

Changes to De Facto Property Law

The Family Law Amendment (De Facto Financial Matters and other measures) Act 2008.

1 March 2009 marked the date that the much anticipated *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* commenced. The purpose of the Act is to, for the first time, allow opposite sex and same sex de facto couples to access the Federal family law courts about property and maintenance matters arising from the breakdown of their relationships.

Essentially, the legislation was designed to bring de facto and married couples under the same umbrella in terms of the law governing the financial matters arising from the breakdown of their relationships, and to give them the same rights.

Am I in a de facto relationship?

A de facto relationship is a relationship of two people who live together on a genuine domestic basis who are not married or related by family.

The criteria used to determine whether two people are in a de facto relationship include:

- The duration of the relationship. Generally, a relationship must have existed for at least two years before a party may apply under the *Family Law Act* for property settlement or maintenance. If, however, there is a child of the relationship or other relevant circumstances exist, there may be an exception to this requirement.
- Whether you live in the same residence together. It is a common misconception that you need to live in the same house as your partner before your relationship can be considered a de facto relationship. While generally this is the case, it may be possible for a de facto relationship to exist even without a shared residence for some or all of the relationship.
- Whether a sexual relationship exists.
- The degree of financial dependence or interdependence between you and your partner and whether there are any arrangements for the financial support of the other.
- Whether you own any property with your partner or have any joint bank accounts or other finances.
- How you and your partner hold yourselves out to others. That is, how you conduct yourselves in public, whether other people know about your relationship and whether others consider you to be a couple.
- Whether there are any children of the relationship.

No one factor or circumstance considered on its own will determine whether or not two people are in a de facto relationship. When a court is called upon to determine whether a de facto relationship exists between two people, it will consider all of the factors and circumstances, and give such weight to each factor as is appropriate. There is no precise formula that is used by the courts to work out whether a de facto relationship exists, and the court will look at all of the facts.

Do the de facto laws apply to me?

If you are in a de facto relationship and finally separate on or after 1 March 2009, the de facto laws automatically apply to your relationship.

If you were in a de facto relationship and separated prior to 1 March 2009, will need to seek advice under the previous laws relating to you, such as Part 19 of the *Property Law Act 1974* (Qld), unless both you and your partner choose to have the new de facto laws apply to you. If you wish to make this choice, you must jointly inform the court of this

choice in writing, after each of you has obtained independent legal advice and received a signed certificate from each of your solicitors to confirm that the required legal advice has been provided.

The decision whether to choose to have the new de facto laws apply to you will depend upon your personal circumstances. This choice is important, as the direction that you choose may benefit or disadvantage you significantly. Therefore, it is important that you obtain legal advice as soon as possible to ensure that this difficult time is not made even more difficult by setting off in the wrong direction.

What is new?

The new de facto laws introduce a number of important changes for de facto couples. Some of the main changes include the following:

- For the first time, the superannuation of de facto spouses can be split between the spouses in the event of a breakdown of the relationship.
- The new de facto legislation provides uniform laws throughout all participating jurisdictions to enable de facto couples to enter into binding financial agreements before, during and at the end of their relationship. Binding financial agreements allow de facto couples to agree on how they will distribute the property and financial resources of the relationship in the event of a breakdown of the relationship, and any maintenance issues in the event of a breakdown of their relationship. Previously, there were different laws in each state.

If you have previously entered into a recognised cohabitation or separation agreement under State legislation, provided your agreement was lawfully entered into and complied with the law applying in the relevant jurisdiction, the agreement should remain valid under the new de facto laws.

- Also for the first time, the new de facto laws allow the courts to make orders for a de facto spouse to provide spousal maintenance to the other after separation. In this way, a de facto spouse can claim spousal maintenance against the other.

What is the time limit to apply?

If you wish to make a claim for property adjustment or spousal maintenance, you must apply within 2 years of the date that your de facto relationship ended.

Only in limited circumstances will the courts grant leave for you to make an application after the end of this period.