

Guide to De Facto Property Rights

Govett Quilliam
THE LAWYERS

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INTRODUCTION

Family Law has traditionally been concerned with the relations between husband and wife and parents and children. However, the substantial swing to an unmarried society has led to the development of the law relating to de facto relationships. Prior to 1 February 2002, common law or equitable remedies were used by the Courts to determine the respective property rights of parties in de facto relationships. Since 1 February 2002 property rights in de facto relationships have been determined by the Property (Relationships) Act (“the Act”).

The Act has jurisdiction over the property of married spouses, de facto couples and civil union partners who have been in a relationship for at least three years. The Act now recognises the equal contribution of de facto partners, and provides rules for division of their relationship property. A de facto relationship that lasts less than three years may still be covered by the Act if there is a child, or if either partner has made a substantial contribution to the relationship.

The purpose of this guide is to outline the key principles of the Act for people in de facto relationships. Should you seek information regarding other family matters such as children’s care arrangements, child support, paternity or domestic protection, please contact a member of our Family Law team who can assist you.

WHAT IS A DE FACTO RELATIONSHIP?

For the purposes of the Act, a de facto relationship is a relationship between two people (either homosexual or heterosexual) who are both aged 18 years or older and who “live together as a couple”, but are not married to each other. Whether or not two people are in a de facto relationship is sometimes unclear. The Act provides a list of factors that the Court may take into consideration, as follows:

- The duration of the relationship;

- The nature and extent of common residence;
- Whether or not a sexual relationship exists;
- The degree of financial dependence between the parties;
- The ownership, use and acquisition of property;
- The care and support of children;
- The performance of household duties;
- The reputation and public aspects of the relationship.

The list provided above is not exhaustive, as other factors may be relevant in a particular case. Also, not all of the list of factors may be applicable in some cases. All relationships are assessed on a case by case basis. A couple do not necessarily have to be living in the same house or even be in a sexual relationship for a de facto relationship to arise. For clarification of your situation, please contact one of our family lawyers.

WHAT PROPERTY GETS SHARED EQUALLY?

The property in which each partner is to share equally is defined in the Act and generally includes:

- The family home
- Furniture and chattels
- Family car
- Income
- Jointly owned property
- Property acquired by either partner during the relationship.

If equal sharing is proven to be unjust or repugnant to justice, then the Court may direct that property is not shared equally.

Generally, property owned prior to the commencement of the relationship, inherited property, gifts, or income and gains thereof, are defined as “separate property” and is not to be shared equally. However there are also exceptions to this.

RELATIONSHIP DEBTS

Relationship debts are the responsibility of both parties and can include:

- Those incurred jointly (e.g. a joint HP agreement);
- Those incurred in the course of common enterprise (e.g. a business both partners work at together - they don't both have to be legal owners);
- Debts to acquire, improve or maintain relationship property (e.g. a bank loan to extend the house or start a business);
- Those incurred to manage the affairs of the household (e.g. purchases of food, furniture, etc).

CONTRACTING OUT AGREEMENTS

Partners in a de facto relationship can protect their property by entering into a Contracting Out Agreement, (sometimes referred to as a Prenuptial Agreement).

A Contracting Out Agreement specifically contracts out of the principles of the Act and can record how property will be divided in the event of a relationship breakdown. This gives couples the right to make their own rules. Couples can specify the property to

be excluded from the relationship property pool. Partners may determine what share (if any) the other may have in their own property. In the event that a couple do not have a Contracting Out Agreement, then the division of their assets may be decided by the Court in the event of separation. It is also possible that by not entering into a Contracting Out Agreement, that a surviving partner may be able to take much more of a deceased's estate upon his/her death than was their intention.

Generally the Courts will uphold the wishes of the parties reflected in a Contracting Out Agreement. However, the Court does have jurisdiction to vary or set aside an agreement in very rare situations.

A couple can complete a Contracting Out Agreement at any time but it is best that this is done prior to a de facto relationship reaching three years duration.

WHAT PROPERTY RIGHTS DO I HAVE IF MY PARTNER DIES?

If a partner makes a Will leaving the other property, then the surviving partner may inherit property by benefitting under the deceased's Will.

However, if the surviving partner is not happy with their entitlement under the Will or are left out of the Will altogether, they can opt to make a claim under the Act for a share of the deceased's estate instead of benefitting in terms of the Will. The surviving partner may also be able to claim under the Family Protection Act and/or under the Law Reform (Testamentary Promises) Act. There are very strict time limits for making a claim against an estate under either piece of legislation, so if you have a query about an estate property matter then you must contact one of our family lawyers straight away.

COMMONLY ASKED QUESTIONS

"I earn \$30,000 a year - my partner earns \$150,000. Can I get more than half of the property if we separate?"

Yes, but only if the difference in financial circumstances creates an economic disparity which is directly caused by the separation of functions during the relationship. For example, did you take a break from your career to look after the children, or to follow your partner to a job overseas? Please note that a difference in income is not on its own, sufficient to establish an economic disparity.

"I can't afford the mortgage payments, so I can't stay in the house. If we sell, then my half-share is not enough to buy a new home for my children and me. Can the Act help me?"

Yes, the Family Court can order that the partner looking after the children can utilise all or part of the other partner's share in property while there is "undue hardship". For example, the Court can order the family home not to be sold until the youngest child of the relationship turns 14 (or some set age). After this day, the occupying partner will then be required to pay the other partners share in the property or accept that the home will need to be sold and the proceeds of sale divided. The other partner's half share of the home must be paid to them eventually.

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