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De Facto Property Proceedings and Binding Financial Agreements

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All practitioners practicing in Family Law should be aware of the time limits arising from the *Domestic Partners Property Act*ⁱ and the strict requirements of Binding Financial Agreements made pursuant to the *Family Law Act*.ⁱⁱ Those claims can be easily avoided.

Time limits arising from the Domestic Partners Property Act

Some Family Law practitioners do not frequently practice in the District Court and, as a result, may not be familiar with the *District Court Rules*.ⁱⁱⁱ

The time limit for bringing a claim under the *Domestic Partners Property Act*^{iv} is one year from the conclusion of the relationship.^v If proceedings are issued in the District Court, the Plaintiff is also required to make an offer to settle at least 90 days before issuing proceedings.^{vi} Failure to do so may result in an adverse costs order.

What does this mean for practitioners?

Parties do not always seek legal advice immediately after separation and it is not uncommon for a practitioner to meet with a new client just prior to or after the expiry of the limitation date. Practitioners should take note of the date of separation and have internal procedures which record and remind the practitioner to make a "Rule 33 offer" and to ensure proceedings are issued within time.

Referral of the South Australian De Facto Relationship Power

After 1 July 2010, when the *Commonwealth Powers (De Facto Relationships) Act*^{vii} comes into effect, de facto couples who separate on or after 1 July 2010 will have their property settlement dealt with under the *Family Law Act*^{viii} where the limitation period is 2 years from the date of separation.^{ix}

It is important that practitioners carefully consider the date of separation which determines not only what Court the matter will be heard in, but also the limitation date. Failure to do so could result in leave being denied to issue proceedings out of time and a claim against the practitioner.

Binding Financial Agreements

Binding Financial Agreements ("BFA") made pursuant to Part VIIIA of the *Family Law Act*^x present even greater problems to practitioners. These difficulties were highlighted in the Full Court of the Family Court decision of *Black v Black*^{xi} and were addressed in amendments to the *Family Law Act*^{xii} which came into force on 4 January 2010.

Requirements of a BFA

The provisions relating to the validity of a BFA are very specific and must be followed strictly. A BFA executed after 4 January 2010 is valid if:

- (a) it is signed by all parties to the agreement;^{xiii}
- (b) a legal practitioner provides each party with independent legal advice before signing the agreement;^{xiv}
- (c) a legal practitioner provides each party with a signed statement as to the advice given and provides a copy of that statement to the other party (or their legal practitioner);^{xv} and
- (d) the agreement has not been previously terminated or set aside by the Court.^{xvi}

Although the amendments are retrospective, non-compliance with the new requirements will not make a previous BFA invalid.

When providing advice as to whether a BFA is binding, practitioners must consider the retrospective nature of the new requirements and the different requirements for statements of independent legal advice. For example, there are now three different requirements for BFAs entered into during the various periods since 2000. It is important that practitioners review previous advice that a BFA is not binding as that advice may no longer be correct.

In addition to this, practitioners should ensure that the BFA includes a separation declaration where appropriate.^{xvii} When a BFA provides for spousal maintenance practitioners should enquire whether one of the parties is on an income tested benefit as that will void any spousal maintenance provisions.^{xviii}

What should practitioners do?

It is good practice to:

1. Give written advice in relation to a BFA to remove any doubt as to the giving of the advice to the client.
2. Have precedent pro forma advice as to what a BFA is and the ramifications of a BFA to forward to clients.
3. Have a checklist on each file to ensure strict compliance with the requirements of the *Family Law Act*.^{xix}



Conclusion

This article is short and we recommend that practitioners are familiar with the time limits in de facto property proceedings and the provisions of the amended Part VIIIA of the *Family Law Act*.^{xx} While Law Claims are receiving an increasing number of claims against practitioners in these areas, such claims can be easily avoided.

For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.

ⁱ 1996 (SA).

ⁱⁱ 1975 (Cth).

ⁱⁱⁱ 2006 (SA).

^{iv} 1996 (SA).

^v *Domestic Partners Property Act 1996* (SA) s9(3).

^{vi} *Supreme Court Civil Rules 2006* R33 and *District Court Civil Rules 2006* R33.

^{vii} 2009 (SA).

^{viii} 1975 (Cth).

^{ix} *Family Law Act 1975* (Cth) s44(5).

^x 1975 (Cth).

^{xi} (2008) *Family CAFC7*

^{xii} 1975 (Cth), which was amended by the *Federal Justice System Amendment (Efficiency Measures) Act 2009* (Cth).

^{xiii} *Family Law Act 1975* (Cth) s90G(1)(a) and s90UJ(1)(b).

^{xiv} *Family Law Act 1975* (Cth) s90G(1)(b) and s90UJ(1)(b).

^{xv} *Family Law Act 1975* (Cth) ss90G(1)(c) and (ca) and ss90UJ(1)(c) and (ca).

^{xvi} *Family Law Act 1975* (Cth) s90G(1)(d) and s90G(1)(d).

^{xvii} *Family Law Act 1975* (Cth) s90DA and s90UF.

^{xviii} *Family Law Act 1975* (Cth) s90F and s90UI.

^{xix} 1975 (Cth).

^{xx} 1975 (Cth).