

WHAT HAPPENS IN A DEFACTO PROPERTY SETTLEMENT?

6 August 2018

Are you in a defacto relationship? Have you separated and not sure how property should be divided? It's important to get Family Law advice early, but here are some of the basics you need to know.

What is a de facto Relationship?

Under the *Family Law Act* 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; and
- (c) Having regard to all the circumstances of their relationship, they have a relationship as a couple who 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 (but are not limited to):

- (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; and more.

Back to the question about a property settlement between a de facto couple, there is a threshold requirement. A person must also satisfy one of the following requirements in establishing whether a de facto relationship has existed and, therefore, whether the court has jurisdiction to determine a property settlement:

- 1) That the period (or the total of the periods) of the “genuine domestic” relationship was at least two years;or
- 2) That there is a child of the relationship;or
- 3) 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
- 4) The relationship is or was registered under a prescribed law of a State or Territory.

Can a de facto relationship exist if the parties are not living together?

A recent case from the Federal Circuit 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 one-off sexual encounter discovered 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 and this had included sharing meals and spending time socialising. There was evidence that the parties had spent two nights 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 obligated to satisfy the requirement that the de facto relationship was of at least two years duration.

The judge highlighted the need for a “genuine domestic relationship”, noting the difference between parties merely “dating.” Taking into consideration the overall circumstances that the parties had been in, the judge 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” de facto spouses are precluded from bringing a court application for property settlement more than 2 years after the date of separation.

If the limitation date is imminent and a property settlement has not been finalised through negotiation it is important that a party obtains urgent legal advice from a family law solicitor. If you need advice on a defacto property settlement, please contact Michael Lynch Family Lawyers on (07) 3221 4300 or law@mlynch.com.au.