

Recent developments in family law

By Michael Kearney

The area of family law remains one of the most active in terms of changes and developments to both the relevant law and practice. It is an aspect of the law that most will require at least a passing acquaintance with, whether on a professional or personal basis. The purpose of this note is to outline a number of developments of importance for the 'non-specialist' in the family law area as follows:

- the *Property (Relationships) Act 1984*;
- superannuation;
- appeal procedures; and,
- changes to the *Family Law Rules*.

Property (Relationships) Act

The issue of jurisdiction in the area of de facto relationships has been very much alive since the demise of the cross-vesting legislation, and has been a topic regularly on the agenda of meetings of the attorneys-general. New South Wales has now enacted legislation to refer power to the Commonwealth in this area.

On 23 October 2003 the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) received assent. The effect of the Act is to refer power concerning the alteration of property interests between de facto partners from NSW to the Commonwealth. The legislation refers power in relation to all de facto relationships (including same sex relationships). At this time it is not known whether the Commonwealth will accept all of the powers referred.

Superannuation

As most are now aware, sweeping amendments to the *Family Law Act 1975* on 28 December 2002 introduced provisions to enable superannuation interests to be treated as property capable of division upon breakdown of a marriage and to



The Lionel Bowen Building. Photo: Fiona-Lee Quimby / News Image Library.

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empower a court to bind trustees of superannuation funds in certain respects.

The amendments raise many new issues for consideration which are gradually being determined by the courts. Of particular importance for practice is the decision of the full court of the Family Court of Australia in *Hickey* (2003) 30 Fam LR 355. In determining a stated case, the court ruled that *inter alia*:

- in contested proceedings where neither party seeks an order in relation to a superannuation interest, it is not necessary for parties to adduce valuation evidence as to the superannuation interest. Parties may agree on the value to be adopted by the court;
- merely seeking that a superannuation interest be taken into account in making an adjustment to other property interests is not to seek an order in relation to a superannuation interest; and
- where orders are sought by consent, do not involve an order in relation to a superannuation interest and both parties are represented, the court will not usually require a valuation of any superannuation interest.

When valuing a superannuation interest, there needs to be awareness of the increasing number of superannuation funds that are obtaining approval from the minister for the use of 'fund specific' valuation factors. That is, whilst the Regulations provide a valuation formula of general application, there are a growing number of funds to which that formula no longer applies. Most recently and by way of example, UniSuper, RACV Super, Ford Super, QSuper and Super SA have all received approval for 'fund specific' alterations to the formula.

The superannuation information provided by each fund pursuant to the Regulations should set out the information necessary for a valuation to be conducted. It is important to note, however, that many such statements may have been issued prior to the approval of different valuation factors and hence be no longer correct.

Appeal procedures

The rules governing the conduct of appeals in the Family Court have been significantly amended. The relevant rules are contained in Orders 32, 32A, 32B, 32C and 32D. The most significant of the new procedures can be summarised as follows:

- The time limit for the filing of a notice of appeal has been reduced from one month to 28 days. There is no provision for the filing of a 'holding appeal'. Many of the other procedural time limits have been altered and these should be checked. Notices of appeal may not be amended after the first return date without leave.
- Within 14 days of filing of the notice of appeal, a 'pre-argument' statement must be filed. Until filing of this statement, the appeal will not progress and is liable to be struck out.
- Case management of appeals will now be conducted by judges who will settle the appeal books and make directions for the further conduct of the matter.
- On the first return date of the appeal the judge may conduct a settlement conference. Whether to do so or not is a matter for the discretion of the court.

Changes to the Family Law Rules

The Family Court, in consultation with the legal profession and other interested parties, is conducting a major overhaul of the *Family Law Rules*. The two areas of primary interest for the profession are the proposals in relation to expert evidence and costs.

The exposure draft released by the court proposes a regime for expert evidence entirely different to that which presently exists in the jurisdiction. It is intended by the court that there be restrictions on both the calling and engaging of experts by parties, mandatory exchange of experts' reports, provision for costs orders against experts and the imposition of civil penalties for failure to attend or non-compliance.

The draft rules also propose the introduction of penalties for non-compliance with the rules by lawyers and others, including fines of up to \$27,500 for each offence.



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