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De facto spouses: From The Toothbrush Case to Bumble (the only certainty is change)

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The question of whether two (or more) people are in a de facto relationship is critical for superannuation purposes, including with reference to the ability to have access to entitlements on a relationship breakdown or death. However, situations that are accepted as evidencing the existence of a de facto relationship continue to evolve.

Background

For most areas of the law, including superannuation, a person will be in a de facto relationship with another person, if the persons are not legally married to each other; and having regard to all the circumstances, they have a relationship as a couple living together on a genuine domestic basis.

Importantly the superannuation rules do not require any minimum length for the relationship to achieve the status of de facto.

Arguably the starkest example of these rules is the Superannuation Complaints Tribunal Decision Number - D96/011.

In this case, a couple who had known each other for around 9 months, 'dated' for around 4 months and lived together for around 6 weeks were held to be de factos. This conclusion meant the surviving spouse was entitled to receive a superannuation death benefit payment.

The Tribunal discussed the fact that if the couple had married and one had died within 6 weeks the outcome would not have been any different.

In doing so however it was also noted that the decision to marry someone is arguably significantly different to deciding to move in together after 4 months as a couple. Therefore while there was no minimum length of relationship imposed, it was still a factor that needed to be considered. In the circumstances of this case, the short term nature of the relationship did not however prevent the couple attaining de facto status.

Recent High Court decision

The High Court decision in *Fairbairn v Radecki* [2022] HCA 18 is a leading example of current judicial thinking in the area of de facto relationships.

Relevantly, where a de facto relationship was agreed to have been in existence for some time (not least of which as the parties had entered into a binding co-habitation agreement, agreeing to keep all property separate), the court had to consider whether the following factual matrix meant the relationship had ended:

(a) one spouse suffered rapid cognitive decline, with evidence of dementia and Parkinsonian features;

(b) the parties occupied separate rooms in the home, with their own personal belongings in their respective rooms;

(c) during periods of absence of the other spouse, the impaired spouse would oscillate between hating and missing the other;

(d) the impaired spouse signed an enduring power of attorney in favour of her children; not the spouse;

(e) the impaired spouse was manipulated by the other, while in a vulnerable and confused state, into accusing her children of taking her money, selling her home and putting her into an institution and demanding their step aside as attorneys, and then in turn forcing the impaired spouse to sign a new document appointing him as enduring attorney and making a new will that was more favourable to him (particularly in relation to creating a life interest in a property, instead of only a right to occupy for 6 months, as had been the case under the previous will);

(f) ultimately an independent attorney was appointed, and, after further concerning events, that attorney commenced property settlement proceedings on the basis that the de facto relationship had broken down.

In agreeing that the relationship had ended, the court confirmed:

1. the relationship did not end merely because one spouse was obliged to move permanently into an aged care facility, nor due to their failing mental incapacity. While each of these aspects may be relevant, they are not determinative;

2. physical cohabitation at a single home is not a necessary feature of an ongoing relationship whether by way of marriage or otherwise; that is, it is not an irreducible minimum that all relationships must exhibit;

3. thus, involuntary and enduring separation – due to, for example, illness – will not always justify a conclusion that a relationship has ended, and trigger a need for a court to intervene to make a property settlement order;

4. rather, the key factor was the non-impaired spouse's demonstrated persistent refusal to make the necessary or desirable adjustments which might have evidenced an ongoing relationship, including the:

(a) parties were occupying separate rooms, before the impaired spouse moved to an aged care facility;

(b) parties kept their assets separate from each other, consistently with the cohabitation agreement, but the non-impaired spouse began to act as if he were no longer bound by this arrangement;

(c) general conduct of the non-impaired spouse, including 'parsimonious attempts to make financial contributions' to support the other's care, refusal to cooperate with her attorney and children, failure to disclose his own assets to Centrelink and persistent refusal to reside elsewhere and permit the home to be sold (all of which conduct served his, and not the impaired spouse's, interests);

(d) public aspects of the relationship also significantly counted against the non-impaired spouse, particularly the need in the first place to have an external attorney appointed.

The Toothbrush Case

The decision in *Frisoli & Anor v. Kourea* (2013) NSWSC 1116, referred to by some as 'The Toothbrush Case' provides another reminder of the potentially unexpected outcomes as a result of a de facto relationship.

The case revolved around a claim against a deceased estate where the surviving 'de facto' partner conceded that she lived with the deceased only 3 nights a week (and with her parents 4 nights a week).

In holding that the relationship was sufficient to create de facto status, the court's decision also meant that the deceased's children from an earlier relationship received no benefits from the estate. This was because the deceased died intestate and in NSW, a surviving spouse is entitled to 100% of the estate.

While the personal estate of the deceased was not large, the de facto spouse was also able, via the notional estate rules (unique to NSW), to gain access to a share of assets held via superannuation and a family trust.

Why then was a de facto relationship held to exist? The specific factors listed by the court included the following:

1. existence of a sexual relationship over a 10 year period, during which period the deceased was not involved in any other relationship;

2. the de facto spouse claimed she did not want to live with the deceased more than 3 nights a week until they got married;

3. the couple shared holidays together;

4. critically, the de facto spouse kept personal items in the deceased's bedroom including a toothbrush and other personal items;

5. the de facto spouse was financially dependent on the deceased;

6. the deceased nominated the de facto spouse as the beneficiary of his life insurance policy;

7. the de facto spouse had a power of appointment in relation to the family trust (which she used to change the trustee to a company she controlled and nominate herself as a beneficiary of the trust); and

8. the deceased referred to the de facto spouse as his de facto partner, who he intended to marry and perhaps have children with, to a lawyer when looking to a prepare a will.

Bumble, surnames and conclusion

The recent decision in *Clayton v Clayton* [2023] NSWSC 399 provides further insight into the types of couple arrangements the courts are having to consider.

In a case centred around a disputed estate, the plaintiff met a woman via the dating app "Bumble".

As part of the plaintiff's argument that there was no de facto style relationship, he indicated that he did not know the lady's surname.

When a barrister for the defendant (apparently incredulously) suggested to the plaintiff that it seemed unlikely he would "go away with somebody, share a swag together and ... have no idea what her surname is?", the plaintiff (apparently mundanely) replied "[t]hat's how dating goes these days".

The court ultimately determined that it was difficult to accept the plaintiff's evidence that he had no idea of the woman's surname.

Given the above mentioned cases, the question of whether two (or more) people are in a de facto relationship will continue to be critical for superannuation purposes. In light of the (ever) evolving nature of personal relationships it is likely the only certainty will remain further changes in what is accepted as a de facto relationship.