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De Facto Relationships

FAST FACTS

WHAT IS A DE FACTO RELATIONSHIP?

A person is in a de facto relationship with another person if:

- they are not legally married to each other
- they are not related by family
- having regard to all the circumstances of their relationship, they are a couple living together in a genuine domestic arrangement.

The *Family Law Act* 1975 sets out the circumstances that may mean people have a relationship as a couple including:

- the duration of the relationship
- the nature and extent of their common residence
- whether a sexual relationship exists
- the degree of financial dependence and any arrangements for financial support between them
- the ownership, use and acquisition of their property
- the degree of mutual commitment to a shared life
- whether the relationship is or was registered under a law of a state or territory as a prescribed kind of relationship
- the care and support of children; and
- the reputation and public aspects of the relationship.

The Act makes it clear that no particular finding on any circumstance is regarded as necessary to determine whether a de facto relationship exists. The court is to give any particular matter the appropriate importance in the circumstances of an individual case. The Act says that the law encompasses both heterosexual and same-sex de facto relationships.

REGISTRATION OF DE FACTO RELATIONSHIPS

The Victorian *Relationships Act* 2008 established the Relationships Register, which enables de facto and same sex couples to register their relationship. To register a relationship, you and your partner must apply to the Registry of Births, Deaths and Marriages. If your application is accepted, the registry will issue a Relationship Certificate. The registration of a relationship does not mean that one exists. There would need to be additional circumstances for there to be a conclusion that the parties were in a de facto relationship.

DE FACTO PROPERTY

What is property?

The term 'property' has been interpreted widely by the family law courts. It includes:

- Real estate – owner-occupied and investment
- Motor vehicles
- Funds held in bank accounts
- Furniture, household contents and personal effects
- Shares held in a company
- Trust assets
- Superannuation
- Redundancy payments
- Long service leave entitlements; and
- Interest of a partner in a partnership.

The above list is not conclusive and you should seek legal advice on whether your property should or should not be added to the pool for distribution between you and your partner.

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What is a financial resource?

In determining property and maintenance matters, you and your partner must consider an appropriate outcome with your financial resources. The term 'financial resource' has also been interpreted widely by the family law courts. The term 'financial resource' means something not covered by the terms 'income' or 'property'. It includes funds or assets over which you or your spouse has influence or control or (in certain circumstances) prospective entitlements or benefits which were received in the past and which might be expected to continue in the future. Examples include income of your de facto partner and distributions from a trust.

DISTRIBUTION OF DE FACTO PROPERTY

The Family Law Courts can make orders altering and adjusting the interests of you and your partner to your property. This exercise involves four steps broadly described as:

1. Ascertaining the net pool - Identification and valuation of all assets, liabilities and financial resources whether they are acquired before, during the relationship or after the separation
2. Contributions - Direct and indirect, financial and non-financial contributions made by you and your partner
3. Future needs - Whether you or your partner have any future needs, for example, age, health, income earning capacity, the property of you and your spouse, whether you or your spouse has the care and support of the children, the financial circumstances of any new relationship of you or your partner; and
4. Practical effect - Whether the result reached between you and your spouse is just and equitable in all the circumstances.

WHICH COURT?

If you and your partner cannot agree on how your property should be divided, both the Family Court of Australia and the Federal Magistrates Court of Australia can make orders altering and adjusting the interests of you and your partner. You or your partner can apply to either court at any time if:

1. the de facto relationship was at least two years
2. there is a child of the de facto relationship
3. you or your partner made substantial contributions and a failure to divide your property would result in a serious injustice; or
4. your relationship is registered.

An application can be made only within two years of the end of the de facto relationship. This is known as the standard application period. Section 44(6) of the Act provides two exceptions:

- (a) Hardship would be caused to the party or a child if leave were not granted; or
- (b) For maintenance applications – the parties' circumstances were at the end of the standard application period, such that he or she would have been unable to support himself or herself without an income tested pension, allowance or benefit.

Examples of the orders the court can make include:

- A declaration specifying the particular interests that you and your partner have in relation to your assets, liabilities and financial resources

- An order for a property to be sold or for the transfer of the property between you and your partner
- An order for the sale of particular assets and a distribution of the proceeds of sale
- An order for payment of money by you or your partner to the other.

Only a small proportion of cases proceed to a final hearing to be determined by a judge. Most cases are settled by agreement between the parties.

DUTY OF DISCLOSURE

In any property settlement, you and your partner have a clear obligation to make full and frank disclosure about your respective financial circumstances. A failure to make proper disclosure of a relevant matter can have serious consequences.

MAINTENANCE

In certain circumstances, separating couples can have an obligation to provide maintenance for their former partner. In broad terms, you can be liable to pay support for your former partner if:

- your former partner is unable to adequately support himself or herself so that their reasonable needs are met; and
- you have the financial capacity to do so.

Issues of maintenance can be complicated, and will often need to be considered as part of an overall settlement of property matters. You should seek legal advice on those issues.

RESOLVING DISPUTES

You and your partner should try to reach agreement on the division of your property. The law requires that you and your partner must make a genuine effort to reach agreement and that you exchange relevant information and try to reach agreement before starting any court proceedings.

MEDIATION

Mediation can be a cheaper and friendlier way for separating parties to settle property disputes. Mediators help parties decide which areas are in dispute, explore possible solutions and draw up agreements. Agreements reached in mediation are not legally binding and should be formalised.

COLLABORATIVE PRACTICE

Collaborative practice encourages an open, cooperative environment, where you and your spouse and your lawyers work towards a fair solution without resorting to court proceedings. Collaborative practice is designed to focus on reaching an agreement.

REACHING AN AGREEMENT

If you and your partner do reach agreement regarding a property settlement, there are two ways of formalising it:

- Consent Orders through the Family Court of Australia; and
- Making a financial agreement which is binding under the *Family Law Act 1975*.

You should take legal advice about which of those options is more appropriate for your circumstances.

Please note the above information is not intended to, and does not encompass all aspects of the law on this subject matter. Further professional advice should be sought before action is taken based on matters outlined on this page. January 2013.



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