Barry.Nilsson.
LAWYERS

DE FACTO PROPERTY PROCEEDINGS – THE STATE COURTS WILL HANG ON

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It may be that we family and relationship lawyers had a collective sigh of relief with the passage and commencement of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*. Practised in the streamlined rules and procedures we are accustomed to in the Family Court and the FMC, many of us found the UCPR and concurrent procedures and requirements puzzling, difficult and not conducive to expeditious resolution.

Thankfully, subject to certain matters particular to de facto proceedings (such as determining the start and end points of a relationship), we hope that de facto proceedings in the Family Court and the FMC will proceed with the same fluidity as matrimonial matters.

But, before we get too excited, we need to take stock. Many de facto property proceedings remain ensconced in the state courts. If so, and certain orders have been made, they cannot be transferred to the federal courts. Further, if the spectre of spousal maintenance or superannuation splitting looms over a matter, it is unlikely the party who might suffer the adverse consequences of such an order will agree to transfer the de facto matter to the federal courts. Further still, there may well be many de facto couples, perhaps even some who think because of media interest in the new law that the new law apply to them, who separated before 1 March 2009. If one looks simply at the mathematics, assuming a couple separates on 28 February 2009, a party to that relationship can bring proceedings in the state courts for de facto property settlement right up to 27 February 2011. Longer still if they can establish that the court might grant leave to extend time.

To suggest, therefore, that all our UCPR troubles are over, is a little premature.

Consequently, we think it still incumbent on practitioners to remain fully conversant with the vagaries of the UCPR and state court procedures. In particular, the following problems continue to raise their heads:
Filing proceedings in the District Court where it may be that the orders sought are less than the $250,000 monetary jurisdictional limit of that court, but the property the subject of the orders sought is not;

- Failing to take proper care of the practice directions relevant to each court in these matters,

especially not preparing draft directions for the furtherance of the matter when filing an application;

- Having a client issue a caveat, then proceed to an application pursuant to section 286 of the Property Law Act 1974, which will not support a caveat. Or filing an application to bring a case in equity or pursuant to section 280 of the Property Law Act 1974 when in those circumstances it is necessary to plead by way of claim and statement of claim;
- Seeking 'interim' orders as opposed to an Originating Application and then a further Application;
- Not making it clear in either pleadings or in an application which section of the *Property Law Act 1974* is being relied upon.

Giving advice to a client regarding the substance of the proceedings is only half the job. Costs will be wasted if the procedures and rules are not properly followed. The UCPR and the state courts will be with us for some time yet and for many matters. Staying abreast of the state rules and procedures and applying them correctly completes the job.

For further information on this topic, please contact our Family Law team.