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DE FACTO RELATIONSHIPS (SUMMARY)

INTRODUCTION

There have been major developments in the law relating to married and de facto couples in Western Australia since 1 December 2002. The Family Court Amendment Bill 2001 came into operation on 1 December 2002 by the insertion of a new Part 5A to the Family Court Act 1997 (WA), and applies to all de facto relationships that ended from 1 December 2002 onwards. Under the newly inserted section 205V of the Act, an eligible de facto partner may no longer apply to the Supreme Court in its equitable jurisdiction for relief in respect of de facto property.

However, note that for those de facto couples who separated before 1 December 2002, proceedings must still be brought in the Supreme Court.

What is a de facto relationship?

Under section 13A of the Interpretation Act (1984), a de facto relationship is defined as “a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship”.

In deciding what constitute a “marriage-like relationship”, the Court may look at the following factors:-

- the length of the relationship between the parties;
- whether the parties have lived in the same residence;
- the nature and extent of common residence;
- whether there is, or has been, a sexual relationship between them;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- the ownership, use and acquisition of their property (including property they own individually);
- the degree of mutual commitment by them to a shared life;
- whether they care for and support children; and
- the reputation and public aspects, of the relationship between them (ie. how their relationship is perceived by others, do their friends and family see them as being a couple?).

It does not matter whether it is a heterosexual or homosexual relationship, or whether either of the partners is legally married to someone else or in another de facto relationship. It should be noted that in the event that a de facto partner has a spouse,

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that de facto partner is to give that spouse notification of the Application in accordance with the Rules.

Application to the Family Court of Western Australia

Section 205Z(1) states that a Court may make an Order in relation to a de facto relationship only if it is satisfied that:-

- there has been a de facto relationship between the partners for at least two years;
- there is a child of the de facto relationship who has not yet attained the age of 18 years and failure to make an Order would result in serious injustice to the partner caring for or responsible for the child; **OR**
- the de facto partner who applies for the Order makes substantial contributions of a kind mentioned in section 205ZG(4)(a), (b) or (c) and failure to make an Order would result in serious injustice to the partner.

In deciding whether there has been a de facto relationship between the partners, the Court must also be informed of any break in the continuity of the relationship and, if so, the length of the break and the extent of the breakdown in the relationship (section 205Z(2)).

Time limit within which to apply

Under section 205ZB, a de facto partner whose de facto relationship has ended may apply for an order under Part 5A in relation to the relationship **only if the application is made within 2 years after the relationship ended.**

However, if the Court is satisfied that significant hardship would be caused to a de facto partner if leave were not granted to them to proceed outside of this application period, the Court may grant the partner leave to apply.

Jurisdiction

A further threshold issue is found in section 205X. In addition to the establishment of a de facto relationship and that the application falls within the application period, the Court must also be satisfied that **one (or both) of the parties to the Application was (or were) resident in Western Australia** on the day on which the Application was made, **and** either of the following applies:-

- both parties have resided in Western Australia for at least one third of the duration of their de facto relationship; **OR**
- substantial contributions of the kind referred to in section 205ZG(4)(a), (b) or (c) have been made in the State by the Applicant.

Adjusting Property Interests

When an application is made for an order to adjust property interests, the Court will consider the relevant matters set out under section 205ZG which are actually equivalent to the matters set out for the division of property between spouses under section 79 of the Family Law Act. In other words, the manner in which de facto

relationship which ended after 1 December 2002 is treated in Western Australia, is similar to the manner in which a married couple is treated.

The matters to be taken into account are broadly speaking:

- ⊕ income, property and financial resources of each partner;
- ⊕ the direct and indirect financial contributions made by each partner towards the property and financial resources of either or both of them;
- ⊕ the direct and indirect non-financial contributions made by each partner towards the property and financial resources of either or both of them;
- ⊕ the contribution made by each to the welfare of the family;
- ⊕ the earning capacity and financial needs of each partner;
- ⊕ the age and health of each partner;
- ⊕ the effect of any proposed order upon the earning capacity of either partner; and
- ⊕ any child support under the Child Support Assessment Act that a de facto partner has provided, is to provide, or might be liable to provide in the future for a child of the de facto relationship.

Maintenance

Pursuant to Section 205ZC a de facto partner is liable to maintain the other de facto partner, to the extent that that they are reasonably able to do so, if, and only if, the other party is unable to support herself or himself adequately whether :-

- by reason of having the care and control of the child of the de facto relationship who has not attained the age of 18 years;
- by reason of age, or physical or mental incapacity for appropriate gainful employment; or
- for any other adequate reason.

The above is determined with regard to the matters referred to in section 205ZD(3). The matters specified are:-

- the age and state of health of each of the de facto partners;
- the income, property and financial resources of each of the de facto partners and the physical and mental capacity of each of them for appropriate gainful employment;
- whether either de facto partner has the care or control of a child of the relationship who has not attained the age of 18 years;
- commitments and responsibilities of each of the de facto partners that are necessary to enable the partner to support:-
 - himself or herself; and
 - a child or another person that the party has a duty to maintain;
- the responsibilities of either party to support any other person;
- the eligibility of either party for a pension, allowance or benefit under the Commonwealth, State or Territory Law or the Law of any other Country (but

disregarding any entitlement to income tested pension, allowance or benefit) or from any superannuation fund or scheme that operates within or outside Australia, and the way that any such pension allowance or benefit is being paid;

- a standard of living that in all the circumstances is reasonable;
- the extent to which the payment of maintenance would increase the income earning capacity of the party seeking maintenance by enabling that party to undertake further training or education;
- the extent to which the party seeking maintenance has contributed to the income, earning capacity, property and financial resources of the other party;
- the duration of the de facto relationship and the extent to which it has effected the earning capacity of the party seeking maintenance;
- the need to protect a party who wishes to continue in that party's role as a parent;
- if either party is cohabiting with another person, the financial circumstances relating to the cohabitation;
- the terms of any order made or proposed to be made in relation to the property of the parties;
- any child support that a de facto partner has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship, under the Child Support Assessment Act;
- any fact or circumstance which in the opinion of the Court the justice of the case requires to be taken into account; and
- the terms of any financial agreement or former financial agreement that is binding on the parties.

It is important to note that, just as with maintenance in a marriage, a de facto partner can seek immediate or urgent maintenance from the Court (section 205ZE).

Financial Agreements

The Legislation provides the opportunity for de facto couples to contract out of these provisions by entering into a financial agreement. Therefore, any agreement entered into by a de facto couple is treated in the same manner as a financial agreement entered into by a married couple – ie where the parties have entered into a recognised financial agreement, that agreement will be enforceable by the Courts.

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