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Q&S QUINN & SCATTINI Lawyers

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Long Term Dating or De Facto Relationship?

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Ever wondered at what point your relationship might transition from long term dating to a legally recognised de facto relationship? The answer is not as simple as you may think.

To be in a 'de facto relationship' parties will not be married to each other, will not be related by family and having regard to all the circumstances of their relationship, they will have a relationship as a couple living together on a genuine domestic basis.

A person who is married can be in a de facto relationship with another person. Same-sex couples can also be considered to be in a de facto relationship. It is even possible for a person to be in two de facto relationships at once.

When there is a dispute as to whether a de facto relationship exists the court will consider things such as:

a) the length of the relationship;
b) the nature of the parties living arrangements including the extent of their common residence;
c) whether a sexual relationship exists;
d) the degree of financial dependence or interdependence and financial support;
e) the ownership, use and acquisition of property;
f) the extent to which both parties were mutually committed to a shared life;
g) the care and support of children;
h) whether the relationship was registered; and
i) the reputation and public aspects of the relationship.

The case of Regan & Walsh (2014) involved a same-sex couple. The applicant claimed to be in a de facto relationship with the respondent. The respondent rejected this assertion stating that the parties were 'friends with benefits', that is, friends who had a sexual relationship at different times. Between the years 2005 and 2013 the parties lived together at various times for a total of 6 years. The respondent asserted that during periods of cohabitation, the parties were flatmates. Ultimately, the court found that no de facto relationship existed. Although the parties lived together the court found that the relationship was not of a couple living together on a genuine domestic basis. The evidence which led to this conclusion included:

1. That the court was not satisfied that the applicant did not know about the respondent's sexual relations outside of their friendship.
2. That the applicant obtained social security benefits for much of the purported relationship and in his

application for these benefits he did not claim to be in a relationship with the respondent.

3. The applicant asserted the parties had a joint bank account in their names but failed to produce evidence of such account.
4. That the applicant acknowledged that he did not know the password for the respondent's computer, mobile telephone or bank accounts.
5. The parties both accepted that the respondent did not ever travel with the applicant on business trips or holidays. The respondent gave evidence that his former wife had travelled with him on business trips.
6. The court accepted the evidence of the respondent that the applicant was both manipulative and controlling and the respondent was found to be an open, honest and credible witness.

The application seeking property settlement was dismissed.

In the case of Cadman & Hallett (2014) there was a dispute as to the date of separation. Both parties accepted that they lived together in a de facto relationship between 1991 until 2000. However, the applicant asserted the relationship ended in 2010 and the respondent asserted the separation occurred in 2000. If the court found that the relationship had ended in 2000 the applicant would have been out of time to bring proceedings before the court seeking property settlement (such application must be made within two years after the end of the de facto relationship).

In this case the parties ceased to have a sexual relationship after the year 2000. During the period between 2000 and 2010 the applicant spent various months and sometimes almost years in the United States, studying. The applicant told the respondent that he had a number of sexual encounters in the United States. Despite this, the parties continued to communicate regularly. The respondent also continued to support the applicant financially during times whilst he was in the United States and when he returned home to Australia to live with the respondent. There were numerous written communications between the parties which were indicative of a subsisting relationship. There were some difficulties during the relationship but it was not until October 2010 that the respondent sent an email to the applicant confirming that he would not be welcome to return to Australia to live with him.

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The court found that the de facto relationship remained on foot until October 2010 despite the parties spending many months and sometimes years living apart. This finding was upheld on appeal.

If there is some dispute as to whether a de facto relationship exists, the court will make a declaration as to such relationship existing or not. If a de facto relationship is found to have existed the court must then determine if a property or maintenance order can be made. To do this they must be satisfied that either:

i. that the period or the total periods of the de facto relationship is at least two years; or
ii. that there is a child of the de facto relationship; or
iii. that:
    a. the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a),(b) or (c); and
    b. failure to make the order or declaration would result in serious injustice to the applicant; or
iv. that the relationship is or was registered under a prescribed law of a State or Territory.

Every de facto relationship case is likely to turn on its own facts. In other words, each case will be different and the court will look to the intricate and particular facts of the case at hand to determine whether a de facto relationship exists or not.

If you or someone you know would like advice about a de facto relationship we suggest that you contact Quinn & Scattini Lawyers on 1800 999 LAW (1800 999 529). We have a team of family law experts who can help.

17-year-olds in the Criminal Justice System: Update

Criminal Law Team

The *Youth Justice and other legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) (**Amendment Act**) come into force commencing on 12 February 2018. The main purpose of the Amendment Act was to change the way in which 17-year-olds were dealt with in the criminal justice system.

Previously, the *Youth Justice Act 1992* (Qld) provided that children aged 16 and under were to be dealt with in the children's court.

The Amendment Act, however, has varied this position by removing reference to a child being a person under the age of 17 years. This has meant that a person under the age of 18 years of age is now dealt with as a child in the children's court and their dealing with police, and given the

benefit of the youth justice legislation's rehabilitation principles.

The benefit of being dealt with as a child means that there is a focus on rehabilitation, having children engaged with family and engaged with education. There is also the ability for police to use a number of diversionary methods when dealing with children, to keep them away from the court system altogether.

These changes have brought Queensland into line with every other state in Australia, which considers persons under the age of 18 to be children, and dealt with by the police and courts accordingly.

Whilst the amendment is a welcome change to the legal position in Queensland, there has been some unfortunate ramifications as a result of the legislation.

Particularly:

1. Persons who were 17-years-of-age when charged by police but have turned 18 prior to 12 February 2018 (the commencement date) will still be dealt with in the adult jurisdiction and the relevant penalties for an adult will apply to these persons, despite being a child when they committed the offence; and
2. 17-year-olds serving a sentence in custody who turned 18 before 12 March 2018, or were expected to be released before 12 March 2018 were to remain in adult jail until being released.

Unfortunately, it was also announced on behalf of the government on 12 February 2018 that due to the increase in number of youths detained across the detention centres being higher than previously expected, and the number of 17-year-olds being held in adult custody, that the government did not currently have capacity to transfer all eligible 17-year-olds who are being held in adult jail to youth detention centres.

This has meant that those 17-year-olds have remained in custody in an adult jail, as opposed to a youth detention centre for children, despite the law classing them as children under the act. This has led to an unjust situation where a large number of 17-year-olds are still currently being held in adult jails, despite being before the children's court.

These children have therefore not been able to obtain the support, rehabilitation and learning opportunities available in youth detention centres that 17-year-olds charged after the commencement date will be receiving.

If you or someone you know:

- is a 17-year-old charged with an offence;
- was 17 at the time of committing offences for which they have now been charged; or
- is a 17-year-old being held in adult custody,

we recommend you get in touch as soon as possible on 1800 999 LAW (1800 999 529) to seek legal advice about their position.

Tips for Executors

Wills & Estates Team

The process of administering someone's estate after they die can be a complex undertaking. However, with the right legal advice the process can be streamlined. Many people do not realise that when they engage a lawyer to help them to administer their loved one's estate, the lawyer is actually acting for the executor and has a duty to ensure that the executor is protected from any claim that may later be made by a disgruntled beneficiary. The lawyer will also inform the executors of their rights; for example, the right to claim executor's commission.

The purpose of this article is to give a few tips that will assist executors as they work through the process of administering an estate.

TIP No. 1: Don't Delay.

The executor's job is to collect the assets of the deceased, pay the deceased's debts, finalise the deceased's taxation affairs and distribute the estate. Where the deceased owned a house that was his/her main residence, it is important that it be sold within the correct timeframe to ensure the estate can take advantage of the capital gains tax exemptions for residences. If settlement of the sale of the property is not completed within 2 years after the date of death, the executors may lose the exemption. The exemption can be worth thousands of dollars to the estate.

TIP No. 2: Keep Good Records of All Funds Coming Into and Being Paid from the Estate.

Different beneficiaries may be entitled to different types of funds. It may be relevant whether estate funds are received on closure of a bank account or on the sale of an asset (capital), or from dividends or rental (income).

By the same token, payments made from the estate should be paid from the correct funds. For example, if there is a house in the estate that is rented out, any debts associated with the house may need to be paid from the rental payments, not from the general pool of estate funds.

The executor is required to provide an account to the beneficiaries for the administration of the estate. It is far better to properly allocate the receipt and payment of funds than to try to recoup funds from a beneficiary where it is later discovered that that beneficiary should not have received those funds.

TIP No. 3: Know who is Liable to Pay What Debts.

If the will gives a particular asset to a beneficiary, that beneficiary must also take on the responsibility for any mortgage or charge that is registered over that asset.

If the will gives the deceased's investment house to one particular beneficiary, then the expenses for that house should be paid from the rent. If there is not enough rent to pay the expenses, the beneficiary may be required to pay the expenses from

his/her own funds. The expenses should not automatically be paid from the general estate funds. This would not be fair to the general beneficiaries.

TIP No 4: Be Patient and Proactive.

Even a straightforward estate administration can take six months to complete. More complex estates can take 12 to 24 months. Where the deceased has not left his/her affairs in good order, merely sorting through the paperwork, finding all the assets and debts, and finalising the taxation affairs can be time-consuming. Executors need to work with their lawyer and accountant to provide information and sign paperwork as promptly as possible.

TIP No. 5: Communicate with the Beneficiaries and Be Sensitive to Their Needs.

Well-informed beneficiaries will usually allow the executor time to do his/her job properly. Where the administration is going to be complex and time-consuming, a good lawyer can help you to:

a) keep the beneficiaries informed;
b) work out what funds need to be retained to pay future debts; and
c) determine whether a partial distribution can be made to the beneficiaries.

Sometimes a beneficiary may have an urgent need for money from the estate. There are laws that allow an executor to make an early distribution of some funds to a beneficiary (even a child beneficiary) in certain circumstances.

At Quinn & Scattini we have the systems and the expertise to assist executors to administer their loved one's estate with a minimum of fuss.

New GST Withholding Rules for Property Transactions

Duncan Murdoch
Director
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A new system for withholding GST in property transactions will commence from 1 July 2018. This has been brought in to counter significant loss of revenue by the ATO where GST on property transactions has not been submitted to the ATO.

How it will work?

The new GST withholding rules will apply to any taxable supply of 'new residential premises' or 'potential residential land'.

'New residential premises' are brand new residential premises but do not include those created through substantial renovation or commercial residential premises.

'Potential residential land' is land created by subdivision but does not include a subdivision that contains any buildings used for commercial purposes.

When it will start?

The rules will apply to any settlements that take place from 1 July 2018.

If a contract was entered into before 1 July 2018 then the new rules do not apply unless the settlement date is on or after 1 July 2020.

Seller to Give Notice to Buyer About GST

A seller of residential property will need give the buyer notice as to whether the supply of property is subject to GST withholding. Where the supply of property is subject to GST withholding then the seller must give the buyer written notice which includes:

- the developer's name and ABN;
- the amount that the buyer is to withhold; and
- when the buyer must pay the withheld amount.

Failure by the seller to provide the necessary notice to the buyer can mean that the seller will be liable for a fine of 100 penalty units (currently $21,000) for an individual and 500 penalty units (currently $105,000) for corporations.

Forms to be Completed by the Buyer

The buyer will need the notice given by the seller to input information online in two separate forms called a Form 1 and a Form 2.

It would be in the best interests of the seller to require the buyer to complete these forms as part of the contract and to provide copies of the completed forms to the seller to confirm that they have been completed properly.

The Amount of GST to be withheld

The amount of GST to be withheld will be:

- one eleventh of the contract price; or
- 7% of the contract price where the margin scheme applies.

When the GST Withholding Must Be Paid?

The buyer is required to pay the GST to the ATO on or before the settlement date.

Failure by the buyer to withhold the GST and pay it to the ATO can mean that the buyer will be liable for an administrative penalty (currently a sum equal to 100% of the amount to be withheld).

Supplier Credit for GST Withholding Tax

The seller/supplier must include the GST liability in its BAS but is entitled to a credit equal to the amount of GST withheld.

Developers in particular will need to be ready for these new rules and will need to ensure that sale contracts contain sufficient provisions to address the new rules.

Quinn & Scattini have considerable experience working with buyers and sellers and can ensure all legal obligations are met so your transaction is seamless.

Unlike some other firms - who focus on only one area of law - Q&S can offer expert solutions for all legal areas.

Access our expert lawyers for your next legal issue.

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