

DE FACTO RELATIONSHIPS IN THE FAMILY COURT

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Introduction

On 1 March 2009, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* took effect.

Arguably, the reforms set out in this Act are the most significant to have been made to the Family Law Act since its commencement in 1975 and will extensively broaden the jurisdiction of the Family Court to deal with financial matters (property disputes and maintenance applications) arising out of the breakdown of de facto and same sex relationships.

Participating Jurisdictions

The “participating jurisdictions” covered by the Act are Victoria, New South Wales, Queensland, Tasmania, the ACT and Northern Territory.

South Australia and Western Australia are yet to refer their powers to the Commonwealth and accordingly de facto and same sex relationships in both those States will not have the benefit of coverage under the Family Law Act.

Application Of The New Laws

The new Act does **not** apply to de facto relationships that break down prior to 1 March 2009, unless parties elect to “opt” in pursuant to section 86A of the Act, which gives the parties to the relationship the ability to “opt in” to the Family Court/Federal magistrates Court, provided that the following prerequisites are met:

- (a) There is no final existing order under State law regarding property or maintenance;
- (b) No designated State Financial Agreement exists in relation to their de facto relationship – or any such agreement has ceased to exist without any property being distributed or maintenance being paid.;
- (c) The parties must agree in writing to “opt in” with the agreement to be signed by both parties and each party having received independent legal advice, before the agreement was signed, about the advantages and disadvantage of making the choice to opt in; and
- (d) A signed statement must be provided by the legal practitioner confirming that this advice was provided.

Setting Aside A Decision To “Opt In”

Under Section 86A(7) the Act, the court may make an order setting aside a choice to opt in “if the court is satisfied that, having regard to the circumstances in which the choice was made, it would be unjust and inequitable if the court does not set the choice aside.”

In such an event the court setting aside a choice to opt in may make such order as it considers just and equitable to return the rights of:

- (a) The parties to the de facto relationship;
- (b) Any other interested persons affected by the choice;

to their position immediately before the choice was made.

It is interesting what outcomes this could lead to where extant proceedings under a State law may have been dismissed as a result of an earlier decision by the parties to “opt in”.

Practitioners should be aware of the provisions of Section 47(1) of the Victorian *Relationships Act* which provides that where a proceeding in relation to a property of one of the domestic partners is commenced in the Family Court at any time before a State court has made a final order (under the *Relationships Act*) to adjust interests with respect to the property, the State court may adjourn its hearing of the matter, subject to there being no delay in the Family Court proceeding [Section 47(2), RA].

This provision is specifically confined to Family Court – not Federal Magistrates Court – proceedings and contemplates the adjournment of property, but not maintenance, claims before the State court.

Further, whether an adjournment is granted in these circumstances is a matter entirely left to the discretion of the State Court [section 47(3), RA].

Meaning of “De Facto Relationship”

“De facto relationship” is defined in Section 4AA of the Act as follows:

Meaning of *de facto* relationship

(1) A person is in a **de facto relationship** with another person if:

- (a) the persons **are not legally married to each other**; and
- (b) the persons are **not related by family** (see subsection (6)); and
- (c) having regard to all the circumstances of their relationship,

they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

(2) Those circumstances may include any or all of the following:

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and

- any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) the care and support of children;
- (i) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

Significantly, for the purposes of this Act, a de facto relationship can exist between 2 persons **irrespective of their gender**, and even if one of the persons is legally married to someone else or in another de facto relationship.

“De Facto Financial cause”

The Act also introduces the concept of a “de facto financial cause” which is set out in section 4(1), which provides as follows:

de facto financial cause means:

- (a) proceedings between the parties to a de facto relationship with respect to **the maintenance of one of them** after the breakdown of their de facto relationship; or
- (b) proceedings between:
 - (i) a party to a de facto relationship; and
 - (ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;with respect to the maintenance of the first-mentioned party

after the breakdown of the de facto relationship; or

(c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the **property** of the parties or either of them; or

(d) proceedings between:

(i) a party to a de facto relationship; and

(ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;

with respect to the distribution, after the breakdown of the de facto relationship, of any vested bankruptcy property in relation to the bankrupt party; or

(e) without limiting any of the preceding paragraphs, proceedings with respect to a Part VIIIAB **financial agreement** that are between any combination of:

(i) the parties to that agreement; and

(ii) the legal personal representatives of any of those parties who have died;

(including a combination consisting solely of parties or consisting solely of representatives); or

(f) third party proceedings (as defined in section 4B) to set aside a Part VIIIAB financial agreement; or

(g) any other proceedings (including proceedings with respect to **the enforcement** of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of the preceding paragraphs.

APPLICATIONS FOR PROPERTY AND MAINTENANCE

Applicable Time Limits

Section 44(5) of the Act provides that a party to a de facto relationship must bring an application for maintenance, declaration of property interests or property settlement within two years after the end of the de facto relationship (described as “the standard application period”).

Section 44(6) provides that the standard application period may be extended with the leave of the court if the court is satisfied that:

- (a) **hardship** would be caused to the party or a child if leave were not granted; or
- (b) In the case of an application for an order for the maintenance of the party, the party’s circumstances were, at the end of the standard application period, such that she would have been unable to support herself without an income tested pension, allowance or benefit.

Ousting Of Jurisdiction By Previous Financial Agreement

An application cannot be made for maintenance or property settlement by a party to a de facto relationship if such matters are already covered by a binding financial agreement between the parties (section 90SA (1)).

If the Financial Agreement is not binding on a party (called “Spouse C” for ease of reference), a Financial Agreement between spouse A and Spouse B will not preclude spouse C from bringing property settlement proceedings(section 90 SA(C)).

Prerequisites for the making of Applications

Duration of Relationship/Contributions

Pursuant to s90SB of the Act, a court can only make orders or declarations for property settlement and maintenance in relation to a de facto relationship if the court is satisfied that:

- (a) The period, or total of the periods, of the de facto relationship **is at least two years**; or
- (b) There is **a child** of the de facto relationship; or
- (c) The applicant has made substantial contributions of the kind set out in section 90 SM(4)(a),(b),(c) (ie Direct or indirect financial contributions, Non-financial contributions or contributions of the homemaker and parent kind) AND a failure to make an order or declaration would result in “serious injustice” to the applicant; or
- (d) The relationship is or was registered under a prescribed law of a State or territory (eg.registered pursuant to section 6 of the *Relationships Act* (Vic) 2008.

The concept of “serious injustice” has been considered in a number of cases in the context of State legislation. See for example *STOTT v. MURPHY* [2004] VSC 373 (Cummins J) and *STREET v BELL* 114 FLR 167 pp 174-175 (Renaud J).

Geographical Requirements

Sections 90SD and 90SK of the Act provide that for maintenance and property applications to be made to the Court:

- (a) Either or both of the parties to the application must be ordinarily resident in a participating jurisdiction at **the time of the application**; AND
- (b) Either
 - (i) Both parties must have been ordinarily resident during at least one third of the relationship in a participating jurisdiction at the time the application was made; or
 - (ii) The applicant for the order made substantial contributions in a participating jurisdiction to the relationship.

It is not essential for the State in question to have been a participating jurisdiction during the de facto relationship (section 90SD(2)).

Powers Of The Court - Property Settlement And Maintenance

If the geographical prerequisites and the 2 years/substantial contributions threshold prerequisites are satisfied, the court has broad powers to make orders in maintenance and property proceedings which are set out in sections 90SE and 90SK respectively.

As is the case with married spouses, the court is obliged to join the trustee in bankruptcy as a party to the proceedings where one of the parties is or already bankrupt or becomes bankrupt after the application is made, where the bankruptcy trustee applies to the court to be joined and the court is satisfied that the interests of creditors may be affected by the making of an order.

The New “Future Needs” Factors – Section 90SF(3)

Section 90SF(3) sets out substantially similar factors to those contained in section 75(2) of the Act, which factors are to be considered both in the context of an application for maintenance and in considering an application for property settlement (section 90SM(4)(e)).

Availability of Superannuation Splitting to De Facto Spouses

The Act ensures that the parties to a de facto relationship will have the same access to the superannuation super splitting provisions of the Family Law Act as married couples.

Declarations About The Existence Of De Facto Relationships

If an application is made for an order for maintenance, urgent maintenance, property settlement or for a declaration of interests in property, in reliance upon an assertion that a de facto relationship existed between the applicant and another person (described as “the primary proceedings”), the court may, for the purpose of

the primary proceedings declare that a de facto relationship existed, or never existed, between those two persons (s 90RD).

The declaration can extend to any or all of the following matters:

- (a) The period(s) of the de facto relationship (for the purposes of determining the duration of the relationship);
- (b) Whether there is a child of the de facto relationship;
- (c) Whether one of the parties made substantial contributions of the kind referred to in section 90SM(4)(a)-(c);
- (d) When the de facto relationship ended;
- (e) *Where* each of the parties to the de facto relationship was ordinarily resident during the de facto relationship.

Effect Of Declarations

A section 90RD declaration has the same effect as a judgment of the court.

It is open to any party to the “primary proceedings’ to apply for a declaration under section 90RD of the Act, subject only to the court being satisfied that one or both of the parties to the primary proceedings were ordinarily resident in a participating jurisdiction when the primary proceedings commenced.

Section 90RH gives the court the power to set aside declarations previously made under section 90RD where the court is satisfied that a fact or circumstance has arisen that has not been previously been disclosed to the court AND that fact or circumstance was not within the affected persons knowledge at that time.

Similarly, declarations made under section 90RD can be varied or set aside and replaced with a subsequent declaration.

In the event of a section 90RD declaration being set aside, the court may make such order as it considers just and equitable for the purpose of placing any person affected by the setting aside of the declaration in the same position as that person would have been, if the declaration had not been made (section 90H(3)).

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