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Under new federal legislation de facto couples are now treated largely the same as married couples in areas such as property division, maintenance and financial agreements.

New law: de facto financial matters

On 1 March 2009, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* came into force, introducing a new Part VIIIAB to the *Family Law Act 1975 (FLA)*.

This new federal legislation regulates de facto property disputes under the Family Court's jurisdiction. De facto property matters were previously dealt with exclusively by state courts under state law. Queensland, New South Wales, Tasmania and Victoria referred this power to the Commonwealth, and these *FLA* amendments are the Rudd government's response to this referral.

The amended law will automatically apply only to de facto relationships that break down after 1 March 2009.

The changes introduced by the new Part VIIIAB are complex and numerous. This article focuses on major developments regarding property division, maintenance, financial agreements and same-sex parentage.

The new Part VIIIAB establishes an approach to dividing de facto couples' property that largely mirrors the *FLA*'s current approach to married couples' property.

In summary, the court is required to consider the parties' direct and indirect financial and non-financial contributions to the parties' property and financial resources, and the parties' contributions to the welfare of the other party or their children.

The court will then consider other matters similar to those currently outlined in s75(2)

of the *FLA* for married couples' 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. The court is further directed to consider any other family law or child support order that would affect the parties or their child/ren, and the property order's effect on the parties' earning capacity.

A significant aspect of Part VIIIAB is that it enables the Family Court to make orders adjusting de facto parties' superannuation interests. As state courts do not have jurisdiction to do so under state laws, previously de facto parties were unable to claim a share in their partner's superannuation, even if they had lived and raised children together for decades.

Another substantial development introduced by Part VIIIAB is the Family Court's ability to make maintenance orders between de facto partners. Part VIIIAB's de facto maintenance provisions almost exactly replicate *FLA*'s spousal maintenance provisions.

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.

In determining whether to make a maintenance order under Part VIIIAB, the court must consider a list of other factors mirroring those provided in s75(2), outlined above.

Part VIIIAB also allows binding financial agreements (Part VIIIAB BFAs) to be made between de facto partners before, during or after cohabitation.

Again, the law for Part VIIIAB BFAs largely replicates that for spousal financial agreements, e.g. provisions regarding maintenance, termination of and setting aside agreements, validity and enforceability of agreements, and the requirement that each party receive independent legal advice before entering the agreement.

If a de facto couple have already entered a financial agreement under state laws in a participating state and have not separated or married before 1 March 2009, then on this date their financial agreement will become a Part VIIIAB BFA.

Finally, the new laws introduce a broader approach to children of same-sex couples. Part VIIIAB will recognise that a child is of the de facto relationship (including same-sex couples) where he/she is adopted by both partners, or by one partner with the other's consent, or is born to one partner through assisted reproductive technology which was carried out with the other partner's consent. ■

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