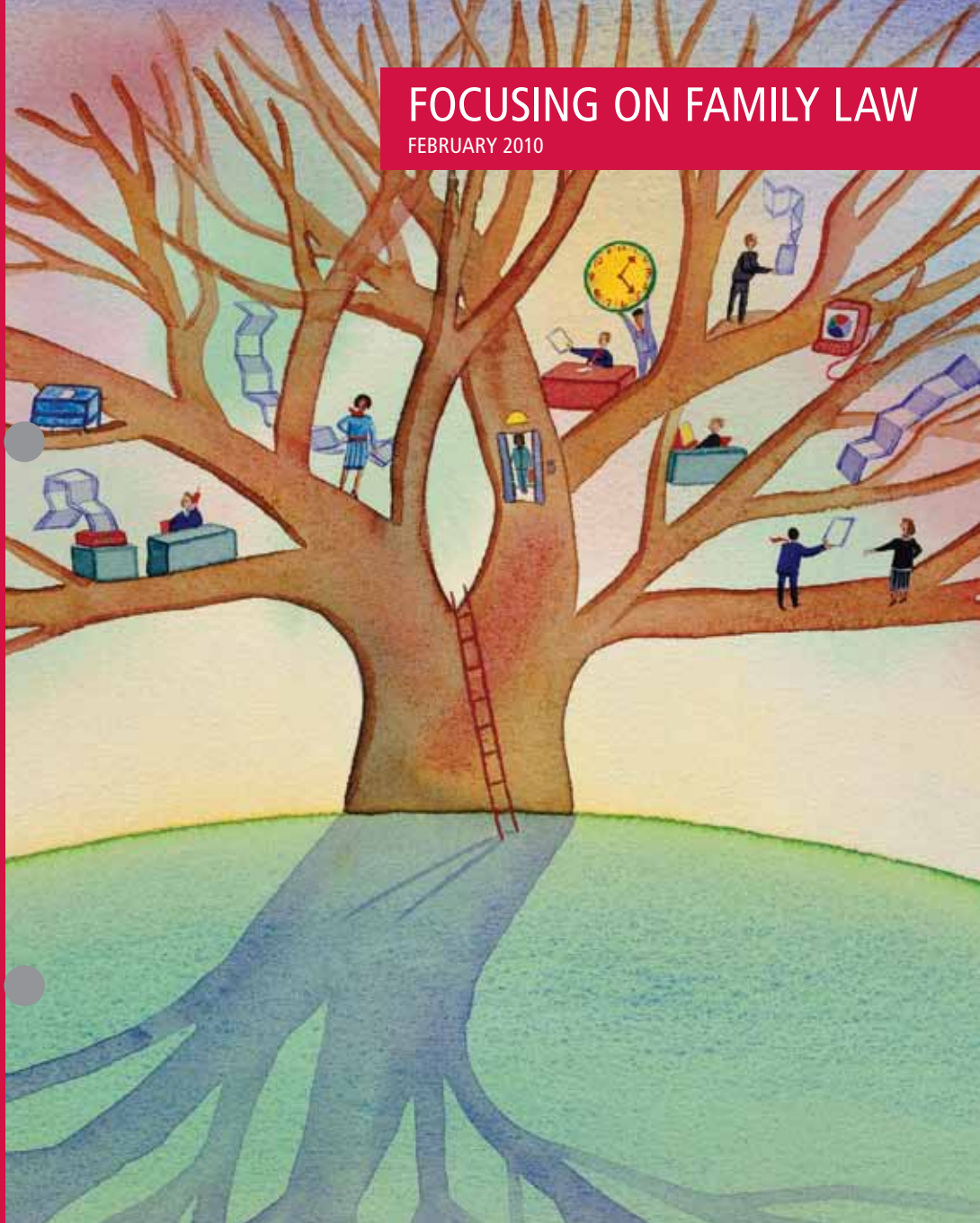


FOCUSING ON FAMILY LAW

FEBRUARY 2010



LEGAL
PRACTITIONERS'
LIABILITY
COMMITTEE

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Introduction

As family law clients are often preoccupied and in emotional distress, they require particular care.

LPLC sees claims in the family law area every year. While the percentage cost of family law claims each year is not high (5% or less in the last three years), it is an area where simple risk management steps can make a difference.

The scope of the retainer needs to be carefully defined and documented. Documenting advice and instructions and keeping the client informed about the progress of the matter and the costs also deserve special attention.

The new edition of Focusing on Family Law examines the most common claims we have seen in family law over recent policy years. We also address an emerging risk arising from recent legislative changes to de facto property arrangements.

A practical checklist is provided to help you minimise the risk of receiving a claim.

The causes of claims

The major underlying causes of claims in the family law area are:

- communication failures;
- failure to manage the legal issues;
- poor engagement management (clarifying and managing the retainer).

If you are aware of common mistakes and why they occur, you will be in a better position to protect against claims.

Never act for both parties

Rule 8.03 of the *Family Law Rules* 2004 specifies solicitors are not to act for parties having conflicting interests. We strongly suggest this encompasses any husband and wife upon marriage breakdown.

Family law clients are, in most cases, in an emotionally charged situation. While they may seem to be in agreement and need you only to 'do the paper work', one party often sees things very differently later on.

In recent policy years we have seen fewer claims arise where the solicitor acted for both parties. However, solicitors also need to be aware of the risk posed by unrepresented parties. Typically, the unrepresented party will later allege that they thought you were acting for them as well as your client and that you failed to protect their interests.

WE RECOMMEND:

- ☑ Never act for more than one party.
- ☑ Tell the unrepresented party that you are not acting for him or her and that the party should get independent advice. Confirm this in writing.
- ☑ Warn your client that an unrepresented party may attempt to undo the settlement later.

Problem areas

1. Financial agreements

Financial agreements under Part VIIIA of the *Family Law Act* 1975 (Cth) pose a liability risk for the solicitors who draft or certify them.

The advantage for the parties is that financial agreements provide more flexibility than consent orders and provide certainty in the form of a binding agreement. However, given that they have the effect of ousting the jurisdiction of the Family Court, section 90G outlines a number of requirements in order to make them binding.

In order for a financial agreement to be binding, it must:

- be in writing and signed by both parties;
- specify whether it is made under section 90B, 90C or 90D of the *Family Law Act*; and
- if it is a 'pre-nuptial' financial agreement, state that it is in contemplation of, and conditional upon a specific marriage taking place within a stated period.

Before the agreement is signed, each spouse party must be provided with independent legal advice about:

- the effect of the agreement on the rights of that party;
- the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement.

The solicitor must also provide to the client a signed statement that legal advice was provided. This may be annexed to the agreement.

If maintenance is dealt with in the financial agreement the parties must be able, at the time that the agreement is entered into, to support themselves without an income-tested pension, allowance or benefit. If not, a claim for maintenance is still available.

The claims

About half the claims concerning financial agreements have arisen from a failure to comply strictly with the form of certification required by section 90G of the *Family Law Act 1975*.

Other claims have arisen in the following circumstances:

- a failure to warn the client of the circumstances in which a financial agreement might be set aside under section 90K: eg. a material change of circumstances relating to children.
- a failure to warn the client about financial obligations created by the agreement.
- the solicitor acting for both parties, so that no independent advice was obtained.
- drafting errors: eg. failing to apportion money between spousal maintenance and property settlement as required by section 90E.

Certification

The statutory requirement that a solicitor give a certificate poses particular risks for solicitors, particularly in relation to 'pre-nuptial' financial agreements.

Solicitors are required to advise the client on:

- the effect of the agreement on the rights of that party;
- the advantages and disadvantages, at the time that the advice was provided, to the party making the agreement.

Solicitors should not underestimate the difficulties or the risks in certifying advice in relation to 'pre-nuptial' financial agreements as they usually entail one party giving up future rights or entitlements.

- The certificate requires you to compare what the client is getting out of the agreement now and what the client will get from a court in the event of a court determination following separation. Separation may occur many years later. Anything can happen in a person's lifetime: disability, unemployment, business failure etc.
- Parties enter these agreements in non-adversarial circumstances, unlike agreements that are entered into post-separation. You may be under pressure to advise quickly and cheaply without comprehensive instructions, especially if there is a wedding date looming. This could give rise to allegations of undue influence or duress.
- You will need to consider whether you have all the information you need to provide this advice and whether it is accurate. Do you need additional advice from an accountant or investment adviser? The client is unlikely to pay for you to undertake investigations when he or she will have already gone through this exercise with the solicitor who prepared or negotiated the financial agreement. However, any failure to investigate may leave you exposed to a claim.
- If the client does not have a good command of English, allowing the intended spouse or relative of the intended spouse to act as interpreter may lead to allegations of undue influence or duress or that the client did not understand the agreement.

Non-compliance with the formal certification requirements of section 90G may be no longer fatal to the validity of an agreement. From 4 January 2010 the requirements in section 90G were relaxed to allow agreements to be upheld despite non-compliance with section 90G. A court may declare an agreement binding if it is satisfied that it would be unjust and inequitable not to uphold the agreement. Solicitors are urged to familiarise themselves with the new wording of section 90G introduced by the *Federal Justice System Amendment (Efficiency Measures) Act (No.1) 2009* (Cth) and to ensure their precedents match the current requirements of section 90G.

Certification advice

WE RECOMMEND

- ☑ Keep proper records of the advice that you have given:
 - » Open a file.
 - » Make file notes and confirm your advice in writing. Include in the letter a clear statement to the effect that by signing the financial agreement your client will be forgoing rights that he or she would otherwise have on marriage breakdown.
 - » Insist that your client obtain independent financial advice from his or her accountant.
 - » Obtain a written acknowledgement from your client that he or she understood your explanation.
 - » Ensure the wording of the agreement and the wording in the certificate reflects section 90G.
- ☑ Use an independent interpreter if your client does not speak English.
- ☑ Keep your file indefinitely.
- ☑ After the agreement is signed, keep a record of who is keeping the original agreement.
- ☑ In the event of a 90D agreement upon divorce, ensure the parties sign a separation declaration.

Preparing agreements

It is not only the certification requirement that can leave solicitors open to a claim. Drafting 'pre-nuptial' financial agreements also carries risk.

- If you act for more than one party, you will expose yourself to a later claim that you preferred the interests of one client over the interests of the other.
- You are required to prepare an agreement that determines future entitlements to property and maintenance, where the future value of the assets and the client's rights are unknown. How can you predict what is in the client's best interests?
- Assets can be diminished or disposed of. The Act provides for a financial agreement to be set aside where circumstances have arisen since the agreement was executed which make it impracticable for the agreement or part of the agreement to be carried out. However, you may face exposure if those circumstances take place, unless you warned the client. Do you lodge a caveat? How do you stop a party from further mortgaging a property without the other's consent? As there may be assets which cannot be protected, you may wish to make provision in the agreement that, in the event of diminution in the value of identified assets, the agreement is void.
- If the wedding date is imminent, be extremely cautious; the related pressure may give rise to allegations of undue influence or duress. The parties may be better off signing an agreement after the wedding (with the further warning that the spouse may then also refuse to sign it!) You also need to have enough time to canvass all of the issues.

Be very cautious where:

- a party speaks limited English
- a party has a disability or illness
- there is a power imbalance or history of domestic violence between the parties
- the party is giving away rights to an asset to which they are likely to contribute toward during the relationship
- advising a woman of child bearing age
- advising the financially inferior partner
- advising a client with an imminent wedding date
- advising third parties, or drafting agreements which involve third parties.

WE RECOMMEND:

- ☑ Never act for more than one party when preparing a 'pre-nuptial' financial agreement, no matter how amicable and united the couple may appear.
- ☑ Tell the other party you are not acting for him or her and recommend separate representation and advice be obtained. Confirm this in writing.
- ☑ Send a comprehensive letter of advice which includes an explanation that your client will be forgoing rights that he or she would otherwise have on marriage breakdown. Have your client sign an acknowledgement that this letter was received.
- ☑ Request that each party supply a declaration of their assets in a form similar to the current Form 13. This should be incorporated into the financial agreement. Impress upon your client the importance of disclosure.
- ☑ Where there are specific assets in the financial agreement that may be dissipated or diminished over the marriage, consider what steps should be taken to protect them and discuss these with your client. Keep a written record of what was discussed and agreed.
- ☑ Advise your client about the risks of signing a financial agreement close to the wedding date.
- ☑ Keep a copy of the executed financial agreement and your file indefinitely.

2. Sue for costs and receive a counterclaim for negligence

When family law solicitors sue for costs, they often find the client's answer is to issue a counterclaim alleging negligence on the solicitor's part. In recent years, these types of claims have increased in both cost and number.

Counterclaims may be cynically considered a client's attempt to avoid paying the bill, but can sometimes reflect the client's dissatisfaction with the way he or she has been treated by the solicitor. Typically, they reflect a breakdown in communication between solicitor and client. Some clients feel they have not been kept informed or treated with respect or courtesy. Clear and regular communication with clients goes a long way toward managing the client's expectations about the outcome and the cost. This can minimise the risk of a disgruntled client making a claim against you.

Suing for costs is a recognised claims trigger so it is worth assessing the likelihood of a claim before issuing proceedings. Whether or not the client's allegations have merit, the process of a client making a counterclaim slows down the debt recovery process. It takes up the solicitor's time in dealing with LPLC and defending the claim.

EXAMPLES:

The disaffected client

The client was a difficult elderly man, aggrieved at the prospect of dividing his considerable assets with his wife of 20 years standing. Throughout the retainer his instructions were changeable and sometimes incomplete.

The client's ultimate dissatisfaction stemmed from consent orders he claimed to have felt pressured to sign. The day after he signed up, he left a message for his solicitor to call him back about the possibility of appealing the orders. The next day the solicitor sent him a copy of the sealed orders and noted the steps the client needed he take to comply with them. The solicitor did not address appeal prospects; he was fed up. The solicitor's response—to ignore the client's enquiries about an appeal—fuelled the client's discontent and the sense that his case was not being taken seriously. The client consulted other solicitors seeking to have the orders set aside. The solicitors sued for costs and received a counterclaim in reply.

Costs blowout

The client consulted a solicitor in a desperate state about an 'unfair' property outcome delivered by judgment interstate. The solicitor assured him he had good appeal prospects, which he did. The retainer followed a stormy route, with erratic instructions from the client. He was particularly anxious about the progress of his appeal and frustrated about delays in the appeal process. The solicitor came close to terminating the retainer because the client was so difficult. Although the appeal was ultimately a success and halved the client's liability to his former wife, the accrued appeal costs eclipsed any real gain. The client was incensed by the outcome and declined to pay his solicitor's account. When the solicitor sued for costs he was met with a counterclaim for negligence.

WE RECOMMEND:

- ✓ Keep your client informed about how the matter is progressing and, in particular, about the level of costs throughout the matter.
- ✓ Periodic or monthly bills are a good way of informing the client about the amount of work being done on the file, progress in the matter and the accruing costs. It is also a useful way of managing the client's expectations about costs so there are no nasty cost 'surprises' for the client at the end.
- ✓ Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the costs involved.

3. Errors and omissions in consent orders

These are a common source of claims and arise for a variety of reasons:

- oversight or typographical errors (particularly in relation to numbers and formulae);
- ambiguously worded consent orders;
- failure to ensure that the orders adequately protect the client's interests;
- inadequate treatment of tax issues; and
- failure to include default provisions.

EXAMPLES

Orders not specific enough about payment of mortgage

The orders provided that the client was to take title to the family home and the former spouse was to continue to pay one of several mortgages. The orders were not specific about the amount to be paid and when; nor did they take into account how the liability was to be treated in the event that the client decided to sell the house. The house was sold and the former spouse stopped making payments.

Orders did not specify mortgage to be discharged

The client was to receive an unencumbered interest in the matrimonial home and the orders provided that if the former spouse could not discharge the mortgage over the matrimonial home, all nominated properties would be sold and the proceeds divided 60/40 in the client's favour. A dispute arose as to whether the matrimonial home was one of the nominated properties to be sold and there was no order requiring the former spouse to discharge the mortgage from the proceeds of sale of the nominated properties. The former spouse sold property but did not seek to discharge the mortgage, forcing the client to discharge the mortgage from her share of the sale proceeds.

Orders did not specify how property to be transferred

The client was to receive a property owned by the former spouse's company. The client was concerned about stamp duty and was advised that no stamp duty would be payable as the company would transfer the property to the former spouse who would then transfer it to the client as part of the property settlement. The orders provided that the former spouse 'do all things necessary to transfer' the property. The former spouse refused to have the property transferred into his name and arranged for the company to transfer the property to the client, making her liable to pay stamp duty.

Failure to determine capital gains tax was payable

Consent orders provided that the former spouse was to transfer her interest in the family business to the client and the client was to indemnify the former spouse for all liabilities of the family business. The orders also provided that the main asset of the family business was to be sold and the proceeds divided between the parties. The solicitor did not turn her mind to the fact that the sale attracted capital gains tax for which the client, under the terms of the consent orders, was solely responsible to pay.

Failure to ascertain amount of tax liability

In a complicated division of property comprising jointly owned businesses and the matrimonial home, the wife's solicitor sought her accountant's advice on the tax liabilities arising under draft consent orders. The solicitor followed up the written request with a phone call to the accountant who was on holidays. There was no file note recording the accountant's response. A subsequent advice from the accountant addressed other issues, but not CGT liability. Under the orders, the wife was clearly accepting liability associated with the business being transferred to her, but she later alleged that her solicitor advised her to sign consent orders at a time when the tax liabilities of the business were unknown. The solicitor's failure to follow up the accountant for tax advice left him vulnerable to a claim for failing to ascertain her tax liability before she signed.

Orders ambiguous on tax liability

At an interim hearing the court ordered the husband to pay the wife's \$20,000 capital gains tax liability. A court note on the orders stated that 'this payment be taken into account as part of the property pool in any final settlement'. At a later hearing, the same solicitor acted for the husband. After protracted negotiations, the parties signed consent orders for a final property settlement. However, the orders were silent as to whether final payment from husband to wife included the \$20,000 already paid by him in CGT liability. The solicitor forgot to ensure that the consent orders reflected the interim tax payment already made.

Inadequate default provisions in orders

Consent orders provided that the husband would pay the wife half of her share of the property settlement immediately and the balance by yearly instalments. The husband defaulted on the instalments, sold the family farm and declared himself bankrupt. The consent orders had made inadequate provision for securing the husband's ongoing liability. An additional problem in this claim was the solicitor's failure to advise the wife to lodge a caveat over the property.

4. Failure to warn about ongoing financial obligations

These types of claims usually arise when the solicitor relies on the client's instructions and fails to investigate the client's circumstances or do adequate searches.

EXAMPLES:

Failure to ascertain client was a co-borrower

The consent orders provided that the former spouse indemnify the client for any partnership debts and remove her as a guarantor of the loans of the partnership. The solicitor failed to ascertain that the client was a co-borrower rather than a guarantor on business loans. Although the client had an indemnity from the former spouse, she nonetheless remained primarily liable for the loans.

Failure to ascertain second mortgage

A settlement was reached whereby the client received the matrimonial home and assumed responsibility for mortgage payments and the former spouse took over the family business. The solicitor relied on instructions from the client that there was only one mortgage on the property and did not conduct a title search which would have revealed that there was a second mortgage. When the existence of the second mortgage was discovered, the former spouse was asked to discharge it and refused to do so, leaving the client with the additional liability.

WE RECOMMEND:

- ✓ Obtain your client's instructions to conduct comprehensive searches or make appropriate enquiries so that consent orders may be framed with full knowledge of the liability position.
- ✓ Wherever possible, you should seek to have existing joint mortgages or loans refinanced.
- ✓ Where this is not possible, warn your client of his or her ongoing liability and confirm the warning in writing.

5. Failure to protect the asset pool

Once a major source of claims, we have seen considerably fewer of these claims in recent years.

Claims tend to arise in the following circumstances:

- There is confusion about the extent of the retainer. The solicitor is initially approached to deal with matters relating to children. Once resolved, everyone's attention then shifts to the property issues, by which time the former spouse has dissipated assets. The client alleges that the solicitor failed to take steps to protect the assets and the solicitor denies being retained to handle the property settlement.
- File notes are not made or written confirmation is not sent in respect of advice regarding the need to make a property application.
- The client delays in making a decision to take action, in the meantime, the former spouse has dissipated the assets. The client blames the solicitor for the delay or alleges that no advice was given.
- A caveat over property owned by a former spouse or related company is not lodged while orders or information from the former spouse are being sought.
- The mortgagee of property in the name of the former spouse is not notified of the client's interest and further funds are advanced to the former spouse which are dissipated, reducing the equity in the property.

WE RECOMMEND:

- ☑ Raise the issue of property with your client when you first receive instructions.
- ☑ Advise your client of the 12 month limitation period which runs from the date of the decree absolute or one month after the date of the divorce order, for making an application.
- ☑ If you are instructed not to deal with property matters, advise your client that any delay in resolving property matters could result in property being dissipated. Keep a file note and confirm this advice in writing.
- ☑ Seek instructions to lodge a caveat as soon as possible if real property is involved and your client is not on title.
- ☑ Where the property is in the name of the former spouse and represents a significant asset of the marriage:
 - » seek formal written acknowledgement from the former spouse that he or she will not draw down further funds against the property or otherwise encumber it;
 - » write to the mortgagee (and include a copy of the acknowledgement if you receive one) and ask that the mortgagee agree it will not allow further funds to be drawn down against the property;
 - » if the former spouse or mortgagee will not provide the above acknowledgement or agreement, consider applying to the court for an injunction preventing further funds being drawn down or other encumbrances being imposed on the property.
- ☑ Confirm all advice in writing and your client's response to it, particularly where your client has chosen not to take your advice and elected to accept the resultant risk.

6. Superannuation slip-ups

The introduction of Part VIII B into the *Family Law Act* has seen a reduction in claims concerning a failure to protect the spouse's superannuation benefit. **For more information on Part VIII B, see Appendix One.**

Part VIII B of the *Family Law Act* allows:

- a non-member's spouse to request information on the member's superannuation interest.
- a non-member spouse to take steps to flag the member spouse's interest by agreement or court order. A flag is analogous to a caveat and, like caveats, must be put in place without delay. A means of protecting superannuation is therefore available and should be pursued in appropriate cases.

WE RECOMMEND:

- ☑ Take comprehensive instructions on the employment background of the parties and possible superannuation entitlements.
- ☑ Act promptly when requesting information concerning the member spouse's interest from the trustee of the superannuation fund.
- ☑ Obtain a professional valuation of the superannuation interest based on the formation received from the trustee.
- ☑ If appropriate, flag the interest in the former spouse's superannuation by way of a superannuation agreement or court order.

7. Failure to obtain a valuation

Although these claims are becoming less frequent, they can still arise in the following circumstances:

- The solicitor recommends that a valuation be obtained but the client cannot afford to obtain a valuation or simply accepts the value suggested by the former spouse. Solicitors need to confirm the advice and its rejection in writing.
- The solicitor simply does not discuss the issue of a valuation or considers it to be unnecessary, particularly where financial statements are available for businesses.
- The solicitor is consulted at the last minute by a formerly unrepresented party for 'independent advice' on a proposed property and the client insists a valuation is unnecessary.

WE RECOMMEND:

- ☑ Raise the issue of a valuation with your client when division of real property is involved.
- ☑ If your client refuses to obtain a valuation, you should advise that the consequence of not obtaining a valuation is that property may be worth more (or less) than your client thinks.
- ☑ Confirm your advice and your client's instructions in writing.

8. Child support and spousal maintenance

Child support is a difficult area governed by the overlapping provisions of the *Family Law Act 1975* and the *Child Support (Assessment) Act 1989*. Claims arise when solicitors fail to grapple with the complexities and/or fail to manage the client's expectations in relation to the degree of finality that can be achieved.

Common problems with child support agreements include:

- Unclear drafting - with the result that one party later contends that the child support agreement did not operate as intended.
- Failure to make application for a child support agreement to be accepted by the Child Support Agency.
- Where the parties intend that a share of property transferred as part of the property settlement is to be credited against periodic child support obligations, failure to spell that out in the child support agreement.
- Failure to advise the client that a child support agreement is never final and is always subject to change, if there is a change in circumstances of one of the parties.

In relation to spousal maintenance, most of the problems we see relate to the failure to advise on whether capitalised spousal maintenance or periodic maintenance is the best option for the client and how best to protect the client's interests. Again, lack of finality is an issue that needs to be addressed.

WE RECOMMEND:

- ☑ Carefully check the wording of the child support agreement to see that the intention of the parties is properly reflected and to avoid ambiguity.
- ☑ Make an application for the child support agreement to be accepted by the Child Support Agency. Remember, if it is not accepted, it is not enforceable.
- ☑ If the parties have agreed as part of the property settlement that a share of property is to be transferred to the other party as child support, ensure the child support agreement states this and that the annual assessed rate of child support is to be reduced by the annualised dollar value of that share of the property.
- ☑ Give a clear written warning that it is not possible to achieve finality with a child support agreement and, if circumstances change, a new agreement or court orders may be required.
- ☑ When advising on spousal maintenance, address the circumstances in which periodic payments may stop and the grounds upon which capitalised maintenance may be revisited.

Emerging risk

Legislative change: de facto relationships

Recent legislative change has given give both opposite-sex and same-sex de facto couples access to the family law courts in relation to property and maintenance disputes.

The changes took effect from 1 March 2009 under the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

A de facto relationship is a relationship that two people who are not married or related by family have as a couple living together on a 'genuine domestic basis'. Section 4AA of the *Family Law Act* sets out a range of relevant circumstance to determine whether a couple have a de facto relationship.

Parties must apply to the Family Court within two years of the end of the de facto relationship.

Transitional arrangements in Victoria apply as follows:

- for relationships that broke down prior to 1 December 2008 – *Property Law Act 1958* (Vic)
- for relationships that broke down after 1 December 2008 but before 1 March 2009 – *Relationships Act 2008* (Vic).
- for relationships that broke down after 1 March 2009 – *Family Law Act 1975* (Cth)

Parties may opt in to the *Family Law Act* even though the relationship broke down before 1 March 2009, provided that both parties consent to this in a signed statement. Before doing so they must have each received independent legal advice about the implications of opting in and obtained a signed statement from each lawyer that the advice was given.

Practitioners need to be aware of the differences between the provisions in the *Relationships Act 2008* (Vic) and the *Family Law Act*: eg no jurisdiction to deal with superannuation under the Victorian Act. (see the comparative table on the following page).

Practitioners are urged to come to terms with the new regime: an information sheet at www.familyrelationships.gov.au entitled 'Property division when de facto relationships break down – new Commonwealth law for separating de facto couples.'

Key features of new de facto regime under the *Family Law Act*:

- it is possible to enter binding agreements
- property settlements
 - » introduction of 'needs factors'
 - » superannuation splitting
- spousal maintenance can be dealt with.

Comparative Table Of Legislation

	PROPERTY LAW ACT SEPARATION PRIOR TO 1 DECEMBER 2008	RELATIONSHIPS ACT SEPARATION BETWEEN 1 DECEMBER 2008 AND 1 MARCH 2009	FAMILY LAW ACT SEPARATION FROM 1 MARCH 2009
Register relationship?	No	Yes	No, but recognises registration under State legislation
Identify and value asset pool	Yes	Yes	Yes
Identify and assess contributions	Yes	Yes	Yes
Identify and assess future needs factors	No	Yes	Yes
Maintenance	No	Yes	Yes
Super splitting	No	No	Yes
Binding agreements	No	Yes	Yes
Which court?	State Courts	State Courts	Family Court

LPLC Family Law Checklist

While the following checklist is not exhaustive, it does draw attention to the key areas that many solicitors overlook in family law matters. The checklist may be photocopied for ongoing use.

CLIENT

MATTER

General:

- Make a comprehensive file note of the initial conference with your client.
- Obtain clear instructions as to the basis on which you are to proceed, particularly where your client seeks to limit your retainer or fails to take your advice.
- Confirm your retainer and your advice in writing, particularly where the retainer is limited, setting out any areas where your client has chosen not to take your advice and elected to accept the resultant risk (eg. not issuing a property application or obtaining independent verification of property values).
- Do not act for both parties. Write to the unrepresented party, explaining that you are not acting for him or her and recommending that the party should obtain independent advice.
- Document all attendances and meetings with your client and other relevant parties.
- Where your client is causing delay, set out in writing the consequences of delay and the relevant time limit.

- Ensure that your file notes:
 - are dated;
 - identify the author;
 - record the duration of the attendance;
 - record who was present or on the telephone;
 - are legible to you and someone else;
 - record the substance of the advice given and the client's response/instructions; and
 - are a note to the file rather than a note to yourself.

Specific:

- Obtain your client's instructions to conduct comprehensive searches and appropriate enquiries so any consent order may be framed with full knowledge of the liability position.
- Wherever possible, have joint mortgages or loans refinanced (and warn your client in writing of the risks of not doing so).
- Think through the consequences of consent orders.
- Make application for the child support agreement to be accepted by the Child Support Agency.
- Where the parties intend that a share of the property transferred as part of the property settlement is to be credited against periodic child support obligations, spell that out in the child support agreement.
- Advise your client that a child support agreement is not final and may be varied by a new agreement or court order, if circumstances change.
- When advising on spousal maintenance, address the circumstances in which periodic payments may stop and the grounds upon which capitalised maintenance may be revisited.

Property disputes

- Raise the issue of the division of property with your client when you first receive instructions, and advise your client of the 12 month limitation period for making an application.
- If you are instructed not to deal with the property matters, advise your client that any delay may result in property being dissipated. Keep a file note and confirm this advice and your client's response in writing.
- Seek instructions to lodge a caveat as soon as possible if real property is involved and your client is not on title.
- Where the property is in the name of the former spouse and represents a significant asset of the marriage:
 - seek formal written acknowledgement from the former spouse that he or she will not draw down further funds against the property or otherwise encumber it;
 - write to the mortgagee (and include a copy of the acknowledgement if you receive one) and ask that the mortgagee agree it will not allow further funds to be drawn down against the property;
 - if the former spouse or mortgagee will not provide the above acknowledgement or agreement, consider applying to the court for an injunction preventing further funds being drawn down or other encumbrances being imposed on the property.
- Advise your client to retain an independent accountant when considering the property division.
- Recommend that valuations be obtained for real property assets of the marriage (and warn your client of the risks of not doing so in writing).

Superannuation

- Take comprehensive instructions on the employment background of the parties and possible superannuation entitlements.
- Act promptly when requesting information concerning the member spouse's interest from the trustee of the superannuation fund.
- Obtain a professional valuation of the superannuation interest based on the information received from the trustee.
- If appropriate, flag the interest in the former spouse's superannuation by way of a superannuation agreement or court order.

Pre-nuptial financial agreements

- Consider seriously the risk implications of providing certification advice on 'pre-nuptial' financial agreements.
- If you do decide to proceed, manage the process very carefully:
 - have a face to face meeting with the client;
 - provide comprehensive advice to your client, including an explanation that your client will be forgoing rights that he or she would otherwise have on marriage breakdown;
 - keep a written record of the advice you have given and the client's response to your advice;
 - confirm the advice in writing;
 - insist that your client obtain independent financial advice from an accountant;
 - obtain a written acknowledgement from your client that he or she understood your advice;
 - ensure the wording of the agreement and the certificate reflect the requirements of section 90G;
 - use an independent interpreter if your client does not speak English; and
 - retain your file indefinitely.

- Consider the risk implications of drafting 'pre-nuptial' agreements and if you do decide to proceed:
 - act for one party only;
 - write to the other party confirming you are not acting for him or her and recommend that separate representation and advice be obtained;
 - provide comprehensive written advice to your client, including an explanation that your client will be forgoing rights that he or she would otherwise have on marriage breakdown;
 - request that each party provide a formal declaration of their assets and impress upon your client the need for disclosure;
 - canvass with your client what should be done to protect specific assets of the marriage that may be dissipated or diminished over time;
 - warn your client of the risks of signing the agreement in close proximity to the wedding; and
 - retain your file indefinitely.

Appendix One

Superannuation

Superannuation

Part VIII B of the *Family Law Act 1975* allows separating spouses to divide superannuation entitlements. Superannuation is treated as 'property' for the purposes of section 79.

Part VIII B has effect over all other law and any trust deed. If a superannuation payment is to be split, it must be in accordance with Part VIII B.

De facto couples are now able to split superannuation under the *Family Law Act*: see page 22 for commentary on the new provisions governing de facto relationships.

What is permitted?

Part VIII B allows a non-member spouse to:

- request information on the member spouse's superannuation interest from the trustee of the member spouse's superannuation fund;
- flag the member spouse's superannuation interest (a payment flag operates in a similar way to a caveat);
- enter into an agreement to split the superannuation entitlement or seek court orders to split the superannuation entitlement; and
- waive his or her rights to the superannuation entitlements of the spouse.

See the *Family Law (Superannuation) Regulations 2001* for further detail on the rules governing the splitting and flagging of superannuation and methods for calculating parties' entitlements.

Steps to flag an entitlement or obtain a split order

The steps are as follows:

- Identify the type of superannuation interest (such as accumulation scheme or defined benefit) and what phase it is in (either growth phase or payment phase) so that the right information is requested.
- Request information from the trustee of the fund (and not the fund administrator) concerning the member's superannuation interest. The request must be in the appropriate form (Superannuation Information Form and Form 6 declaration which both need to be signed by the non-member client) together with the appropriate fee for the provision of the information. It would also be prudent to have an authority for the trustee to provide the information to the solicitor.
- Value the interests. The methodology is set out in the regulations. It is a three step process for a growth phase interest:
 - determine gross value;
 - deduct amounts for any earlier splits; and
 - deduct any surcharge debt (surcharge is or was a tax on certain contributions and rollovers made to superannuation funds).

To waive an entitlement

The waiver of an entitlement by a non-member spouse:

- requires agreement of the trustee and the non-member spouse;
- must be in the prescribed form;
- must be accompanied by a statement that the non-member spouse has received financial advice from a financial adviser as to the financial effect of waiver; and
- must be certified by the financial adviser.

Binding Death Benefit Nomination (BDBN)

BDBN, being a reversionary interest, is a splittable payment unless the beneficiary is:

- a child under 18 years; or
- a dependant child over 18 years and the payment is made to enable education to be completed; or
- the child has special needs.

(See regulation 13 of the *Family Law (Superannuation) Regulations 2001*).

Payments may be made to these children at the discretion of the trustee, notwithstanding a flag or split order.

This is not a comprehensive summary of superannuation splitting. Solicitors are encouraged to consider the legislation together with the rules and regulations carefully.

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