

De facto rights and entitlements in family law

Author: Jane Holford
Email: jane@smithfamilylaw.com.au
Date: **Monday October 3, 2022**

In 2009, the Federal Government made changes to the ***Family Law Act*** and effectively gave de facto couples almost the same rights and obligations as married parties. Provided that a de facto couple separated after 1 March 2009, the *Family Law Act* will apply to their circumstances. Even if a de facto couple separated prior to March 2009, they can decide to have their matter decided under the *Family Law Act* if both parties agree.

What is a de facto relationship under family law?

The meaning of de facto is defined under the ***Family Law Act*****.** A person is in a de facto relationship with another person if:

1. the persons are not legally married to each other; and
2. the persons are not related by family; and
3. having regard to all the circumstances of their relationship, they have a "relationship as a couple living together on a genuine domestic basis."

Determining if you are in a de facto relationship

The following factors are considered when determining if persons have a "relationship as a couple":

- the duration of the relationship;
- the nature and extent of their common residence;
- whether a sexual relationship exists;

- the degree of financial dependence or interdependence, 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 prescribed law of a State or Territory as a prescribed kind of relationship;
- the care and support of any children; and
- the reputation and public aspects of the relationship.

This is not an exhaustive list of factors, and not all of the factors must be present in order for the Court to find that a de facto relationship exists. For example, a de facto relationship may still be found to exist even if the couple does not live together or share finances.

The *Family Law Act* also provides that a de facto relationship can exist between 2 persons regardless of their gender and that a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

The Court has discretion in determining if a de facto relationship exists

In determining whether a de facto relationship exists, the Court is entitled to have regard to such matters and to attach such weight to any matter as may seem appropriate to the Court in the circumstances of the case. This makes it hard to predict the outcome of a case with any degree of certainty.

Due to the uncertain nature of determining whether a relationship is 'de facto' under the Family Law Act, we recommend that you seek legal advice.

CALL SMITH FAMILY LAW FOR ADVICE AND HELP: **03 8625 8957**

De facto relationships and property settlement or spousal maintenance

Separating de facto partners can seek property settlement and spousal maintenance, however, there are some conditions.

The *Family Law Act* provisions will only apply to a de facto party seeking to apply for **property settlement** and/or **spousal maintenance orders** when one or more of the following apply:

- The period, or the total periods, of the de facto relationship is at least 2 years; or
- There is a child of the de facto relationship; or
- A party to the relationship made substantial contributions, and it would be seriously unjust for that party if the Act did not apply; or

- The relationship is registered.

A child of the relationship must be the child of both parties.

Time limits for making property settlement or spousal maintenance applications

A party to a de facto relationship can bring an application for a property settlement or maintenance under the *Family Law Act* within 2 years of the relationship ending. After that time, an application for a property settlement can only be made with the consent of the parties or with permission from the Court.

The Court may grant a party leave to apply after the end of the standard application period if the Court is satisfied that:

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

You can read more about time limits in our previous blog, **"Time limits for property settlement and spousal maintenance"**.

Can de facto couples enter into binding financial agreements?

De facto parties can enter into **Financial Agreements** either **before** entering into a relationship, **during** the relationship or **after** the relationship has ended. This is the same for married couples.

Recording when you separated

Due to these time restrictions and limits, it is important to record the date that you separated. Sometimes parties will disagree as to the actual date of separation, so it is useful to have your own record. This is particularly relevant to de facto matters where the parties are not able to obtain a **Divorce Order**.

Some things that the court will consider when determining the date of separation can include:

- The sleeping arrangements before and after the date of separation;
- Whether there is an existence of a sexual relationship;
- Who is doing the household chores (are the parties still caring for one another);
- Are the parties continuing to share meals together;
- How do the parties represent themselves (as separated or as a couple) – have they told friends/family/Government agencies (e.g. Centrelink) about the separation; and

- Are the parties going on holidays since separation (and whether those holidays were taken together)?

How a family lawyer can help

Legal advice will help you understand the law relating to your family law matter and help you settle and formalise your arrangements. Receiving expert legal advice can equip you with the knowledge you need to make empowered and practical decisions about your next steps.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.