

‘Divorce’ explained for de facto partners

Unlike married couples, de facto partners cannot apply for a divorce when their relationship breaks down. Their property affairs and arrangements for the future care of their children however may be finalised by agreement, with the assistance of their legal advisors or, if necessary through Family Court proceedings.

Couples in a de facto relationship generally share the same rights and responsibilities as those who are married and may access provisions of the *Family Law Act 1975* (Cth) (the ‘Act’) to determine property and children’s matters if the relationship breaks down.

The Act will apply to all children’s matters regardless of whether the parents were married or in a de facto relationship. To access the provisions for property and maintenance matters however, a party must establish the existence of a de facto relationship and meet other criteria.

If you are separating from a de facto partner, it is important to be aware of how a de facto relationship is defined and how the Act applies.

What is a de facto relationship?

A de facto relationship is where a couple, of the same or opposite sex and who are not legally married or related by family, live together in a genuine domestic relationship. Factors considered in establishing a ‘genuine domestic relationship’ include the duration of the relationship, the nature and extent of common residence, the existence of a sexual relationship, financial interdependence and property acquisition and ownership.

Once a de facto relationship can be established, the Family Court may make maintenance and property orders if:

- the de facto relationship has lasted for at least two years; or
- there is a child of the de facto relationship; or
- the party applying for orders has made substantial contributions to the relationship and would suffer injustice if a property order was not made; or
- the relationship is registered under a prescribed law of a State or Territory.

Time limits and keeping records

Timeframes and time limits are relevant to family law proceedings so it is important that you maintain accurate records. As noted above, unless there are children of the relationship or extenuating circumstances, property proceedings may only be commenced if the person bringing an application can show that the de facto relationship lasted for at least two years.

Additionally, property proceedings must normally be commenced within two years of separation. In this regard records of the date of separation should be maintained and ex-partners should provide written notification to the other confirming that the relationship is at an end.

Agreeing on the division of property

The least exhaustive and most efficient way to divide property after ending a de facto relationship is to negotiate a settlement with your ex-partner and document the consensus reached in a financial agreement or consent orders.

A **financial agreement** sets out the agreed division of assets between the parties and can include provision for the sale of real estate or other property, the payment of outgoings and distribution of surplus funds. The agreement can also require the parties to pay off joint credit cards or loans and close bank accounts.

When negotiating a financial agreement, the parties must give proper disclosure of their assets and financial resources.

Once a verbal agreement is reached, the parties meet separately with a lawyer to receive independent legal advice and sign an acknowledgement that they are each aware of their rights and obligations under the agreement.

If done correctly and in the right circumstances, financial agreements can be a less formal and cost effective solution for dividing property.

Sometimes, it is preferable to have an agreement for the division of property endorsed by the Court through **consent orders**. This is more formal than a financial agreement because the Court must approve the orders proposed.

The application for consent orders must include full financial disclosure by both parties and the Court will only approve the order if it is just and equitable to do so.

Because of the Court's involvement in considering and consenting to the orders they are usually considered more binding than a financial agreement, providing greater finality to the parties' financial affairs.

Court proceedings

Parties to property or children's matters must first attempt to resolve their conflict through dispute resolution processes, unless there are extenuating circumstances. Proceeding to Court requires careful preparation and consideration of the expense and emotional stress likely to be involved in light of the asset pool.

If a matter proceeds to Court, the following steps are taken to determine the division of property:

- The assets, liabilities and financial resources of the parties are identified – this includes real estate, motor vehicles, business interests, investments and shares, furniture, cash and superannuation.
- The parties' contributions are assessed including monetary contributions such as assets brought into the relationship and earnings from employment, and non-financial contributions such as caring for the family.
- The parties' future needs are evaluated in consideration of their respective earning capacities, age, health and need of the primary carer of children to provide a suitable home.
- In all of the circumstances, orders are made that are 'just and equitable'.

The Court's determination in these matters is discretionary and it will take account of various factors. The starting point however is usually an equal distribution of assets.

Arrangements for children

If there are children of the de facto relationship, agreements regarding their future care may be documented in parenting plans or consent orders (as for property division) without going to Court.

If agreement cannot be reached on parenting issues it may be necessary to apply to Court for the appropriate orders. The overriding principle considered in children's matters is always that the best interests of the child are paramount. Essentially, this means that children:

- should have the benefit of a meaningful relationship with both parents;
- be protected from physical and psychological harm;
- receive parenting that allows them to reach their full potential;
- unless there are issues of risk, have the right to spend time on a regular basis with both parents.

Generally, parental responsibility should be equally shared. This does not necessarily mean that the children will spend equal time with each parent but that the parents are jointly responsible for long-term decisions affecting the health, welfare and education of their children.

The length of time children spend with each parent will depend on various factors such as their ages and ability to cope with change, their relationship with other siblings, the parents' respective work commitments, schooling and location.

Summary

If you are ending or beginning a de facto relationship it is important to know your legal rights and obligations.

If your relationship has broken down, even if you and your ex-partner are amicable, agreements on property division should be documented to legally end your financial affairs.

If there are children involved, a conciliatory process is almost always better for all, bearing in mind that care arrangements and the needs of the children may change over time.

If you or someone you know wants more information or needs help or advice, please contact us on (03) 9459 5764 or email admin@rtlegal.com.au.