



# 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:

- Property Transfers in the Family Court
- New Staff
- Superannuation in the Family Court
- Legal Aid Arbitration
- Defacto Property
- Setting Aside a Property Consent Order

## PROPERTY TRANSFERS IN THE FAMILY COURT

Real Property that is being transferred between parties, in accordance with a Family Court Order, does not require the payment of any registration fees to the Queensland Titles Office nor the payment of any stamp duty to the Queensland Stamps Office.

## NEW STAFF

We are pleased to advise that there has been a recent increase in staff at Michael Lynch & Associates, Family Lawyers.

Joining our ranks in mid-December 1996 is a new Solicitor, Ms Ann Sturgess. Ann specialises in Family Law, having practiced in the field for many years. Ann is also an appointed Child Representative.

The firm is also pleased to have been joined by two new secretaries, Melissa and Michelle.

## SUPERANNUATION IN THE FAMILY COURT

The Family Court's consideration of Superannuation in property settlements, has had a history of confusion and uncertainty.

Numerous theories and approaches have been adopted by the Court, in an attempt to provide an equitable consideration of Superannuation entitlements.

The Family Court does not treat Superannuation as "property", but as a "financial resource".

In a recent Full Court decision of the Family Court, the decision of the Trial Judge, was upheld, where the Superannuation entitlement was treated as a "financial resource" and considered in the financial proceedings on that basis.

The Court found that as Superannuation is not property it is not capable of being considered "as if property" in a standard property settlement application. The Court determined that in most cases the proper approach to be taken in dealing with Superannuation is, either:

- to adjourn the proceedings, with or without the making of an Order regarding the Superannuation policy, or
- to treat the Superannuation entitlement as a "financial resource" and to "consider" the resource as simply an element in the property settlement determination.

It should be noted that Superannuation in Family Law is again being discussed by the Government. The current idea being floated in relation to Superannuation, is that legislation should allow for policies to be severed, but remain unrealised, so that an interest in a Superannuation policy can be "portable".

## LEGAL AID ARBITRATION

In an effort to address the back log of Family Court property hearings the Legal Aid Office has elected to conduct arbitration conferences, for those parties who are eligible for Legal Aid.

The arbitration guidelines are detailed but involve the parties agreeing to accept the arbitration decision, as a substitute to proceeding to a Family Court hearing.

## DEFACTO PROPERTY

The Commonwealth Government does not have the power to legislate in the area of financial disputes between defacto partners.





**Contact details**

Michael Lynch Family Lawyers

**Principal**

Michael Lynch\*

**Senior Associates**

Helen Bryden\*

**Associates**

Emily Wood

**Solicitors**

Elizabeth Millar

\*Queensland Law Society

Accredited Family Law Specialists

**Telephone:** 07 3221 4300

**Facsimile:** 07 3221 9454

**Email:** law@mlynch.com.au

**Web:** www.michaelylchfamilylawyers.com.au

**Address:** Level 6

193 North Quay

Brisbane Qld 4000

**Post:** PO Box 12027

George St, Brisbane Qld 4003



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Law Society Mediator

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The States have long since referred their powers in relation to the children of defacto relationships to the Commonwealth. However continuing difficulties arise in relation to the property of defacto couples.

Queensland and Tasmania are considering referring their power to deal with defacto property disputes to the Commonwealth and the Federal Government has expressed the view that there may be advantages in having the Family Court have jurisdiction to deal with all property matters both for married couples and defacto couples.

## SETTING ASIDE A PROPERTY CONSENT ORDER

In a recent case in the Family Court, the Court was presented with facts where, following separation the husband sought legal advice. The husband then informed the wife that she was not entitled to any of the parties property as she had made no contribution to its acquisition. The wife accepted this and did not obtain legal advice.

The parties then filed a Consent Order in a Magistrates Court. The Consent Order equated to the wife receiving 9% of the property.

The Magistrate asked the wife whether she wished to obtain legal advice, to which she declined. She was advised that she was entitled to seek legal advice but not suggested to do so.

Approximately 5 years later the wife filed an Application seeking to set aside the Consent Order on the basis of a "miscarriage of justice".

The Full Court supported the Trial Judge in concluding that there was a miscarriage of justice at the time of making the Consent Orders. The Court said it was the responsibility of the Magistrate to at least make a brief enquiry, given that the wife remained unrepresented. The failure to do so resulted in a miscarriage of justice.