

# **FAMILY LAW & DE FACTO RELATIONSHIPS**



**Do you think “what’s yours is yours” in  
a de facto relationship? Think again!**

# 20 MINUTE CONSULTATION

Do you want to know family law & de facto relationships?

We provide a completely confidential, no obligation, [free 20-minute appointment](#) to discuss your unique situation and legal options.

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## TABLE OF CONTENTS

Introduction	05
Understanding de facto relationship	05
When does the Act apply to de facto relationships?	06
Geographical requirement	06
Is a de facto relationship the same as a marriage?	07
In which states and territories do the law apply?	07
Registration of de facto relationships	07
What if you don't want to be covered by these laws?	08
Understanding property disputes in de facto relationship	08
Understanding property agreements in de facto relationship	08
Duty of disclosure	08
Spouse Maintenance	09

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## TABLE OF CONTENTS

The law	09
Resolving disputes	10
Mediation	10
Collaborative practice	10
How will the courts decide how the property should be divided?	10
Children in de facto relationship	11
Applying for parenting orders	11
Child support	11
Time limits on de facto applications	11
How to make an agreement with my partner?	12
Next steps	12

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## Introduction

You might be living with your partner in a cheerful relationship without any bindings or obligations of a formal marriage commitment. Or you might be in a relationship but living separate homes and thinking you don't owe anything to your partner in either case. Think again! Under Australian Family Law, where you aren't married or not living together, doesn't essentially mean that "what's yours is yours". Under Australian Law, separating de facto couples have substantially the same rights and liabilities as those of married

couples with regard to property settlements. This includes claims for spousal maintenance and superannuation "splits. In today's society, particularly in Australia many couples live in de facto relationship. The face of the modern household is quite different to what it used to be even just a generation ago. As a result, the definition of spousal relationships has also changed in the eyes of the law. Since 2009, de facto couples across Australia have had similar rights and obligations as married couples. Therefore, de facto couples are entitled to the same rights and claims when it comes to Family Law matters including

property, financial settlements and arrangements for the children of the relationship.

This eBook provides information about the laws affecting de facto couples. The laws cover property division, maintenance, financial agreements and the superannuation of people in de facto relationships.

## Understanding de facto relationship

On 1 March 2009 the Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008 ("the Act") made significant changes to the Family Law Act 1975 (Cth) ("the Family Law Act") in relation to de facto couples. The Act introduced Part VIIIAB into the Family Law Act which gives a Court exercising jurisdiction under the Act power to deal with property and maintenance matters upon the breakdown of a de facto relationship.

A de facto relationship is defined in Section 4AA of the Family Law Act 1975. The law requires that you and your former partner, who may be of the same or opposite sex, had a relationship as a couple living together on a genuine domestic basis. However, your relationship is not a de facto relationship if you were legally married to one another or if you are related by family.

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

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

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

1. The duration of the relationship
2. The nature and extent of their common residence
3. Whether a sexual relationship exists
4. The degree of financial dependence and any arrangements for financial support between them
5. The ownership, use and acquisition of their property
6. The degree of mutual commitment to a shared life
7. Whether the relationship is or was registered under a law of a state or territory as a prescribed kind of relationship
8. The care and support of children
9. 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.

For any relationship that was terminated after March 2009, that meet at least one of the four gateway requirements for de facto relationships, parties are able to issue proceedings in the Family Court or the Federal Magistrates' Court. The Courts will then deal with the matter in the same way they would with a legally married couple issuing proceedings.

For individuals that are considering entering into a de facto relationship by moving in together, it'll be important to understand the implications of such an arrangement. It'll be worthwhile to discuss matters with your partner or consider a more formal Binding Financial Agreement that outlines household contribution and maintenance responsibilities as well as providing a level of certainty when it comes to the division of assets in the event of a relationship breakdown.

## When does the Act apply to de facto relationships?

The Act does not apply to all de facto relationships. Once a de facto relationship has been established it is also necessary to establish one of the grounds in the Act which deals with when the Act applies to a de facto relationship. A Court can only make an order under the Act or a Court may only make a declaration in relation to a de facto relationship only if the Court is satisfied:

- a) That the period, or the total of the periods, of the de facto relationship is at least two years; or
- b) That there is a child of the de facto relationship; or
- c) That:
  - 1. The party to the de facto relationship who applies for the order or declaration made substantial contributions of the kind mentioned in para 90SM4(a), (b) or (c); and
  - 2. A failure to make the order or declaration would result in serious injustice to the applicant; or
- d) That the relationship is or was registered under a prescribed law of a State or Territory.

## Geographical requirement

The Act also provides a geographical requirement in relation to a de facto relationship. A Court can only make an order in relation to a de facto relationship if it is satisfied:

- a) That each or both of the parties were ordinarily resident in a participating jurisdiction when the application for the order was made; and
- b) That either both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
- c) The applicant for the order made substantial financial or non-financial contributions in relation to the de facto relationship in one or more States or Territories that are participating jurisdictions at the application time.

There is an alternative condition when the parties to the de facto relationship were ordinarily resident in  
a participating jurisdiction when the relationship broke down.

## Is a de facto relationship the same as a marriage?

In some areas of law, a de facto relationship is treated like a marriage, where there is no time requirement for recognizing the relationship, and in other areas it is not. There is no time requirement for recognizing a de facto relationship for:

- making agreements about property
- Legal Aid
- pensions and benefits
- getting a restraining order against a violent partner
- court orders for care of children
- child support
- income tax deductions

De facto partners may be entitled to the same rights as married persons when:

- making agreements about property
- Legal Aid
- pensions and benefits
- getting a restraining order against a violent partner
- court orders for care of children
- child support
- income tax deductions

In these situations, the partners must have been together for three years, or for periods totalling three years over four years, or have a child together.

If the relationship was for less than three years, either of the former partners may seek a declaration from the court recognizing the relationship on the basis that they were living together in a close personal relationship and that the interests of justice require that a declaration be made. This application is made under the Family Relationships Act 1975 (SA), which sets out what the court must consider when making its decision.

## In which states and territories do the law apply?

The laws apply to couples whose de facto relationship has a geographical connection with New South Wales, Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory, the Northern Territory, Norfolk Island, Christmas Island or the Cocos (Keeling) Islands. Where orders are sought in the Family Law Courts, the laws will apply if the couple were ordinarily resident in one of those States or Territories when their de facto relationship broke down.

## Registration of de facto relationships

- By registering a de facto relationship, the document or 'certificate' can be used as proof of the existence and duration of the relationship.
- Registration may cause rights and obligations that are similar to marriage.
- These rights and obligations may be created even though the parties have not lived together for a period of two years.

## What if you don't want to be covered by these laws?

It is possible for a couple to make it clear that they do not want the laws to apply to their relationship. Couples can make an agreement about how they will distribute their property and maintain each other if their relationship was to break down. These are called binding financial agreements and can only be entered into after both parties have obtained independent legal advice. Binding financial agreements can be made before entering into a relationship or during a relationship.

## Understanding property disputes in de facto relationship

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. 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: 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

Applications can only be made for the court to resolve a property or maintenance dispute only if following conditions are met –

- the relationship existed for at least two years
  - there is a child of the partners,
  - one of the partners has made substantial financial or non-financial contributions to their property
  - or as homemaker or parent and serious injustice would result to that partner if an order was not made.
- the relationship is registered.

A claim for property or maintenance must be made within two years after the relationship ends, unless there are special reasons. Property matters between de facto partners are dealt with in the Family Law Courts under the same principles as for legally married partners. A former partner can also seek maintenance for themselves from the other partner. It is not true that if you live with someone they are automatically entitled to half of everything you own.

## Understanding property agreements in de facto relationship

A couple living or intending to live together can draw up a binding financial agreement saying how property will be divided should the relationship end. A binding financial agreement can also be made after the relationship has ended.

To be binding, agreements must be in writing and signed by both partners. Each partner must get independent legal advice (each partner must have their own lawyer). Each lawyer must sign a statement stating the required advice was given and a copy of the statement must be sent to the other partner. In some circumstances, a court may set aside or vary an agreement, for example if there has not been full disclosure, or there has been fraud or unconscionable conduct.

## 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.



## Spouse Maintenance

Under Australian Family law there is very limited legal obligation on one de facto spouse to maintain or support the other, either during the relationship or after separation.

To be eligible for spousal maintenance, the applicant must show that he or she has lost their earning capacity as a result of the relationship, but that they are prepared to participate in training and further education to increase their ability to earn.

Alternatively, spousal maintenance can be claimed when a party is unable to work because they are the primary carer for a child. This child must be the child of the former spouse. The same applies if the applicant cannot work because they are caring for a physically or mentally handicapped child.

### The law

The right to maintenance for married and de facto couples are outlined in section 72 and section 90SF(1) of the Family Law Act ("FLA") respectively.

An application for married couples must be made within 12 months of the date of the divorce application being filed. For de facto couples an application must be made within two years of separation. The Court may consider granting leave for a party to file an application after this time.

Matters for consideration for married couples are outlined in sub-section 75(2) and for de facto couples in sub-section 90SF(3) of the FLA.

Ultimately there is three limbs to the test for spousal maintenance. The three parts to the test are as follows:

Whether or not the person applying for the maintenance is exercising, to a reasonable extent, their ability to support themselves;

Whether or not the person applying for maintenance after exercising their ability to support themselves has a reasonable financial need; and

Whether or not the person that is being asked to provide the maintenance has the financial capacity to do so, having regard to their own commitments and standard of living which is reasonable in all of the circumstances.

Spousal maintenance can be made payable for a specified period such as to allow a person to complete a course of education, or up until the children reach school age, or may be payable indefinitely, until varied by subsequent court order.

The Court has the power to vary any existing maintenance order provided there has been a significant change in circumstances since the making of the order. Such variations may be to increase, decrease or cease future payments.

Spousal maintenance can also be payable on an interim basis up until final determination of the matter. Such orders are based upon the same legal criteria as final payments, but are more arbitrary in their making because of the limited way in which evidence is available to the Court on an interim hearing. In practical terms, such orders for interim spousal maintenance are made on the basis of needs and maintaining the status quo of the parties up until a final determination.

A Court can order urgent spousal maintenance (refer to section 77).

Lump sum and/or the transfer of property can be viewed as payment of spousal maintenance (refer to section 77A).

Parties can contract out of spousal maintenance obligations by signing a financial agreement.

## 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.

## How will the courts decide how the property should be divided?

When deciding how your property will be fairly and justly divided, the Family Court will consider:

- What each of you owned before the relationship. How relevant this is will depend on both the length of the relationship and the contributions each person made to the upkeep and improvement of any assets brought into the relationship.
- The net value of your current assets – this includes the value of any property such as houses, shares, boats, caravans or superannuation.
- Contributions made by each person over the course of the relationship. This includes:
  - direct financial contributions (for example wages, or payments for properties or improvements to properties)
  - indirect financial contributions (for example gifts, inheritances from relatives or payment of household expenses)
  - non-financial contributions (such as do-it-yourself renovations and contributions to the welfare of the family, caring for children or domestic tasks).
- Your future needs, including considerations such as who will have the care of any children, your relative earning capacities, and any financial resources available to either of you.

Once the Court has decided what proportion of the assets should be given to each party, it can make orders about how this is to occur. For example the Court may order:

- that assets such as the family home be sold and divided in a particular manner;
- that the ownership of assets be transferred into one person's name;
- that ongoing maintenance be paid; and/or
- that superannuation funds be split

## Children in de facto relationship

Children have the same rights whether their parents are married or not. They are entitled to be cared for and to be supported. When a parent dies, children are entitled to share in the property if there is no will, or to challenge a will that is unfair. It is best if separated parents can decide together how to care for their children. A family relationships counsellor can often help you reach agreement. If you cannot agree, a Family Law Court can make orders about the care of children. Family Law Court orders for the children of de facto couples are decided in the same way as if the parents were married. See our booklet Family Law and You for more information.

If a child has been present during the relationship, a person who is not the parent of the child may wish to continue to spend time with, communicate with or care for the child. If agreement cannot be reached, the person is able to make an application for a parenting order through the Family Law Courts. The person must be able to show they are concerned with the care, welfare and development of the child. In determining whether to grant a parenting order, the court must put the interests of the child first. It will consider a variety of issues, including maintaining any established arrangements, the relationship between the applicant and the child, the wishes of the child and the child's safety. Former de facto partners can access family mediation services to negotiate matters concerning children.

## Applying for parenting orders

If no agreement can be reached then an application for parenting orders must be submitted to either the Family Court of the Federal Circuit Court (Federal Magistrates Court). A parenting order may also be applied for by:

- The child
- A grandparent
- Any other person concerned with the care and welfare of the child

The decision is then made through a Court hearing. The Court bases its decision on what is in the best interest of the child or children. More information about how the Court makes its decision can be found Section 60CA, Section 60CC and Section 64B of the Family Law Act 1975.

## Child support

The parent who cares for a child is entitled to child support payments from the other parent. If there is a dispute about who is the father of the child, seek advice about parentage testing procedures. A person who starts a de facto relationship with a person who already has children does not have a legal obligation to support those children except in special circumstances.

## Time limits on de facto applications

An application for property adjustment or maintenance must be made within two years of separation (refer to s.44(5) of the Family Law Act). A party may seek leave to make an application after this time if the court is satisfied under section 44(6) that either:

- hardship would be caused to the party or a child if leave were not granted; or
- in the case of an application for an order for the maintenance of the party- the party's 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.

## How to make an agreement with my partner?

Many couples are able to come to an agreement about how their assets are to be divided without needing to ask the Court to decide. If you are able to do this, it is a good idea to speak to a lawyer about the possibility of registering your agreement with the Family Courts in the form of Consent Orders.

This will mean that neither you nor your ex-partner can change your mind at a later date and ask for more of the assets. Consent Orders usually mean that you are exempted from paying stamp duty if any properties are sold or transferred.

De facto couples can also make “binding financial agreements” about the way they will manage their assets together. This can be done before moving in together, during the relationship or after separation. You should speak to a lawyer if you wish to make such an agreement, because both partners must receive independent legal advice, and the agreement must comply with certain formal requirements in order to be binding.

## Next steps

While most of the couples don't think or talk about what might happen if they were to separate or to discuss what's theirs is theirs. The fallout from a relationship breakdown can have long term financial consequences. As maintenance orders can bind parties for many years, it is becoming increasingly common for married and de facto couples to create a binding agreement that states how their property and finances would be divided if they were to separate.

As in the case with married relationships, the nature, length and quality of the de facto relationships differ from couple to couple. If you are unsure of the potential impact that your relationship could have on your financial situation it is important to seek appropriate legal advice.

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