Information Guide

Defacto Spouse Property Matters

Provided by milburn guttridge lawyers

The *Property Law Act* 1974 deals with all property matters involving de facto partners including financial entitlements, shares and superannuation.

Purpose of the Act

The Act has the following main purposes:-

1. To facilitate the resolution of financial matters at the end of a de facto relationship;
2. To recognise de facto spouses should be allowed to plan their financial future;

   In this regard, financial matters can be resolved at the end of relationship by a *Separation Agreement* or before or during the relationship by a *Cohabitation Agreement*;
3. To facilitate a just and equitable property distribution at the end of a relationship in relation to the de facto spouse and any child of the de facto spouses;

   In this regard, *a child of a de facto spouse* means:

   3.1. A biological child of the de facto spouses; or

   3.2. A child of the female de facto spouse whose male de facto spouse is presumed or proved to be the father; or

   3.3. A child adopted by the de facto spouses; or

   3.4. A child who is or was during the relationship:

   3.4.1. Treated by either de facto spouse as a child of the relationship; and

   3.4.2. Ordinarily a member of the de facto spouses' household;
4. To provide for an application for declaration to help determine interests in property of de facto spouses;
5. To provide for an injunction to help persons protect their interests in property;
6. To provide for a declaration about the existence or non existence of a de facto relationship;

   In this regard, a "*de facto spouse*" is either one of two persons, whether of the same or the opposite sex, who are living or who have lived together as a couple on a genuine domestic basis but who are not married to each other or related by family.

   Two persons are regarded as a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other. Please note that two people are not a couple only because they are co-tenants; and
7. Matters involving disputes concerning a de facto relationship can be dealt with by the Supreme Court, the District Court or a Magistrates Court. The Family Court has no jurisdiction to deal with the dispute unless concurrent jurisdiction in relation to the matters involving children is invoked.

Financial Matters and Financial Resources

Courts have jurisdiction to deal with de facto spouses' "*financial matters*" which are matters about property or financial resources of either or both of them.

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A persons' "*financial resources*" include the following:

1. A prospective claim or entitlement under a superannuation scheme, employment termination or retirement package or similar benefits;
2. Property that under a discretionary trust may become vested in, or applied to, the benefit of the person;
3. Property which is wholly or partly under the control of the person; and
4. Any other valuable benefit of the person.

Cohabitation Separation and Recognised Agreements

As indicated, a *cohabitation agreement* is an agreement made in contemplation of starting a de facto relationship, or during a de facto relationship, and deals with all or some of the financial matters between de facto spouses.

It does not matter whether the cohabitation agreement was made before or after 21 December, 1999, nor does it matter that there are other parties to the agreement or that the agreement deals with other matters.

A *separation agreement* is an agreement made by the de facto spouses in contemplation of ending a de facto relationship or after the relationship has ended, dealing with all or some of the financial matters.

A *recognised agreement* is either cohabitation or separation agreement of de facto spouses that:

1. Is in writing;
2. Is signed by the de facto spouses and witnessed by a justice of the peace or solicitor; and
3. Contains a statement of all significant property financial resources and liabilities of each de facto spouse when the de facto spouse signs the agreement.

There is no requirement for the de facto spouse to receive independent legal advice in respect of the agreement.

Recognised agreements will be enforced by a Court unless the agreement results in "serious injustice" or "impracticability".

In other words, the agreements are of vital importance in that by and large the agreement struck will exclusively regulate the resolution of financial matters at the end of a de facto relationship. That said, a provision in an agreement purporting to exclude the jurisdiction of a Court in relation to the agreement is invalid but this does not affect the validity of the rest of the agreement.

Effect of De facto Spouse's Death

If a de facto spouse dies before the provisions of a cohabitation agreement or separation agreement can be carried out, the provisions may be enforced on behalf of or against the estate of the deceased de facto spouse unless the agreement expressly provides otherwise.

Applications to the Court

Whilst the Courts' involvement in dealing with the distribution of financial assets at the end of a de facto relationship is limited where a recognised agreement has been entered into, the Court has considerably greater powers where no such agreement has been entered into.

In this regard, after a de facto relationship has ended, a de facto spouse may apply to the Court for an Order adjusting interests in the property of either or both of the de facto spouses.

The application may be made for the benefit of either or both of the de facto spouses or a child of the de facto spouses.

A Court may make any order it considers just and equitable about the property of either or both of the de facto spouses adjusting the interests of the de facto spouses or a child of the de facto spouses in the property.

Prerequisites

A Court may make a *property adjustment order* <u>only</u> if it is satisfied:-

1. The de facto spouses have lived together in a de facto relationship <u>for at least two years</u>; **or**
2. <u>There is a child</u> of the de facto spouses who is under eighteen years; **or**
3. <u>The de facto spouse</u> who applied for the order <u>has made substantial contributions</u> to:

3.1. The acquisition, conservation or improvement of any of the property of either or both of the de facto spouses; and

3.2. The financial resources of either or both of the de facto spouses; or

3.3. The welfare of the family.

and failure to make the order would result in serious injustice to the de facto spouse.

Time Limits for Making Application

A Court may make a *property adjustment order* only if:

1. The application was made within two years after the day on which the de facto relationship ended; **or**
2. The Court has given approval to apply after the two year period;

Factors to be Considered by a Court in Making an Adjustment Order

The Court must consider the following:-

1. Contributions made by each de facto spouse and child to:

   1.1. The acquisition, conservation or improvement of any of the property of either or both of the de facto spouses;

   1.2. The financial resources of either or both of the de facto spouses;

   1.3. The welfare of the family the effect of any proposed order on the earning capacity of the de facto spouses;

2. Any child support provided or to be provided by a de facto spouse for a child of the de facto spouses;
3. Any other order affecting a de facto spouse or a child of the de facto spouse;
4. Any of the following to the extent that they are relevant in deciding on what order adjusting interests in property is just and equitable:-

   4.1. The age and state of health of each of the spouses;

   4.2. The income property and financial resources of each of the spouses and the physical and mental capacity of each for them to obtain appropriate employment;

   4.3. Whether either has the care of a child of the de facto spouses who is under eighteen years;

   4.4. The commitments of each of the de facto spouses necessary to enable the de facto spouse to support him or herself and a child whom the de facto spouse has a duty to maintain;

   4.5. The responsibility of either de facto spouse to support another person;

   4.6. The eligibility of either de facto spouse for an Australian pension that is not income tested or a foreign pension (but must disregard the eligibility of either de facto spouse for an Australian pension that is income tested);

   4.7. What standard of living is reasonable for each of the de facto spouses in all the circumstances;

   4.8. The contributions made by either of the de facto spouses to the income and earning capacity of the other de facto spouse;

   4.9. The length of the de facto relationship;

   4.10. The extent to which the de facto relationship has affected the earning capacity of each of the de facto spouses;

   4.11. The financial circumstances of cohabitation, where either de facto souse is cohabiting with another person;

   4.12. Any payments provided for the maintenance of the child in the care of either de facto spouse; or

   4.13. Any fact or circumstance that the Court considers the justice of the case requires to be taken into account.

Adjournment of Cases

A Court may adjourn an application to adjust interests in property if the Court considers that there is a likely significant change in the financial circumstances and that it is reasonable to adjourn having regard to the time when the change is likely to happen. The Court would of course need to be satisfied that the adjournment will result in an order which is likely to do justice between the parties later rather than immediately.

Existence of a De facto Relationship

Obviously, this matter will come into dispute often. A person may apply to the Supreme Court or the District Court for a *declaration* that there is or has been a de facto relationship in existence.

A Court may, upon Application, make declaration as to the existence or non-existence of a de facto relationship.

Courts Powers Generally

In exercising its powers a Court may do one or more of the following:

1. Order the transfer of property;
2. Order the sale of property and the distribution of the proceeds of the sale;
3. Order the document be executed;
4. Order payment of a lump sum (either by single amount or by instalments);
5. Order the payment of an amount be made wholly or partly secured in a way the court directs;
6. Appoint or remove a receiver or trustee;
7. Order or grant an injunction for the protection of property or to aid enforcement of another order;
8. Make an order or grant an injunction about the use or occupancy of a de facto spouses home;
9. Order that the lease of a rented property be assigned from the lessee to the other de facto spouse;
10. Order that payments be made direct to a de facto spouse;
11. Impose conditions;
12. Make an order by consent; and
13. Make any other orders or grant any injunctions it considers necessary to do justice.

Variation and Setting Aside of Orders

On the application of a person in relation to whom an order has been made, a Court may vary the order if it is satisfied:-

1. There has been a miscarriage of justice because a fraud, suppression of evidence, the giving of false evidence, failing to disclose matters as required; or
2. Because of circumstances that have arisen since the order was made it is impracticable for the order to be carried out; or
3. A person has defaulted in carrying out an obligation; or
4. A child will suffer hardship if the Court does not make a variation.

Transactions to Defeat Claims

The Court can make a variety of Orders to stop people from dealing with property if it is likely to disadvantage the other party in the property settlement.

Legal Costs

A party to a proceeding involving de facto property disputes will generally have to pay their own costs. However if the Court is satisfied that there are circumstances justifying the making of an order, it may make an order for costs or security for costs it considers appropriate.

In considering whether there are circumstances justifying making an order for costs, the Court must consider the following matters:-

1. The income, property and financial resources of each of the parties;
2. Whether any party has legal aid;

3. The conduct of each of the parties in relation to the proceedings;
4. Whether the proceedings resulted from a party's failure to comply with previous orders;
5. Whether any party has been wholly unsuccessful in the proceedings;
6. Whether any party has made an offer to settle under the uniform civil procedure rules and the terms of the offer; and
7. Any other fact or circumstance that the Court considers appropriate for the administration of justice.

Duties Act

The law has been amended to allow for transfers of property interests between de facto spouses to be free of transfer (stamp) duty.

Waiver:

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Regards and thanks for considering us when you need a Lawyer.

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Your Will and Power of Attorney

It may be an appropriate time for you to consider the contents of your Will (if you have one or if not, to have one prepared).

We believe that it is also an appropriate time for you to consider having an Enduring Power of Attorney prepared. An Enduring Power of Attorney appoints someone to act on your behalf (i.e. as Attorney) should you suffer any disability rendering you mentally incapable of looking after your own affairs.

milburn guttridge lawyers has had a long standing relationship with ***Cancer Council Queensland*** *regarding the making of Wills and many clients have left bequests to the Cancer Council in their Wills. If you are thinking of doing so please let us know as you may be eligible for a* ***free Will****. Please ask for details.*

If you have any questions at all regarding the above please do not hesitate to contact our office.

What if my Power of Attorney was signed before 1998?

The enduring power of attorney introduced in 1990 was limited to dealing with a person's financial affairs and did not empower the attorney to deal with other aspects of the principal's life such as personal and health care decisions. Since 1998, the law allows us to draft the power of attorney much wider to cater for a much greater range of contingencies.

If you have an 'old' power of attorney, we suggest you update it.