

# DEFACTO PROPERTY SETTLEMENTS UNDER THE FAMILY LAW ACT

We have just had the 2 year anniversary of the significant amendments that were made to the *Family Law Act* giving the Family Court jurisdiction to determine de facto relationship property settlements for couples that separated after 1 March 2009. The legislation covers both opposite and same sex couples.

As of 1 July 2010 South Australia also elected for de facto matters to be determined by the *Family Law Act*, leaving Western Australia as the only State not to refer its powers to the Family Law Act.

## WHAT IS A DEFACTO RELATIONSHIP?

Under the *Family Law Act* a person is in a de facto relationship with another person if:

- The persons are not legally married to each other; and
- The persons are not related by family; and
- Having regard to all the circumstances of their relationship, they have a relationship as a couple who are together on a “genuine domestic basis”.

## FACTORS TO CONSIDER IN DETERMINING WHETHER PARTIES ARE TOGETHER ON A “GENUINE DOMESTIC BASIS”

In working out if the parties do have a relationship as a couple on a “genuine domestic basis” the Court will take into consideration a wide range of possible factors, some include:-

- The duration the relationship;
- The nature and extent of their common residence;
- Whether a sexual relationship exists;
- The degree of financial dependence or interdependence, and any arrangements for financial support between them;
- The ownership, use and acquisition of their property;
- The degree of mutual commitment to a shared life;
- Whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- The care and support of children; and
- The reputation and public aspects of the relationship.

In considering the factors above the Court is not bound to give equal weight to each factor and may have regard to any of the factors as it deems appropriate in the circumstances of each case.

## THRESHOLD REQUIREMENT

A person **must** also satisfy one of the following criteria in establishing whether a de facto relationship has existed and therefore whether the Court has jurisdiction to determine a property settlement: -

- That the period, (or the total of the periods) of the “genuine domestic” relationship is at least two years; or
- That there is a child of the relationship; or
- That a party made a substantial contribution of a certain kind and a failure to make an order would result in a serious injustice; or
- The relationship is or was registered under a prescribed law of a State or Territory.

## CAN A DEFACTO RELATIONSHIP EXIST IF THE PARTIES ARE NOT LIVING TOGETHER?

A recent case from the Federal Magistrates Court has considered an Application for a property settlement where the parties had a child together, but had not lived together.

The facts involved two friends who after a once off sexual encounter discovered shortly thereafter that the female (the Applicant in this case) was pregnant. During the time prior to the birth of the child the parties had spent time together, this had included sharing meals and spending time socialising. There was evidence that the parties had spent two overnights together, but otherwise had maintained their own separate residences. Following the birth of the child, the Respondent Father ceased all communication with the Applicant and the child, even refusing to sign the child's birth certificate.

As there was a child of the relationship the parties were not required to satisfy the requirement that the defacto relationship was of at least two years duration.

The Federal Magistrate highlighted the need for there to be a "genuine domestic relationship" noting the difference between parties merely "dating." Taking into consideration the overall circumstances that the parties had been in, the Federal Magistrate was not satisfied that the parties' relationship could be regarded as a "de facto relationship". The Applicant's Application was therefore dismissed.

#### **LIMITATION PERIOD REMINDER**

There is no time limit on how soon after separation parties can commence property settlement negotiations. If negotiations have not reached a final property settlement division, within 2 years of the date of separation, then each of the parties should carefully consider their position as to whether they file a Court Application to preserve their ability to pursue a property settlement. Without "leave of the Court" defacto spouses are precluded from bringing a Court Application for property settlement more than 2 years after the date of separation.