

Introduction to Australian Family Law Act 1975 book 2009

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This edition is published early to provide users with access to consolidated versions of the *Family Law Act 1975*, *Family Law Rules 2004* and *Family Law Regulations 1984* following the significant amendments which have occurred in the past 12 months.

The long-awaited de facto amendments, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, were passed on 21 November 2008 after many years of anticipation.

Main Changes to Family Law Act

In summary, the major changes to the *Family Law Act* have been:

1. The insertion of a new Pt VIIIAB which deals with de facto relationships, both same-sex and heterosexual, in relation to:
 - (a) property settlements (excluding superannuation, which is included in Pt VIIIIB)
 - (b) spousal maintenance
 - (c) financial agreements
2. Related amendments as a result of the Act being amended to cover de facto relationships. For example, property orders and Pt VIIIA and Pt VIIIAB financial agreements can be set aside on the grounds that they were made with the purpose of defeating a property order or financial agreement between another couple where one party is or was a member of both couples
3. Amendments in relation to Pt VIIIA financial agreements. In particular:
 - (a) third parties can be parties to a financial agreement since 21 November 2008
 - (b) financial agreements can cover "other matters" besides property and spousal maintenance and matters ancillary to property and spousal maintenance. Pt VIIIAB financial agreements cannot cover "other matters"
 - (c) provisions covering matters "incidental or ancillary" to property, financial resources and spousal maintenance before a marriage or during a marriage are of no force or effect until a marriage breaks down
 - (d) provisions dealing with property or financial resources after the breakdown of a marriage until a separation declaration is made, unless the parties are divorced, or one or both parties die
 - (e) A separation declaration can be included in a Pt VIIIA financial agreement (s 90DA(2)).
4. Amendments in relation to children:
 - (a) to define a child of de facto partners

- (b) for children born under surrogacy arrangements, if an order is made under a prescribed law of a State or Territory that a child is a child of a person or a person is a parent of a child, that relationship also applies under the Act.

Jurisdictional requirements for de facto couples

There are various jurisdictional hurdles before a party to a de facto relationship can apply for a property order or declaration, or for a spousal maintenance order. These are:

1. A finding that there was a de facto relationship taking into account any or all of the following circumstances:
 - (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
 - (e) the ownership, use and acquisition of their property
 - (f) the degree of mutual commitment to a shared life
 - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship
 - (h) the care and support of children
 - (i) the reputation and public aspects of the relationship (s 4AA(2))
2. The parties must have separated on or after 1 March 2009.
3. The de facto relationship must have lasted for at least two years (s 90SB). There can, however, be periods of separation and resumption of cohabitation. If the parties have not been in a de facto relationship for at least two years, the court may still make a declaration or an order if one of the following applies:
 - (a) there is a child of the de facto relationship
 - (b) the court is satisfied that the party who applies to the court for a declaration or order, made substantial contributions of a kind mentioned in s 90SM(4)(a), (b) or (c) and a failure to make the order or declaration would result in serious injustice to the applicant
 - (c) The relationship is or was registered under prescribed law of a State or Territory. These laws are prescribed in reg 15AB of the *Family Law Regulations* as the *Relationships Act 2008 (Vic)*, the *Relationships Act 2003 (Tas)* and the *Civil Partnerships Act 2008 (ACT)*.
4. One or both parties must have been ordinarily resident in a participating jurisdiction when the primary proceedings were commenced (s 90RG). The participating jurisdictions are all the States and Territories except South Australia and Western Australia.

5. For a declaration or order as to property rights, the geographical requirements of s 90SK(1) must be met. For an order for maintenance, the similar geographical requirements of s 90SD must be met. These requirements are:
 - (a) one or both parties to a de facto relationship were ordinarily resident in a participating jurisdiction when the declaration or order was made, and
 - (b) that either:
 - (i) both parties were ordinarily resident in participating jurisdictions during at least a third of the relationship, or
 - (ii) the applicant made substantial contributions in relation to the de facto relationship under s 90SM(4)(a) to (c).
6. Proceedings must be issued before the parties have been separated for two years. However, the leave of the court may be sought to institute proceedings out of time in a similar way to proceedings being commenced after one year has elapsed since the date of a divorce (s 44(5), (6)).

It is expected that there will be many disputes about such matters as the date of separation and whether there was a de facto relationship. These disputes will be able to be resolved with a declaration by the court as a preliminary matter to the resolution of the primary dispute (s 90RD). A declaration may be made as to:

- Whether or not a de facto relationship existed
- The period, or periods, of the de facto relationship for the purposes of s 90SB(a)
- Whether there is a child of the de facto relationship
- Whether one of the parties to the de facto relationship made substantial contributions of a kind mentioned in s 90SM(4)(a), (b) or (c)
- When the de facto relationship ended
- Where each of the parties to the de facto relationship was ordinarily resident during the de facto relationship

Opting in by de facto couples

De facto parties who separate prior to 1 March 2009 are not able to use the *Family Law Act* unless they choose to "opt in". Parties can make a choice if:

- There is no current order about property or maintenance
- There is no agreement between the parties enforceable under State law in existence
- The parties consent in writing
- The parties have received independent legal advice as to the advantages and disadvantages of making the choice
- The parties have received signed statements confirming the advice from their lawyers

Anecdotally, it appears that many couples are opting in to the *Family Law Act* in order to formalise their settlement by way of Pt VIIIAB financial agreements.

Overview of the new legislative de facto provisions

In relation to property matters, s 90SM is similarly worded to s 79, s 90SF(3) is similarly worded to s 75(2) but the sub paragraphs are re-numbered and s 90ST is similarly worded to s 81. In relation to spousal maintenance, s 90SF(1), 90SE, 90SF(3), 90SH and 90SI are largely repetitive of s 72, 74, 75(2), 77A and 83 respectively.

In relation to financial agreements s 90UB, 90UC, 90UD, 90UJ and 90UM are largely repetitive of s 90B, 90C, 90D, 90G and 90K respectively. One major difference is that a Pt VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other s 90UJ(3)).

Part VIIIAB, dealing with superannuation, now covers de facto couples. The main amendments to Pt VIIIAB relate to the necessary changes to separation declarations so that they can be entered into by de facto couples.

Changes to Family Law Rules

Since 1 July 2008 there have been two sets of changes to the *Family Law Rules 2004*. The first set commenced on 9 December 2008 and 1 January 2009. The second set commenced on 1 March 2009. Some of the more substantive changes which commenced on 9 December 2008 included:

- If a document is filed by electronic communication and the court sends the person who filed the document a communication recording the date of filing, a copy of that communication must also be served. In any other case the person who serves the document must write on the front of the served copy of the document the date of filing
- The filing of a child dispute resolution certificate is not required for child support proceedings

On 1 January 2009 the procedure with respect to appeals changed. The new Chapter 22 aims to make the procedures governing appeals from the Family Court and appeals from the Federal Magistrates Court more uniform and to simplify the procedures governing all such appeals. In particular:

- An application for leave to appeal is made in the Notice of Appeal rather than in a separate application form
- The phrase “leave to appeal” is used rather than “permission to appeal”
- The requirement to file a pre-argument statement for appeals to be heard by the Full Court was abolished
- A draft index to the Appeal Book must be filed within 28 days after the filing of a Notice of Appeal (or of the date when the reasons for the order appealed are published)

- Failure to comply with the requirement for filing of an Appeal Book index will result in the appeal being deemed abandoned immediately at the expiration of the 28 day period
- A procedural hearing is held after the draft Appeal Book index is filed

The amendments which commenced on 1 March 2009 covered:

- The trial and case management pathway and docket system (see below)
- De facto couples. Amendments introduced the machinery provisions necessary to give effect to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*. De facto financial causes will be handled by the Court in the same manner as other financial matters, while allowing scope for jurisdictional issues, to be aired as necessary.
- Consequential amendments due to the introduction of new forms being the Initiating Application (Family Law) and the Response to Initiating Application (Family Law) which allow an application for interim or procedural orders to be made in the same form as is used to seek final orders and at the same time. A separate Application in a Case is not required for such applications if made at the start of a case.

Trial and case management pathway and docket system

A new trial and case management pathway and docket system was introduced. The extensive changes to the Rules included:

- The terms ‘resolution phase’ and ‘determination phase’ were removed. Broadly, the court events are now divided into those managed by Registrars (Chapter 12) and those managed by Judges (Chapter 16)
- A new phrase was introduced, “the first day before the Judge.” The meaning varies depending upon the issues. For parenting matters where Div 12A applies, or where there is consent to property matters being dealt with under Div 12A, it is considered the first day of the trial. For property matters where Div 12A does not apply, it is the first procedural hearing before the Judge. For combined cases, it is the first of either the first day of the trial, or the first procedural hearing before the Judge
- The trial notice, compliance certificate and pre-trial conference were removed from the Rules
- New powers were delegated to Deputy Registrars including:
 - Power to grant permission under new r 11.10(1)(a)(ii) for applications to be amended to include new causes of action following the procedural hearing at which the case is listed for the first day before the Judge
 - Power to make an order under r 6.05 in relation to a person seeking to intervene in a case to become a party
 - Power to make orders for expedition pursuant to the proposed r 12.10A

- Some existing powers were delegated to Deputy Registrars including:
 - Power under s 65G(2)(b) to make a parenting order by consent in favour of a non-parent without attending a conference with a family consultant
 - Power under s 68M(2) to make an order that a child be made available for an examination for the purposes of preparing a report in connection with the proceedings
- The first return date of a parenting application is no longer a case assessment conference, but rather a procedural hearing
- Once a case has been referred to the first day before the Judge, an amended application containing a new cause of action cannot be filed unless permission is granted by the court
- A new event, a “compliance check”, may be conducted by a Registrar 21 days before the first day before the Judge, and usually by telephone
- The court events before which a notification of costs must be given by a lawyer are the conciliation conference, and the first day of the allocated dates mentioned in r 16.10 (for parenting cases) and r 16.13 (for financial cases)
- Instead of filing a conciliation conference document before a conciliation conference, each party to a financial case must file a Financial Questionnaire 21 days after the case assessment conference
- A balance sheet must be prepared and filed within 63 days (ie. 9 weeks) of the case assessment conference, and prior to any conciliation conference
- All parenting cases, except those in the Magellan Project, will generally proceed through the Child Responsive Program after the first directions hearing
- The following Divisions were removed from the Rules as they were rarely used:
 - Division 11.2.3 – Small claims; and
 - Division 13.4.2 – Non-party documents

Changes to Regulations

There have been several sets of changes to the *Family Law Regulations*. The amendments commencing 22 September 2008 related to accreditation, registration and the work of family dispute resolution practitioners. The amendments commencing 17 December 2008 reflected amendments to family violence legislation in certain States and Territories and ensured references to provisions relating to child support were consistent with changes to the child support scheme. Amendments which commenced on 5 December 2009 prescribed matters for the purpose of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* including State and Territory laws of the purpose of parentage presumptions and the new financial settlement regime for de facto couples.

The Year Ahead

Major changes are proposed to financial agreements under Pt VIII A and Pt VIII AB of the *Family Law Act*. The current proposals are to make substantive changes including such matters as:

- the order of execution of the agreement by the client and the certificate by that client's lawyer
- the requirements for an agreement to be binding

The Federal Government is planning to merge the Family Court and Federal Magistrates Court. Extracts of the *Federal Magistrates Court Rules* have been removed from this edition as they are expected to become obsolete shortly.

Conclusion

The past 12 months have seen a flurry of legislative changes. The most significant change was that for most de facto couples separating after 1 March 2009, the Family Court can decide both their parenting and financial disputes. The law on the resolution of de facto property disputes is almost uniform across the country. Western Australia's law largely reflects the *Family Law Act*. Only South Australia remains separate.

There have also been major procedural changes and changes to financial agreements, particularly the ability to include third parties.

It will be an exciting year as lawyers and the courts adapt to the new law and court procedures, and learn to apply the complex jurisdictional hurdles which apply to de facto couples.