



Family Matters

THE NEWSLETTER OF BERRY FAMILY LAW: WINTER 2015

Introducing you to Michael Lipshutz



"I seek to provide the very best representation possible".

Michael has practised law since 1975, predominantly in the area of family and divorce law and commercial litigation. He has appeared as Counsel in the Magistrates, County, Supreme, Federal, Family Courts, Federal Circuit Court and various boards and tribunals.

He has also been involved in a variety of administrative law matters, which started when he successfully made the first challenge to the Estate Agents Board. He subsequently appeared in a variety of disciplinary matters involving breaches under the Estate Agents Act appearing before the Estate Agents Board and the Administrative Appeals Tribunal.

Michael is an accredited Arbitrator and is a member of the Australian Institute of Mediators and Arbitrators. He is also a member of the Family Law section of the Law Council of Australia.

With over 40 years' experience in family law, Michael has extensive experience in property and children's matters.

Michael has been actively involved in community work outside the law, including as Chairman of the Anti-Defamation Commission (Human Rights Organisation). He is a Councillor of the City of Glen Eira and has chaired several important committees including Local Laws. He was Deputy Mayor in 2014.

Michael reflects that "by working in family and divorce law one deals with real problems and issues that directly affect families. I seek to provide the very best representation possible. Family and divorce law is a highly specialised and complex area. Over the years I have found that many clients have sought advice from sources such as friends, associates and lawyers not experienced in family law".



Berry Family Law

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Children and Overseas Travel

Apart from exceptional circumstances any parent wishing to take their child overseas should obtain the other parent's consent. If there is a Parenting Order in place or there are pending proceedings in relation to parenting matters before the Family Court it is a Commonwealth offence to take a child overseas without the consent of the other parent.

If one parent refuses to allow the other to take the child overseas an application can be made to the Court for orders allowing the travel. In determining whether to allow a child to travel overseas the Court will consider what is in the child's best interests. The Court may consider whether there is any risk that the child will not be returned to Australia. If there is a risk involved the Court can look at implementing safeguards to ensure the child returns.

Does the child have a passport?

Save for exceptional circumstances a child can only obtain a passport with the written consent of both parents. If consent cannot be obtained from one parent an order of the Court permitting the application for a passport will usually be needed.

Where there is concern that one parent may fraudulently apply for a passport for a child a "Child Alert Request" can be made to the Australian Passport Office. This warns the Australian Passport Office that one parent has not given consent for a passport to be issued for the child. The request will remain on the system for a maximum of 12 months (or until the child is 18 if a Court Order is provided in support). The request is not a complete guarantee that a passport will not be issued but it provides a safeguard to alert a parent if an application is made.

If a child already has a passport (or can obtain a foreign passport) the alert will not stop the child leaving the country.

Storing passports and Watchlist alerts

If a child already has a passport and a parent is concerned about the child leaving the country it is possible to seek that the passport be safely stored (for example by a solicitor).

A parent can also apply for an Order that a child's name be placed on the Family Law Watchlist. The Australian Federal Police maintains a list of names and details of children on a "watch list" who are not permitted to travel overseas. If there is an attempt to take a "Watchlist" child from Australia the Federal Police will be immediately alerted and border security will not allow the child to leave without the specific consent of both parents or a further Court Order.

Hague Convention

If a child is travelling overseas with one parent a check should be made that the country they are travelling to is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. This is a treaty signed by Australia and other countries who have agreed to follow a procedure to ensure the fast return of children who have been wrongfully removed (or retained) from their country of habitual residence.

Seek Advice

When a child is going or has gone overseas and a parent has concerns about their safety and/or return legal advice should be sought immediately from a Family Lawyer.

What is Property?

Since 1 January 1976 Family Court Judges have tried to resolve exactly what property is. It is clear that property can be both real (estate) and personal. Property is confined to presently existing entitlements. It does not extend to future or potential interests.

Since 2002 superannuation has also been considered to be property. It can be adjusted but it is usually treated differently to other property. Some superannuation can be converted into a pension or annuity income stream. These income streams are also property. They may be considered differently and may not always be divided.

There is a misconception that the Court must divide the property of separated parties. This statement is wrong for two reasons. First, the High Court has recently confirmed the Family Courts may adjust ownership in property even when parties have not separated. Second, even though parties have separated, the Court is not obligated to adjust their property interests. The Family Law Act provides that the Court can only adjust property interests when to do so is just and equitable.

It is possible to divide property by an informal agreement. However, if the agreement is not ratified under the Family Law Act it shall not be binding. The risk in settling informally is that either party can still obtain a Court property adjustment notwithstanding the agreement.

When a Court hears an Application for property adjustment it must first consider whether it would be just and equitable to make any property adjustment.

Then the Court must:

- a. Identify and value all of the property at the time of the hearing;
- b. Identify the various contributions made by the parties up to the hearing, whether they are financial or non financial, direct or indirect or made to the welfare of the family;
- c. Determine the percentage of each party's contribution;
- d. Determine what adjustment (if any) is necessary taking into account the need of each party in the future;
- e. Assign a percentage to any adjustment for future need; and
- f. Apply the percentages in c. and e. to the property in a. to make its Order.

If you need assistance with a property settlement it is advisable to talk to a Family Lawyer.

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