

Discovering the true cost of infidelity

For clients with a wandering eye, a cohabitation agreement may save them from financial strife. **NABIL WAHHAB** explains.

Extra marital affairs may only be an occasional lunch, a secret rendezvous, or the giving of an expensive gift. However, there are some extra marital affairs that are more permanent – for instance, where a spouse and lover stay together two or three nights a week, have a child or some financial dependency.

Defining a relationship

The Property (Relationships) Act 1984 (NSW) allows lovers to bring a claim for property division against the spouse if the lover can show that the affair constitutes a domestic relationship or de facto relationship. The act defines what constitutes a domestic (such as same sex couples) or de facto relationship.

The act also lists a number of factors that the court takes into account in determining whether or not a domestic or de facto relationship exists. The factors include:

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependants or inter-dependants, and any arrangements for financial support between the parties;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the performance of household duties; and
- and the reputation and public aspects of their relationship.

The court need not be satisfied that all these factors are met.

Case law

Invariably, a spouse would argue no such relationship exists as they are in another relationship or are married. However, as early as 1986, in the case

of *D v McA*, the Supreme Court of NSW found a spouse who had an ongoing sexual relationship with an employee, and was often away from home on business for months at a time, was in a de facto relationship with the lover.

In this case, the spouse had separated from his wife, had a relationship with his employee (who was his children's nanny and the applicant in the court case), and a relationship with another employee (who was an employee in his company).

The spouse and the lover had a child together. The spouse denied there was a de facto relationship, and tried to assert that he was in a relationship with the other employee and denied the child was his. Ultimately, the court found that he was in a de facto relationship with the applicant, and the court made certain orders for property in favour of the applicant.

Certainly, just because the court finds that a lover and a spouse are in a de facto relationship may not mean that the court will make an adjustment of property in favour of the lover.

However, the court may make an adjustment of property, as it did in the case of *D v McA*, if the relationship was lengthy, a child is born of the relationship, contributions were made by the lover towards assets or because the spouse purchased property in the name of the lover and, at the end of the relationship, the spouse seeks to reclaim the property.

Cohabitation agreements

If a spouse wishes to continue with an affair, it is important to consider the financial consequences of such an action, and how to protect themselves from claims by the lover. Such financial issues also need to be taken into account by a lover. This is because de facto cases are very difficult, and the

court may be reluctant to make a property order in favour of the lover.

One protective measure is a cohabitation agreement, which is effectively a prenuptial agreement (as they are known in the USA). The agreement provides certainty as to the rights and entitlements of both the spouse and lover in the event of a breakdown in the relationship. The agreement could also provide for support during the course of the relationship, financial and otherwise, and any other financial support that may be required after the breakdown of the relationship (in particular, for a child born of the relationship).

Why would a spouse wish to have such an agreement? Because the spouse may not wish to reveal the relationship to their other spouse if the relationship breaks down and a claim is made against the spouse. It also provides the certainty of outcome discussed earlier, and reduces the legal fees that would be paid to lawyers in defending a claim.

This is particularly necessary if the other spouse finds out about the relationship, and the spouse ends up defending two claims for property, one against the lover and one against the spouse. Such claims may also be litigated in different courts.

Estate planning

It is also in the interests of the spouse to consider the impact of having a lover on their estate planning. A lover may be able to claim against the estate of the spouse on their death, as the lover may come within the definition of a "spouse" under the Family Provision Act. If the lover is able to show that they have a need, they may succeed in challenging the estate of the deceased spouse.

A lover may also challenge the death benefit payments made by a superannuation trustee. A trustee may agree that the lover was in a de facto or



domestic relationship and end up making a payment from the death benefits in favour of the lover or the child born out of the extra marital affair.

What about the situation of the spouse falling ill and requiring medical treatment? The lover and the other spouse may be in conflict about the treatment to be provided and, unless the spouse has made an Enduring Guardianship in favour of their spouse or lover, the Guardianship Board may appoint someone to make these decisions.

There are many other legal and financial issues that a spouse having an extra marital affair needs to turn their mind to. These include power of attorney, declaration of life and what to do with their body on death (eg, cremation or burial, within a family vault or in a particular cemetery).

Legal planning, financial planning and estate planning are pivotal to the preservation of wealth and peace of mind. This is even more important when spouses have extra marital affairs of some permanency. Unless the issues raised here are dealt with early, a spouse or their personal legal representative will have to pick up the pieces. This will come at a great cost in both human and financial terms.

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