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FAMILY LAW

The de facto law revolution

Couples should be aware of new laws relating to de facto relationships, writes NABIL WAHHAB.

On March 1, 2009, the new de facto law on relationship breakdown took effect in all of the states and territories with the exception of South Australia and Western Australia. This followed a referral of powers by all of the states and territories except South Australia and Western Australia.

The new law is a revolution as it represents a significant departure from the de facto law that existed under state laws in some of the states. Set out in the Family Law Act 1975 (Cth), it applies to de facto couples and couples in same gender relationships.

The law equates the rights of de facto partners (including same sex partners) with married couples as to property settlement, superannuation splitting and spouse maintenance. It is the revolution that had to happen.

Under the old law as contained in the Property (Relationships) Act 1984 (NSW) (which law was similar in some of the other state laws on de facto relationships), the only matters the state courts took into account in determining the financial consequences on relationship breakdown were the contributions made by each of the partners during the course of their relationship to the property pool.

The property pool did not include superannuation (albeit in a recent Supreme Court decision it was suggested that while superannuation was a financial resource it would or should have been taken into account in the property pool assessment. The difficulty with this is that for over 20 years superannuation was sort of ignored in the assessment of contributions by lawyers acting for parties and the courts).

The state courts also developed a concept of compensation to counteract contributions made by a de facto partner. That is, in determining a person's entitlement to the property pool based on their contributions, the courts looked at the benefits a spouse received from the other spouse, such as gifts, holidays, a nice home to live in and restaurants attended, to reduce that party's overall entitlement.

This made it difficult to see how relationships could be viewed as partnerships, a concept that was developed very early on in the family law sphere when the Family Court dealt with property matters.

Even if we ignored the concept of compensation, the assessment of contributions by the state courts (be they local, district or supreme court) have been so inconsistent that it was difficult to advise a client about the likely outcome.

> "A significant number of people have entered into de facto relationships deliberately and now they are thrown into the family law den."

However, state courts generally were less robust in their assessment of contributions.

Accordingly, a case that was determined in the state courts versus a case determined in the Family Court with the same set of facts would have yielded significantly different results.

No doubt the aim of the new law is to unify the legal consequences that will flow after relationship or marriage breakdown.

Of course, there will still be a range of outcomes, however, it is likely that the range of outcomes will be close. Some might say that is fantastic news for all those who are living in de facto or same sex relationships.

But here is the catch: a significant number of those couples have opted to live in a de facto relationship because they have heard horror stories come out of the Family Court or they had firsthand experience with marriage breakdowns and the Family Court such that they never wanted to go there.

Some people entered into de facto relationships because of the difference in the law applicable to people who live as de facto versus those who are married. There was a choice, but that choice came to an end on March 1, 2009. The upshot is that competition is gone and we now live in a world of family law monopoly.

So some will be totally unhappy.

Did I tell you about the future needs the new law looks at that can result in a significant adjustment in favour of one spouse? Did I tell you about superannuation splitting and spouse maintenance? Not yet. The news gets worse for some. The other side of the coin is that they get better for the other half.

In New South Wales at least, the state courts assessed only contributions that were made to the property pool that each of the parties had at the date

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of the hearing in determining the property settlement.

The state courts did not look at the future needs of each of the parties. However, under the new law, the court will assess not only contributions (ie, the past) but also consider whether an adjustment should be made to the contributions assessment by reason of the 17 factors in section 90SF(3) (ie, the future).

In most cases, the following matters in section 90SF(3) will be taken into account by the court in determining whether and what adjustment the court should make to the notional division of the parties' property as a result of the contribution-based assessment of the parties' contributions to the property pool:

■ the age and state of health of each of the de facto parties;

■ the income, property and financial resources of each of the parties and the physical and mental capacity of each for appropriate gainful employment;

CASE STUDY

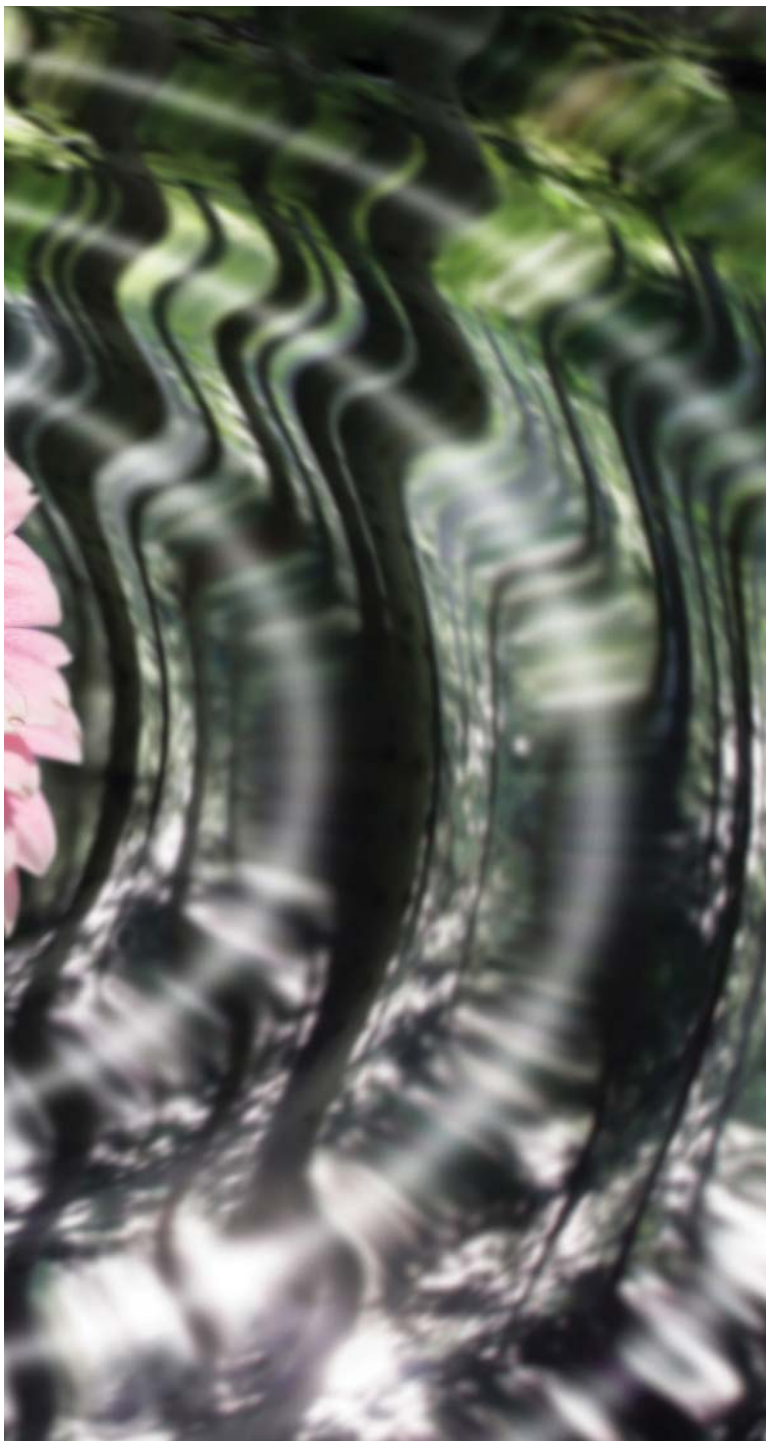
ASSUME that Jack and Jill lived together in a de facto relationship for 15 years, during which time they accumulated $1 million in property plus $200,000 in super, all of which is in Jack's name. They have three children aged 12, 10 and 8. At the beginning of their relationship, neither Jack nor Jill had any assets. Assume further that Jill has been unemployed since the birth of the eldest child 12 years ago. Jack is a manager and earns $100,000 per annum.

If the matter proceeded in a state court in NSW, the best result that Jill could achieve would be about 40-50 per cent of the property pool (excluding super), as the court would only assess contributions. Under the new law, the Family Court will assess the contributions at 50-50 as to the property and super. The sting for Jack will come in the form of the section 90SF(3) assessment.

The court will take into account the following matters:

- Jack's income;
- Jill's inability to find gainful employment; and
- the level of care that each of the parties are providing for the children.

The above factors are likely to result in an adjustment of about 10-15 per cent of the property pool. That is, Jill could well end up with $600,000 to $650,000 of the property pool and a super split of $100,000. The court also has the discretion to trade-off cash for super and vice versa. If Jill shows the court that she needs, say, at least $650,000 to buy a home, the court may ultimately order a smaller super split in her favour and adjust the balance from the available cash.



■ whether either party has the care or control of a child of the de facto relationship who has not attained the age of 18 years;

■ commitments of each of the parties are necessary to enable the party to support himself or herself or a child of another person that the party has the duty to maintain;

■ the responsibilities of either party to support any other person;

■ a standard of living that in all the circumstances is reasonable;

■ the need to protect the party who wishes to continue that party's role as a parent;

■ if either party is co-habitating with another person, the financial circumstances relating to the co-habitation; and

■ any child support that a party is to provide, or might be liable to provide in the future for a child of the de facto relationship.

The above factors cannot be understated. They can make a huge difference in the assessment of parties' ultimate entitlements.

What about spouse maintenance?

Under state law in NSW (at least) there was no legal obligation on de facto parties (including same sex partners) to support each other financially.

There were limited circumstances where a spouse could have applied for spouse maintenance and it was granted for very short periods of time and generally in cases where the relationship was of significantly long duration and the party required retraining or where the parties had a disabled child.

The state courts also took into account a party's entitlement to Centrelink benefits in determining whether to grant spouse maintenance. That is, if a party is entitled to or receives Centrelink benefits, then that will reduce that party's needs.

Under the new law, there is a right to spouse maintenance. This is premised on the basis that parties have an obligation to support each other to the extent that one spouse has a need and the other spouse has capacity to pay. This is a significant departure and increase in the rights (and obligations) of spouses who live in a de facto relationship including same sex relationships.

The Family Court, in determining whether or not a partner is entitled to spouse maintenance, will consider a threshold question of whether or not a spouse has a need.

Once that need has been established then the court will look at the capacity of the other spouse to maintain the first spouse.

Centrelink benefits are disregarded under the new law.

Certainly under the new law it will be much easier to obtain a spouse maintenance order on behalf of a de facto partner than it was under the old law applied in the various states and, further, it is likely the duration of the spouse maintenance order will be for a significantly longer period of time.

A way out?

A significant number of people have entered into de facto relationships deliberately and now they are thrown into the family law den.

Financial advisers and accountants will need to reassess their clients' needs, including their asset protection, estate planning and financial planning, by reason of the new law as the financial consequences could spell disaster for their clients.

One way to protect clients is to have them and their spouse (married, de facto or in same sex relationships) enter into Binding Financial Agreements (BFAs).

The effect of a BFA is to oust the court's jurisdiction to deal with part or all of the property the subject of the BFA as well as spouse maintenance and superannuation.

Such agreements can give peace of mind to your client as they provide certainty of outcome in the event of relationship breakdowns.

It's all in the timing

There is only one catch: the new law applies to de facto relationships that have broken down (ie, parties separated) after March 1, 2009, or where the de facto partners have agreed to opt into the new regime. If the parties separated before March 1, 2009, the old state law will continue to apply.

There is a glimmer of hope for some though. The first cases to be litigated no doubt will turn on whether parties separated before or after March 1, 2009, as the stakes are high and the outcomes are starkly different if the matter was litigated in the Family Court versus the state courts.

And a word of warning: it would be foolish for a financial activist client to agree to opt into the new regime as the new regime can result in the non-financial activist's partner receiving significantly more than they would otherwise receive if the matter was litigated in the state courts both as to property settlement and spouse maintenance.

A proactive approach

The new law has unified the financial consequences for married and de facto couples.

It also has the effect of equating the rights of de facto partners (and same sex partners) in the states that have referred their powers to the Commonwealth.

The new law will have significant implications for estate and financial planning as well as the asset protection measures that clients have put in place.

Clients' needs will have to be reassessed in light of the new regime. The earlier financial planners act, the better their clients will be in the future.

Nabil Wahhab is a director of York Family Law, Sydney. He is an accredited specialist in family law.