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Newsletter

Superannuation and Family Law - New De Facto Legislation

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Abstract – What a difference a day makes!

Ted and Mary, a de facto couple decide to end their 20 year relationship on 28 Feb 2009. Their major asset, Ted's super, cannot be split. Had they separated the next day, 1 March 2009, their property would have been treated the same as if they were a married couple. Same sex couples are not discriminated and are caught by this legislation. The new legislation creates a series of surprises with consequential winners and losers.

The New De Facto Legislation

1 March 2009 heralded the start date of the most significant amendment since the commencement of the Family Law Act (FLA) in 1975. *The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 No.115, 2008* is one of three pieces of legislation with this start date. These other Acts ends discrimination for same sex couples (see Feb 2009 Newsletter) and amends the Evidence Act.

Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 No.115, 2008 has become Part VIIIAB of the FLA.

According to the census, 10% of couples lived in de facto relationship in 1996. This had risen to 15% in 2006. For the first time, division of de facto couples property will be decided by uniform legislation. Couples can be opposite sex, same sex, or multi partnered and will have access to superannuation orders and spousal maintenance for the first time. Superannuation splits involving multiple partners are specifically mentioned in the legislation. This will be discussed later.

There are 3 tests that need to be met before a couple can be a de facto:

- The parties must have a geographical connection to a participating jurisdiction – ie a State or Territory that has referred its powers to the Commonwealth.
- The relationship must be a genuine de facto relationship and not merely a dependent domestic relationship.
- The parties' relationship broke down after 1 March 2009. There are "opt in" provisions in limited circumstances. These are discussed later.

In terms of the geographical connection, only South Australia has yet to refer its powers. The agreement with the States and Territories allow jurisdictions to participate or withdraw from the scheme at any time.

The legislation provides for the following tests:

- Duration of the relationship.
- Nature and extent of their common residence.
- Whether a sexual relationship exists.
- Financial dependence or interdependence.
- The ownership, use and acquisition of their property.
- The degree of mutual commitment to a shared lifestyle.
- Whether the relationship is or was registered in a State or Territory that has a relationship register.
- The care and support of children.
- The reputation and public aspects of the relationship.

Importantly, none of the above is conclusive and is a guide only.

As well as meeting the test for a de facto relationship, at least one of the following needs to apply:

- The period of the relationship is at least 2 years (in whole or in aggregate), or
- There is a child of the relationship, or
- Serious injustice would follow if an order is not made, or
- Relationship is registered. Whilst registration is significant, it is still not sufficient, by itself, to determine whether a de facto relationship exists.

The legislation provides for the courts to make a declaration of the de facto relationship. In marginal cases, family law practitioners will first ask the Court to determine whether a relationship exists and its duration before considering the property aspects.

Opting In – Financial Agreements For Breakdowns Before 1 March 2009

Relationships that broke down before the commencement day may choose for Part VIIIAB to apply. Parties are only able to make such a choice if there are no state court orders or financial agreements dealing with their financial matters and their choice is unconditional.

Their choice must be in writing, signed, and include certification that both parties received independent legal advice. The legal advice has to cover the advantages and disadvantages of making this choice. The choice is irrevocable.

Transitional Arrangements

Part VIIIAB is divided into two parts – transitional provisions and amendments to the FLA. There is no provision for matters that are currently in the State Courts to be transferred to the Federal family law courts.

A financial agreement that has been validly entered into before the commencement of Part VIIIAB under the laws of a State or Territory can be recognised as binding under the FLA. However, there must be a question mark as to the sustainability of an old agreement that does not include superannuation, particularly if that asset is significant. It may very well be in the client's interest for a fresh agreement under the FLA.

Superannuation

Part VIIIAB will allow the courts to make splitting orders to divide a de facto party's superannuation interest in the same way as current arrangements. Part VIIIAB agreements can include provisions regarding superannuation interests.

With the introduction of Part VIIIAB, there is an increased likelihood that a party's superannuation interest will be subject to multiple splitting orders. In the past, family law practitioners would have dealt with relationships in a sequential order. That is, one relationship followed by another. The new legislation makes reference to concurrent multiple relationships, for example, two de facto relationships or a marriage relationship and a de facto relationship at the same time. Under these circumstances, how is the superannuation split?

Section 90MX(3) provides for a splitting sequence and gives an example:

W has a superannuation interest that is subject to 3 payment splits in respect of W's de facto relationship with X, W's marriage to Y and W's de facto relationship with Z (in that order).

The operative times of the payment splits are in the same order as the relationships.

Assume each payment split provides for a 50% share to the non-member spouse. W becomes entitled to a splittable payment of $100.
The final payment entitlements are as follows: X gets $50. Y gets $25. Z gets $12.50. W gets the remaining $12.50.

The above example in the legislation provides more questions than it resolves.

Other Matters

Part VIIIAB provides for trustees in bankruptcy and other third parties to be a party to disputes between de facto couples.

Capital gains tax roll over provisions and stamp duty relief apply to de facto couples.

The Act introduces a new ground for setting aside financial agreements where a person has attempted to defraud or defeat a claim of their de facto partner or spouse through a 'sweetheart deal' with another de facto partner or spouse.

The Family Law (Superannuation) Amendment Regulations 2009 (No.1) make provisions for de facto couples to obtain information from fund trustees about superannuation interests.

Will the Outcomes be the Same?

A major difference between a marriage and a de facto relationship is establishing when a de facto relationship has commenced or ended. Undoubtedly, for the more difficult cases, the courts will establish whether a relationship exists and its duration. The legislation provides for this.

The Family Court treats marriage as a socio-economic partnership and, the longer it lasts, the less weight it gives to whoever brought the property into the relationship. This can be quite at odds with the intentions of people in de facto relationships for whom 'what I have is mine and what you have is yours'. The legislation is retrospective in so far that it captures all property irrespective of when the de facto relationship commenced.

Whilst binding financial agreements can give couples choice to contract out of the property regime of the Act and to divide their property in some other way, it is a largely theoretical solution and not a universal one. What the Act has done is to impose a property settlement regime that may be quite contrary to the intent of the parties. This has been done without any accompanying offsets such as a publicly funded awareness program or public funding for Agreements for those de facto couples not wishing to be caught unintentionally by these new provisions. For de facto couples separating after 1 March 2009, "surprise" may be the most common reaction: - for the legislation inevitably will give rise to a new class of winners and losers.

The big issue is whether the Family Court will treat property brought into a lengthy de facto relationship, where separateness was a way of life, in the same way as a traditional married couple, either subjectively or otherwise.

Feedback

Please email me any feedback or topics you would like covered in future newsletters.

The next newsletter will cover the Global Financial Crisis (GFC), Superannuation and Family Law. The GFC in unparalleled. The issue is how do practitioners protect their client's interests.

Curriculum Vitae - click here to view my CV and past newsletters.

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