next Edition

## FREE BOOK - A GUIDE TO FAMILY LAW

The "Guide to Family Law - Everyday Answers" is our easy-to-read Family Law information booklet.

Over 50 pages in user-friendly language explaining the issues that people going through a separation need to know. It also contains recommended reading lists, useful contact numbers and frequently asked questions and it's FREE.

To obtain a copy please telephone (07) 3221 4300 or visit: [www.michaelynchfamilylawyers.com.au](http://www.michaelynchfamilylawyers.com.au)

## DNA TESTING - OBTAINING A COURT ORDER

The Full Court of the Family Court recently considered an Appeal by the Husband against the Trial Judge's decision refusing to order DNA testing to establish parentage of a child.

The facts were:

- The parties married in March 1987.
- One child was born during the marriage, in July 1987. At the date of Trial the child was 17 years old.
- The parties separated in 2001. The child resided with the Wife after separation.
- The child was treated throughout the marriage as a child of the marriage and since separation the Husband had paid child support.

The Trial Judge determined that the Husband had not provided adequate evidence to overcome the "presumption of parentage" arising from "the marriage".

The Husband Appealed claiming that the Court had not obtained the "best available evidence" by failing to Order DNA testing.

The Court of Appeal rejected the Husband's Appeal stating that:

- In parentage testing Applications in Australia the "best interests" of the child are the paramount consideration where "parenting orders" are also sought.
- In this case, "parenting orders" were not sought and therefore the Application failed as the Court had no jurisdiction to consider the Application.

Beyond that, the Court was of the view that "there must be few cases where the interests of children can be shown to be best served by the suppression of truth (i.e not obtaining scientific evidence)".

The Court failed to see the "best interests of the child" being served by the paternity of a child being challenged, without compelling reasons, when the child is 17 years of age.

## GETTING DOCUMENTS FROM A THIRD PARTY

The Family Law Rules provide a mechanism for obtaining relevant documentation from someone who is not a party to a Court case, (i.e a third party).

A Form 12, "Notice of Non-Party Production of Documents" can be filed in the Court and served on a person who is not a party to a case.

This Notice may require the third person to produce a specific document or class of documents, but they must be:

- Relevant to an issue in the case;
- In the possession or under the control of the third party; and
- That the third party may be required to produce at the Trial.





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The process for issuing such a notice is that at least 14 days before serving a third party with the Form 12, the party must serve a copy of the Form on the other party to the case and any other party that may be effected by the production of the requested documentation.

### RELOCATION - COURT ORDERS CONTRARY TO THE FAMILY REPORT

The Full Court of the Family Court recently considered an Appeal where the Trial Judge allowed the Mother to relocate from Geelong to Darwin, even though that conflicted with the Family Report writer's recommendation.

The facts were:

- The parents commenced cohabitation in Darwin in 1993;
- They married in 1996 and separated in August 2000;
- The children were born in Darwin and in 1997 the family moved to Geelong;
- 2 years after separation the Father agreed that the Mother could take the children to Darwin for a holiday. Whilst there the Mother commenced proceedings to relocate to Darwin. The Father commenced proceedings for the Mother to return to Geelong.

At the Interim Hearing, in December 2002 the Mother was Ordered to return to Geelong.

At the Final Hearing, the Trial Judge allowed the Mother to relocate to Darwin, stating that if there were to be substantial block contact in Geelong and in Darwin, a "close relationship, though different, could still be maintained".

The Father did not seek a residence Order. The Trial Judge was persuaded by the fact that the Mother apparently had family support in Darwin. The Court also determined that the Father's financial situation was better than he maintained and therefore that it would not be as difficult to exercise contact as the Father asserted.

The Family Report writer strongly recommended that the Mother remain in Geelong but the Child Representative supported the Mother's move to Darwin.

The Father Appealed. The Appeal Court held that it was open to the Trial Judge to depart from the Family Report writer's recommendations and the Trial Judge provided adequate reasons for doing so. The Court also noted that, unlike the Family Report writer, the Trial Judge had the benefit of hearing all of the evidence, including the Mother's treating doctor.

### HOW IS SUPERANNUATION TREATED IN A PROPERTY SETTLEMENT?

Superannuation is treated as "property" in matrimonial property settlements.

The Courts approach to Superannuation "contributions" during cohabitation is that the non-employee spouse is recognised as making an equal contribution to Superannuation that accrued during cohabitation.

### NEXT EDITION

Our next edition is coming out soon. It will be by email and in hardcopy. If you would like to receive multiple copies of the colour printed version, please let us know - phone (07) 3221 4300.

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