



- Splitting superannuation
- Q & A
- Getting a second opinion

- "Bring the child back"
- Tax treatment of a redundancy

SPLITTING SUPERANNUATION

Under the *Family Law Act* superannuation is treated as property and is able to be divided in a property settlement.

Superannuation can either be retained by the member spouse or split between both spouses.

A request for information on a member spouse's superannuation interest can be made by either spouse. The person requesting the information must declare the information is needed following a relationship separation and is needed to help with superannuation agreement negotiations. This request is made by way of a "Family Law Declaration and Request for Information Form".

On receipt of a Court Order or superannuation agreement the Superannuation Fund Trustee will proceed to split the "member spouse's" account. This split does not result in a "cashing out" of the member entitlement but "rolling it over" into the other spouse's member fund.

It is essential that superannuation is considered in a property settlement and that you obtain Specialist Family Law advice. For a fixed cost (\$330 incl. GST) initial appointment contact us on (07) 3221 4300.

Q & A

Q: If a divorce application requires 12 months separation, what happens if there has been a period of reconciliation during that 12 months. Does the 12 months need to start again?

A: If you were reconciled after your separation for 3 months or more, then the 12 month period needs to start again after the reconciliation. If the reconciliation was less than 3 months, you can add up the period of separation before the reconciliation and the period after the reconciliation to make the total of 12 months.

GETTING A SECOND OPINION

Family Law is a complex and ever changing area of law.

All of the lawyers at Michael Lynch Family Lawyers practice solely in Family and Relationship Law. We are often requested to provide a second opinion on legal advice people have received elsewhere.

We are happy to assist in providing this Specialist assistance.

To make an appointment call us on (07) 3221 4300.

"BRING THE CHILD BACK"

An Application to the court for the return of a child to a parent needs to be considered urgently by the court. In a recent case however, the Judge elected to adjourn the "recovery" application for a month.

The facts:

- Prior to the court application, the child had lived with the father for 10 months.
- Shortly before the court application the mother removed the child from the father's care and prevented

any contact between the child and the father.

- The matter was listed in court 2 days later. On that day the matter was listed for an interim hearing one week later.
- The mother then filed an affidavit alleging a history of control and intimidation by the father towards her.
- On the next court date, both parties requested an urgent hearing. The Judge however declined to hear the matter, instead appointing an ICL (independent child lawyer), sending the parents to a child inclusive conference and adjourned the case for “mention” in 1 month’s time.

Appeal:

- The father appealed the decision on the grounds that the Judge refused to hear his “recovery” application and gave no adequate reasons for the refusal.
- The Appeal Court found that whilst the orders for the appointment of an ICL and counselling were appropriate, the Trial Judge was obliged to engage with the application for the recovery order before him.
- The Full Court amended the next court date from a “mention only” to a “hearing” of the father’s recovery application.

TAX TREATMENT OF A REDUNDANCY

The size of redundancy payments can often be significant and as they are received by one spouse their treatment in a property

settlement can be problematic. So, how are they considered in a property settlement if a couple separate?

The Family Court recently considered such a case.

Facts:

- The husband was made redundant and was given an employment termination payment of \$469,199 in 2011. The wife sought at trial that the total of this sum be “added back” into the property pool.
- At the trial, the judge found that in adding the entirety of the \$469,199 back into the property pool would ignore taxation implications, particularly as some of the redundancy payment included annual leave entitlements. Accordingly, the judge proposed to allow \$300,000 of the payment to be “added back” into the property pool.
- At no time during the trial was it suggested by either the husband, the wife or the Judge that the redundancy payment or any part of it was liable for tax. The first time tax was raised was by the Judge in the final judgment.
- The wife filed an appeal against the trial judge’s treatment of the husband’s redundancy.

Appeal:

- The appeal court found that as the judge had no evidence that tax was payable and failed to give the wife an opportunity to respond to the issue of tax before his decision that the appeal was successful and the matter was remitted for re-hearing.

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