



10 QUESTIONS

Legal Answers

Every edition Perth Woman's own
Raymond Tan answers readers questions
www.perthwoman.com.au

Defacto relationships, mediation and property settlements can all come with their share of challenges. Thankfully legal expert Raymond Tan is here to answer your questions.

How long do you have to be together before you are classed as 'De facto?'

In most cases, you need to be in a relationship for 2 years before you can access the Family Court for resolution of property issues. However if there are child related issues, there is no need to show a relationship of at least 2 years.

The following factors set out in s 13A of the Interpretation Act 1984 are used to determine whether a de facto relationship exists between two people, but not all factors are essential:

- The length of the relationship between them
- Whether they lived in the same residence
- The nature and extent of their common residence
- Whether there is, or has been, a sexual relationship between them
- The degree of financial dependence or interdependence, and any arrangements for financial support, between them
- The ownership, use and purchase of their property (including property they own individually)
- The degree of mutual commitment by them to a shared life
- Whether they care for and support children, and
- How their relationship as a couple is perceived by others

It does not matter whether:

- The people are of different sexes or of the same sex, or
- Either person is legally married to someone else or in another de facto relationship.

Is it legal to have your husband followed by a private investigator if you suspect he's up to something?

There is no law preventing anyone from employing a private

investigator to trail a spouse. However, the Family Court adopts a no fault policy when they decide family law issues. It is therefore unnecessary to take such a course of action as you will not get more of a property split if your husband has committed adultery. A judge has to decide a case, there is inevitably a winner and a loser.

Before my father died he verbally stated that he was leaving my two brothers and I each an equal share of his estate. However only my brothers' names are on the will, and they don't think I should get anything. I cared for dad for 10 years before he died and he wanted me to have an equal share. What can I do?

Where the will does not make reasonable provision for certain dependants, they can apply to the Supreme Court for the judge to see if the Estate should be distributed in a manner that is fairer for all dependents.

When and how this can be done is set out in the Inheritance (Family and Dependants Provision) Act 1972. It is important that an application be made as soon as possible as you have to file an application within 6 mth from the grant of the Probate or Letters of Administration.

The person buying my house is slowing down the process, what can I do to move them along?

The contract should have a final settlement date. If that date has passed and you are willing and able to proceed to settlement then you should advise your settlement agent to issue a default notice. The default notice places an onus on the buyer to quickly finalise the settlement or be exposed to the contract being terminated with the seller retaining the right to sue for damages. Penalty interest can also be charged as soon as notice is given

Do property issues get dealt with the same way for a de facto relationship as a marriage?

Under the family law jurisdiction, there is now very little difference between your rights as a defacto spouse or as a married spouse. The major difference is that you are unable to access the Family Court system for property matters unless you have been in a relationship for at least 2 years. There are however exceptions to the 2 years requirement if there is a child from the relationship.

There is also a difference regarding superannuation. De facto couples cannot apply for a "flag" or a "split" in the spouse's super funds. A "flag" or "split" is an order to the super fund to say that part of the funds are to be held for another spouse. However, the court is still required to take into account the value of such a super fund if the parties are not married.

What is mediation and who needs to use it?

Mediation is a process entered into between parties to a dispute. The mediation is usually handled by a mediator appointed by the parties or the court. The mediator is usually an independent person who has skills in negotiations and problem solving. Any party to a dispute should use mediation as an alternative to court proceedings. Mediation is more likely to result in a win-win situation compared to a court trial which usually has a win-lose situation.

What is the difference between a discretionary and a unit trust?

Trust structures are usually used for tax savings purposes.

A discretionary trust has a trustee who decides how to distribute the income earned by the trust. The trustee can distribute more income to a beneficiary with a lower income instead of a beneficiary with a higher income. The distribution is done at the discretion of the trustee for maximum tax reduction.

A unit trust is set up when there are various investors in a business venture. The units are like shares in a company.

At the end of each year, income is distributed to the Unit Holders in proportion to the units that beneficiary holds. The Trustee has no discretion. Units may be held by Family Trusts, companies or by individuals.

It is best to speak to a lawyer or an accountant for advice as to which is the best business structure you should use.

My partner wants to give our son the same last name as her other children, who have a different father. Our son would have this man's last name instead of mine, and he has nothing to do with him. We are not married. Can I oppose this on legal grounds?

If you have any questions for Raymond go to the **Perth WOMAN** website and follow the instructions.
www.perthwoman.com.au

What's in a name? If I remember my Romeo and Juliet, a rose by any other name is still a rose. However, I can see why the natural father will be upset that his child is not being given his surname. The issue of naming rights can be a minefield. Yes, you have a right to file an application in the Family Court for an order that your son be registered with your surname.

My 4 year old son was recently playing on a playground. The equipment was faulty and broke, and he fell and broke his arm. Can I claim back some of the medical expenses? If so who should I contact?

The first question I would ask is who owns the playground? The owner of the land where the playground is located has a duty to ensure that the equipment is safe. If a person suffers an injury, there is a right to claim damages. The damages include the cost of medical treatment and any other valid losses. The first thing to do is to contact the owner of the land where the equipment is located to inform them of a possible claim. You should then see a lawyer for advice as soon as possible.

My husband and I have been married for 5 years now; he originally immigrated to Perth from the Philippines and we got married. If we get divorced will he be deported?

I will assume that your husband was granted a spouse visa when he migrated to Australia. If he has a valid spouse visa as a permanent resident, there is no reason for the Department of Immigration to deport him because of the divorce.

White Paper
by Safira Taylor



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