



family flyer

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Family Lawyers

Issue #12

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:

- Child Support - Voluntary Pay Cut After Separation:
- Spousal Maintenance - Finality?
- Cross-Vesting Legislation Invalid:
- New Family Court Forms:
- New Court Officers:
- Federal Magistrates:

CHILD SUPPORT - VOLUNTARY PAY CUT AFTER SEPARATION:

The Family Court recently considered the effect of a spouse taking a lower paying job after separation.

The Full Court said that the level of financial support is to be measured according to the parents' "capacity" to provide financial support.

This test is more onerous than in spouse maintenance adjustments where the Court looks at "what is proper having regard to the reasonable ability of the liable spouse to meet the needs of the other party".

The Trial Judge stated "If a man is prepared to work at a level of 80 hours per week during the marriage, the Court cannot say that he should be excused from such productivity when the marriage breaks down".

The Full Court decision clarified that "earning capacity" is the test for Child Support and "ability to pay" is the test in spouse maintenance and they are distinct.

- whether a party is unable to support themselves adequately;
- whether the paying spouse is "reasonably able to pay";
- whether the maintenance is "proper" and the factors for this are set out in the *Family Law Act* in Section 75(2).

The pre-separation standard of living is relevant but not binding. The Court has held that maintenance should not be paid merely at a "subsistence" level, unless this is "reasonable".

The Court has power to order the payment of maintenance by a lump sum, or by periodic sums. Quite often parties agree to a lump sum payment in an attempt to finalise spouse maintenance.

The Family Court recently ordered that a Wife who had a Court Order for periodic Spouse Maintenance and who brought an Application seeking a variation of the Maintenance Order was granted a lump sum Maintenance Order.

It is worth noting that a consideration of the particular facts of this case is necessary when considering anyone else's position. It does reflect a preparedness by the Court to make such Orders.

The Law is in a state of flux but it seems the way is open for a party to return to Court for a "top-up", as long as it is described as Lump Sum Maintenance.

SPOUSAL MAINTENANCE - FINALITY?

The Family Law Act specifies that financial relations between parties should be finalised, if at all possible.

There has been a shift in the last few years away from this in spouse maintenance matters. The Court is now more likely to make a periodic Spouse Maintenance Order, than it was years ago.

In considering a Spouse Maintenance Application the Court must consider matters such as:

CROSS-VESTING LEGISLATION INVALID:

Issues that arise from defacto relationships (except with regard to children) fall outside the scope of the Family Court. They are determined by State Legislation.

All States of Australia have referred their powers regarding children of defacto relationships to the Federal Government and those matters are able to be dealt with by the Family Court.



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In recent years Legislation was passed for "cross-vesting" i.e. allowing matters outside the Family Court, specifically defacto relationship property matters, to be considered by the Family Court. (If the matters had a connection with the Court by way of another aspect).

There has been recent media attention of a High Court decision in June, that has determined that this cross-vesting legislation is invalid.

The effect of this decision has been to cause uncertainty and concern. Legislation is being passed to enforce existing Orders of the Family Court.

The Family Court has now stated publicly that it will not deal with "cross-vested" matters and all "cross-vested" matters before it will be dismissed unless they are transferred to the appropriate Court immediately.

NEW FAMILY COURT FORMS:

On the 28th of June 1999 the Family Court introduced various new forms.

Of major significance is the Form 12A, "Application for Consent Orders".

Anyone involved in the preparation of a Consent Order should carefully note the new provisions of a Form 12A that requires full completion, even if both parties are legally represented.

NEW COURT OFFICERS:

On the 1st of June 1999 the Family Court (at Brisbane) appointed four (4) new Registrars. This has substantially reduced Court waiting times.

In conjunction with this the powers of Registrars were modified enabling them to deal with matters such as Interim Residence and Contact Applications.

FEDERAL MAGISTRATES:

A Bill to establish the Federal Magistrates Service has been introduced into Federal Parliament.

It is expected that sixteen (16) Federal Magistrates including a Chief Federal Magistrate will be appointed in the first year of the service, expected to be in 2000.

It is understood that their location is under consideration, taking into account the areas of greatest demand. By the end of 2000 it is anticipated that, there will be Magistrates in every State.

The proposed Legislation follows research by the Attorney-General's Office in June 1999 that Family Court Judges are increasingly spending their time on matters which could effectively be dealt with at a lower level.

It is understood that the service will use the infrastructure of the existing Courts, including the Registry services of the Family Court where feasible.

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