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Family Lawyers



New De Facto Family Laws Presentation to State Trustees

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Introduction

- Two new pieces of legislation have been introduced that will significantly change how de facto property disputes are dealt with. Unlike other areas of family law, currently these disputes are dealt with exclusively by state courts under state law.
- The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* will allow these disputes to be dealt with by the federal Family Court and the federal *Family Law Act 1975* ('FLA') by inserting a new Part VIIIAB into this Act ('Part VIIIAB FLA'). This will commence on 1 March 2009.
- The *Relationships Act 2008* ('RA') is a Victorian Act which commenced on 1 December 2008, to replacing Part IX *Property Law Act 1958* ('PLA'). This Act will apply to de facto property disputes until the new FLA Part VIIIAB commences, and also makes provisions regarding "caring" de facto relationships that will continue to apply after this date.

These new laws may affect State Trustees clients in two ways:

1. 'Caring relationship' property matters: Clients who are in a relationship where they receive personal or financial support of a domestic nature from another who they are not in a couple or married relationship with, and who do not provide such care for a fee or reward or on behalf of an organisation. The RA makes some provision for property matters arising for such relationships.
2. Family law property matters: Clients who are in a domestic relationship and have property interests that should be protected through a financial agreement, or have been in a de facto relationship that has broken down and need to divide with their former de facto partner. These property matters will come under *Relationships Act* until 1 March 2009, and Part VIIIAB *Family Law Act* thereafter.

Caring relationships

'Caring' relationships under the RA

- Some divisions of the RA define a domestic relationship as including relationships where one or both of the parties provide personal or financial commitment and support of a domestic nature for the other's material benefit.
- This is irrespective of the parties' genders and whether they live under the same roof, but expressly excludes where one party provides care for a fee or reward, or on behalf of another person or organization.
- Such relationships are not to be confused with the notion of a 'carer'. Rather the relationship will arise between adult companions, a parent and an adult child, or two adult siblings that have a high level of commitment to provide support to the other so that their relationship can properly be described as being of a domestic character.



Relevance of a caring relationship

- The *RA* deals with three main issues:
 1. Relationships Register: Part 2.2 *RA* creates a Relationships Register for parties in domestic relationships in Victoria. This will be maintained by the Registrar of Births, Deaths and Marriages. Registration will provide conclusive proof of the existence of a domestic relationship for legal purposes
 2. Relationship Agreements: Part 3.2 *RA* establishes that parties in a domestic relationship may enter a relationship agreement regarding their financial matters, and that the Court cannot make orders contrary to such agreement if it meets certain requirements.
 3. Property and maintenance orders: Part 3.3 *RA* provides for the Court to make orders regarding property division and maintenance matters between domestic partners. This allows the court to consider the parties' superannuation entitlements when making property orders, and provides greater recognition of parties' homemaking and caring contributions to the relationship.
- 'Caring relationships' are included in the definition of domestic relationships for sections of the Act dealing with the Register and Relationship Agreements; so parties in caring relationships can access the provisions in these two sections.
- Caring relationships are NOT included in the third section regarding property and maintenance orders. It appears that parties to caring relationship cannot access provisions in this third section *unless their relationship is registered*.

Further changes under new *RA* Amendment Act

- The Relationships Amendment (Caring Relationships) Act 2008 received Royal Assent in 11 February 2009, and will come into force on 1 December 2009 at the latest. This Amendment Act will clarify the distinction between marriage-like domestic relationships and 'caring relationships', and confirm that 'caring partners' will only be able to apply for property and maintenance orders if their relationship was registered.
- The Amendment Act will also provide that relationship agreements can only be entered by caring partners in contemplation of, during or after a *registered* caring relationship. Under the current *RA*, parties do not necessarily have to register their relationship before entering a relationship agreement.
- This Amendment Act also provides that before registering a caring relationship, caring partners must each obtain a certificate of independent legal advice regarding the effect, and advantages and disadvantages of registering the relationship. This will provide extra protection to vulnerable people such as State Trustee clients, who may otherwise register a relationship with an unscrupulous acquaintance or family member wishing to take advantage of the law.

New 'caring' laws compared to previous law

- Before the *Relationships Act* was passed, property disputes arising from 'caring' relationships were dealt with under trusts law.
- Under trusts law, property interests will only to be adjusted away from the legal title holder where the parties clearly intended this, or where both parties made contributions to the property so it would be unconscionable not to give the non-title holder a beneficial interest in it. Trust law also makes no provision for maintenance.
- Therefore the *Relationships Act* allows for more generous property orders than trust law. The new law also defines relevant factors and criteria, which give more certainty and predictability in the determination of property interests than under trust laws.

Affect of registering caring relationship in other areas of law

- Registration of a caring relationship will allow the relationships to be generally treated in the same way as other domestic relationships—not only in family law but also most other laws e.g. Administration and Probate, criminal, fair trading, freedom of information, health services and issues etc. The *Relationships Act* amends many other pieces of legislation to achieve this.
- Registration of a client's relationship may therefore be helpful in areas other than family law e.g. allowing their partner to access health records etc also.



- Under the amended Act, registered caring relationships will be treated differently to registered domestic relationships regarding reversionary pensions under superannuation, and judicial pension schemes. Extending spousal entitlements to caring partners in these areas would constitute a fundamental change in policy.

Caring Relationships and Federal Law

- The provisions of the *Relationships Act* regarding caring relationships will continue to operate when the new Federal de facto laws commence on 1 March 2009, as this area is not covered by the new federal laws.

Family law property matters

What Act will apply to de facto property matters?

- State Trustee clients who have been in a de facto relationship that has broken down will have their property matters dealt with under either the RA or the new Part VIIIAB of the *Family Law Act 1975*, depending upon the date of when their relationship broke down.
- Relationships breaking down before 1 MARCH 2009 will automatically come under the RA, unless both parties chose to come under Part VIIIAB FLA.
- Relationships breaking down after 1 MARCH 2009 will automatically come under the new Part VIIIAB which commences on this date. Therefore, *before* Part VIIIAB commences will come under RA; unless the parties both chose for Part VIIIAB.

Property Orders under new laws

- Under both the RA and Part VIIIAB FLA, courts will divide the de facto couple's property through approaches similar to that currently used for married couple's. In deciding property orders, the court must consider:
 - the parties' direct and indirect financial and non-financial contributions to the parties' property and financial resources;
 - the parties' contributions to the welfare of the other party or their children (including contributions made as a homemaker or parent);
 - other matters similar to those currently outlined in s75(2) of FLA for married parties' property division e.g. the parties' income, property and financial resources, financial needs and obligations, age and state of health, responsibilities to support other people, the length of relationship, and the extent to which each party has contributed to the other's financial resources and earning capacity;
 - under Part VIIIAB, the Court will also consider any other order made under the FLA or *Child Support (Assessment) Act* that would affect the parties or their child/ren, and the effect of the property order on the parties' earning capacity.
- A main difference between the *Relationships Act* and the new *Family Law Act* is with regard to superannuation. Under the RA, the Court may consider the parties' superannuation when calculating their financial resources and contributions, but will not be able to split super between the parties. Under the new *Family Law Act*, the Family Court will be able to make superannuation splitting orders.

De facto maintenance under new Part VIIIAB

- The new laws also allow the court to make orders for maintenance between de facto partners.

Under the RA

- Maintenance will only be available here if the applicant is unable to support his/herself because of circumstances arising out of the de facto relationship e.g. where the applicant's earning capacity has been adversely affected by the relationship because he/she left paid employment to care for the couple's children.
- Therefore maintenance will not be available where the applicant is unable to support him/herself for reasons not related to the relationship e.g. poor health.
- The Court will also consider s75(2) factors such as the property and financial resources, financial needs and obligations, age and state of health, responsibilities to support other people, the length of relationship, and the extent to which each party has contributed to the other's financial resources and earning capacity.



Under Part VIIAB FLA

- The terms providing for de facto maintenance applications and orders under Part VIIIAB almost exactly replicate those currently in force regarding spousal maintenance. Accordingly de facto maintenance may be ordered where the respondent is able to pay, and where the applicant is unable to support him/herself due to his/her care of a child of the relationship, age, physical or mental incapacity to gain appropriate employment, or any other adequate reason. As such, maintenance will be available in broader circumstances under Part VIIIAB than the *RA*.
- Again, in determining whether to make an order for maintenance under Part VIIAB, the court must consider a list of other factors replicating those provided in s 75(2) for spousal maintenance orders, outlined above.

Financial agreements

Under the *RA*

- The *RA* provides that parties may enter a 'relationship agreement' regarding financial matters before, during, or after co-habitation. The court cannot make any property orders that are inconsistent with the terms of an enforceable relationship agreement. The *RA* largely leaves these agreements to be made and dealt with in accordance to the law of contract.

Under Part VIIAB FLA

- Part VIIIAB will allow de facto partners to enter binding financial agreements before, during or after cohabitation. The law for these agreements will largely replicate those for spousal financial agreements.
- If a de facto couple have entered a financial agreement under state law before 1 March 2009, then upon this date their financial agreement will become a Part VIIIAB agreement provided the couple have not separated or married.

Same-sex couples

- Both of the new laws recognise and apply to same-sex de facto relationships.
- The *RA* will recognise a child adopted by a same-sex couple as being a child of this relationship; but makes no provision for such recognition for children born to one of the partners through assisted reproductive technology.
- Part VIIIAB will take a broader approach: regardless of the de facto parties' genders, Part VIIIAB will recognise that a child is of the de facto relationship where he/she is:
 - adopted by both of the parties, or by one party with the other's consent
 - born to a party of the relationship as a result of assisted reproductive technology which was carried out with the other party's consent.



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