KR Hewlett & Co's

FAMILY RELATIONSHIPS and WILLS NEWSLETTER June 2009

DEFACTO relationships now covered by the Family Law Act: From 1 March 2009, property division cases of de facto couples (including same-sex couples) who separate as from that date will now be covered by the Family Law Act, like married couples. There are some significant consequences of this change.

An important improvement is that previously, for a de facto couple, if there were disputes in relation to both property adjustment and parenting of children, there had to be *two* separate court applications - one application to the state courts in relation to property adjustment, the other to the Family Court or Federal Magistrates Court in relation to the parenting matter. Now, just one court application will be necessary to the Family Court or Federal Magistrates Court in relation to both property adjustment and parenting matters.

In the long run however, probably *the most significant change will be the additional factors that are taken into account in property adjustment cases between de facto partners* due to the new laws.

The *previous* NSW de facto legislation had improved the amount of money or other property that "*the homemaker*" partner could easily claim. That legislation did not however, for the homemaker, fully take into account that after the relationship ended, the homemaker parent was often left with less prospects for obtaining gainful employment and was often left having the care and control of children of the relationship.

In comparison, the laws relating to property division between married couples did take into account those factors - "future needs" factors. In recent years, this has meant that a previously married homemaker parent who had less employment prospects and who was left to look after the children may receive more than half of the matrimonial property in a matrimonial property adjustment case.

By the previous de facto law not taking fully such "future needs" factors into account in property adjustment matters, it meant that the de facto homemaker parent may have previously received a less generous property division settlement than their married counterpart.

A previous justification for that less favourable settlement of a de facto homemaker was that some de facto couples deliberately chose not to get married, as they may not have wished to commit to each other in such a firm or permanent way. The argument went that, in that situation, perhaps the de facto partner making the more substantial contributions should not have to substantially provide for future needs of the homemaker partner that they split up with.

Now, in the new laws, in property division matters between de facto couples, the court is also required to have regard to "future needs" factors. This may mean that a homemaker de facto partner may in future be substantially more generously treated.

It may take several years, or longer, to see whether the family courts will treat a homemaker de facto partner much more generously than under the laws which applied up to 1st March this year, and how the family courts will treat submissions by some de facto partners that they deliberately chose not to get married because they wanted to be in a less committed or permanent relationship.

BE PREPARED! There are differing views about this change. Perhaps the most important view about it however is to be prepared, and I would at this stage recommend the following:-

1. People considering entering into de facto relationships must understand that there are now even stronger laws that will apply to them in the event that their relationship breaks down.

2. Therefore, before the relationship commences, those people should probably discuss with their partner and family their views about what should happen in the event that the relationship breaks down.

3. Especially where there is an imbalance in assets or financial resources or where the couple do not wish to be treated like a married couple in the event that their relationship breaks down, it may well be advisable for them to enter into a "binding financial agreement" (a "prenup") before their relationship commences.

4. It is possible for third parties to be a part of a binding financial agreement. Therefore, if a family member loans money to a married or de facto couple so that they can purchase a home, they may like be a party to, and to have their rights recorded in, that agreement.

5. A court may later find, after great expense, that a de facto relationship exists at a time when one of the parties did not realise it existed.

6. For example, it is currently not necessary for a couple to live with each other all the time for them to be found to be having a de facto relationship. Also, sometimes, a person could be married, but not yet separated, but still be found to be having a de facto relationship with another person. This is not to say that a person who is just having an affair, or who are just a boyfriend or girlfriend, are in a de facto relationship - this is very unlikely to be the case. When the affair or relationship becomes serious however, at some stage, a de facto relationship may have commenced.

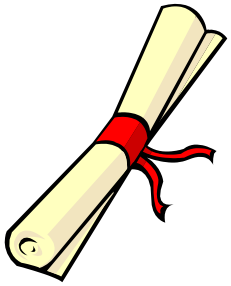
7. In some previous cases, there has been a *lot of legal fees wasted* by all parties in the court case trying to determine when the de facto relationship *commenced*.

8. Accordingly, for people contemplating a de facto relationship, they should try and discuss, perhaps obtain legal advice, and agree when the de facto relationship is *commencing*. If this is agreed beforehand, it may help to reduce any later conflict between the parties about property division.

9. The new laws still state that generally, unless there is a de facto relationship for at least 2 years, there can be no claim for property adjustment upon the relationship ending. There are exceptions, the most important being if there is a child of the relationship. Also note that currently, if a de facto partner dies without leaving a last will, in NSW, much of their assets may go to the surviving de facto partner even though the relationship had gone on for less than 2 years.

10. Under the new laws, as well, a de facto partner's superannuation is now more fully considered property, and it can be subject to adjustment in favour of the other partner, just like superannuation has in the last few years been adjustable in the case of property division between married couples.

In conclusion, in my view, these de facto law changes are very important. I believe that they will mean that it will be imperative for any person contemplating entering into a de facto relationship to beforehand obtain legal advice and plan carefully.



<u>WILLS</u> and family provision: Laws relating to will challenges have changed, with changes effective from 1 March 2009.

In recent years, the categories of people who can (theoretically but not necessarily successfully) challenge a deceased person's will has

expanded. As expected, people from categories such as spouses, de facto or same sex partners, children can challenge. Also, other categories of people can too. Those other categories of potential claimants include former spouses, children born out of marriage (ex nuptial children), dependents, stepchildren and grandchildren. Further, a person in a close personal relationship with the deceased at the time of death can challenge. Such a person might include, as well as others, an unpaid carer of the deceased, or person cared for by the deceased.

In recent years, in "close" categories of claimants such as children, there have been many successful challenges. In my observation, even in "remoter" categories of claimants, there have been quite a few successful challenges. Anyone making a will should obtain good legal advice about this. After a person's death, executors of the estate and potential claimants should obtain prompt good legal advice about this area.

Under the changes, from 1 March 2009, except in special circumstances, the court will be required to refer all family provision cases to mediation. This should hopefully lead to earlier and cheaper resolution of many cases.

Further, as the NSW Attorney General announced on 1 March 2009, the "new laws … give judges power to limit legal costs in cases involving disputes over wills." Other provisions should also assist in reducing costs. These are all welcome changes which our firm will enthusiastically embrace.

The new laws should encourage early and full disclosure of the deceased's financial affairs by the executor, as inadequate disclosure maybe a basis for a *further* challenge to be made.

Importantly, another change is that a will now not be able to be challenged pursuant to NSW family provision laws unless the claim is filed with the court within *12 months* of the date of death. After that 12 month period, you can apply to the court for leave to apply out of time, but this will be risky.

In conclusion, as noted above, consideration needs to be given to these new laws not only when a person has died, but of course also when a person is making out their will.

Family law – the parenting: It is almost 3 years, since July 2006, that the family law reforms relating to "shared parenting" came into effect.

Perhaps the most important part of the changes may be the phrase "substantial and significant time".

The courts, as probably expected by many lawyers including myself, have *not* overwhelmingly made orders for children to spend equal time with each of their separated parents. The courts *have* however on many occasions considered it important for the children to spend "substantial and significant time" with the parent they do not live with.

The legislation defines “substantial and significant time” as follows:-

> “For the purposes of subsection (2), a child will be taken to spend ***substantial and significant time*** with a parent only if:
>
> (a) the time the child spends with the parent includes both:
>
> (i) days that fall on weekends and holidays; and
>
> (ii) days that <u>do not fall on weekends</u> or holidays; and
>
> (b) the time the child spends with the parent allows the parent to be involved in:
>
> (i) <u>the child's daily routine;</u> and
>
> (ii) occasions and events that are of particular significance to the child; and
>
> (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.” (underline emphasis added)

Potentially, children to spend time with the non-resident parent mid week, and the non-resident parent to be involved in the children's daily routine.

According to a case providing some guidelines, this could include opportunities for the child to, for example, be assisted by the non-resident parent with homework, to take the child to

and from sports training and games, take the child to practice for extracurricular activities such as Scouts, music or dance and the child to be involved in the non-resident parent's routine activities such as cooking, washing and cleaning and the child taking on some household responsibilities as age appropriate.

Of course, this also means that the contact occasions will need to be of adequate duration and frequency and suitability to the non-resident parent's life to enable this to reasonably occur.

This should be borne in mind by members of families of people separating, noting that there is still strong evidence to indicate that a child of a separate relationship will (*usually*) benefit from still having reasonable regular contact with both parents after separation.

Family Law – THE FAMILY LOAN: Oh, what a topic. The next 5 words you will read are critical to remember. *Prevention is better than cure*. If a family loan all goes wrong, it is a topic of angst and anger amongst husband, wife and family lender. In family law, easily, tens of thousand of dollars and hundreds of hours can be spent trying to persuade a court what the actual arrangements had been, sometimes decades before. There are problems for banks or solicitors to keep records for many years, and remembering or finding what was said or signed. Even if remembered, what was said could have meant different things to different people involved or could have been vague or could have changed over the years. In my view, the best way forward is to have all involved, *before the loan*, discuss it with a good solicitor. Please do not try and document it yourself. There are plenty of self documented family loans that have led to great heartache and expense. If you have tried reading all of a loan contract and mortgage for a standard home loan from a major bank, you will probably understand how difficult it is to try and simply document it yourself. Actually, the family loan can be more complex to properly document, in some ways, than the bank loan and mortgage. Good timely legal advice is essential for all concerned.

WILLS LAW – CHANGES TO INTESTACY LAWS COMING UP FAST, SO BE PREPARED! As you are probably aware, there are government law “formulas” that apply in NSW to work out to whom property of a deceased person will be distributed, where that person has died without leaving a last Will. These formulas are known as the intestacy rules.

Those intestacy rules are changing, as Parliament has just passed new legislation currently before it. Please note – the new rules are not yet law, they are awaiting assent. In a parliamentary reading speech about the proposed new laws, the Honourable Mr Barry Collier MP stated in part as follows:-

> "The..Bill.. marks the next step for New South Wales in implementing the recommendations of the National Committee on Uniform Succession Laws…
>
> ..The bill... implements the national committee's report on intestacy.....
>
> ... The national committee's recommendations were informed by the New South Wales Law Reform Commission's research about the characteristics of both testate and intestate estates..
>
> The research was useful in determining how people who do not write wills might have intended to distribute their property upon death.....The first significant changes relate to the distribution of the estate between a spouse or partner and any children of an intestate. Currently, when an intestate dies without leaving children and a spouse or partner, the spouse or partner is entitled to a statutory *legacy*, the deceased's personal effects and half the residue of the estate. The intestate's child or children are entitled to the remainder unless it is required to secure an interest in the shared home for the spouse or partner.
>
> **The new bill provides that where an intestate dies leaving a spouse or partner and children of that relationship, the entire estate goes to the spouse or partner**. This recommendation was based on the Law Reform Commission's Research. The Law Reform Commission found that in 75% of testate estates surveyed, where a testator had a spouse and children of the relationship, the testator left the whole estate to the spouse. Spouses and children shared in the estate in only 2.3% of estates surveyed....
>
> **The bill provides for different arrangements where the intestate dies leaving a spouse or partner and children *from another relationship*.** This recognises the fact that such children may not stand to inherit from the intestate's spouse or partner. **In these circumstances the estate is shared between the spouse or partner and the intestate's children**. The spouse or partner will

receive a *legacy*, the intestate's personal effects and half the residue of the estate. All of the intestate's children share in what remains....

... **the new bill increases the statutory legacy entitlement for a spouse or partner, where they are not entitled to the whole estate**, from $200,000 to $350,000. There is an automatic indexing mechanism in the bill for increasing the legacy in accordance with changes in the consumer price index ..."(emphases added)

It is important to again note that the new provisions are awaiting assent, so they are not quite law yet. **There are also many other important provisions in the new law not referred to above**. For example, it is proposed that there will be changes, for an intestate estate, where the deceased person leaves surviving both a legal wife (as they did not divorce presumably) and a de facto partner or partners.

The application of the revised government intestacy formulas in these new laws will often still be complex. The application of the formulas cannot take into account individual circumstances and may still often lead to results that a deceased person would not have wanted. It is therefore more important than ever for every person to ensure that they have a current will..

THAT'S IT FOR NOW! May you always have a hope for a blooming rosy path for you and all your loved ones….

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