

Information for separating de facto couples

According to the 2001 Census, more than 110,000 Western Australians live in de facto relationships - the equivalent of about 12 per cent of all couples.

Prior to December 1 2002, if their relationship broke down, or one of the partners passed away, there was no formal process for disputes over property and maintenance to be resolved.

This meant de facto couples had to argue their case before the Supreme Court, which was expensive, time-consuming, public and uncertain.

The law changed on December 1, 2002, and questions of the fair allocation of property and maintenance in de facto relationships are now determined by the Family Court.

The Family Court is a much more appropriate court for these issues to be decided. It has the expertise, is much less expensive, is completely confidential and it provides access to alternative dispute resolution processes. In fact, 95 per cent of Family Court applications between separated couples are settled without going through the full court process.

The law was modernised to provide equity and access for all Western Australians.

The law - before and after

The current laws only apply to de facto couples whose relationship ended after December 1, 2002.

BEFORE DECEMBER 1, 2002 Common Law	AFTER DECEMBER 1, 2002 Family Law
There were no time frames recognised by law	Must have been in a de facto relationship for at least two years
The law didn't assist de facto spouses to resolve disputes over property or maintenance	The current law makes it much easier for a de facto spouse to make property and maintenance claims - the same rights as a married person
Did not account for the contributions made by the people in the de facto relationship (for example, paying off the house, looking after children)	Accounts for the contributions made by the parties in the relationship
Claims dealt with in the Supreme Court (was expensive, time consuming, no confidentiality and legal representation was required)	Claims dealt with in the Family Court (no representation required, mediation is available, inexpensive and confidential)
Difficult claims system through the Supreme Court Difficult for the spouse making the claim to be successful	Claims can be made far more easily Mediation and counselling available

What is a de facto relationship?

The following factors are used to determine whether a de facto relationship exists between two people. However, not all factors are essential:

- Whether they had been together for more than two years
- Whether they lived in the same residence
- Whether there is, or has been, a sexual relationship between them
- The degree of financial dependence, or the financial arrangements, between them
- The ownership, use and purchase of their property
- The degree of commitment by them to a shared life
- Whether they care for and support children
- How their relationship is perceived by others (ie do they have a reputation of being a couple?)

It does not matter whether:

- The people are of different sexes or of the same sex
- Either of the people are legally married to someone else or in another de facto relationship

The current rights generally only apply if either or both de facto partners are over 18 years of age. In "exceptional or unusual cases", it may also apply to a relationship where both partners are over 16 years.

One or both of the parties must be a resident in Western Australia on the day when the application is made. Both parties must also have resided in WA for at least one third of the duration of the relationship.

Resolving property disputes

The current law provides the Family Court of WA with the power to make orders to adjust the property interests of the de facto couple. The court may only make a property order in three situations:

- where the parties have been in a de facto relationship for at least two years;
- where there is a child of the partners of the de facto relationship who is less than 18 years of age and a serious injustice would result to a partner; or
- where the applicant made substantial contributions to property and a serious injustice would otherwise result.

When an application is made for an order to adjust property interests, the court must consider all relevant matters. These include:

- nature and length of the relationship;
- direct and non-direct contributions made by each partner;
- direct and non-direct contributions made by each partner to the welfare of the other partner or a child of the partners;
- age and health of each partner;
- income, property and financial resources of each partner; and
- earning capacity and financial needs of each partner.

Maintenance

The current laws cover the important question of maintenance.

Following a break up in a de facto relationship, one of the parties may apply to the Family Court for maintenance. A de facto partner will be liable for maintenance to the extent that they are reasonably able to do so, if - and only if - the former partner is unable to support themselves adequately, for example, if the applicant has the care of a very young child or a young disabled child.

When deciding whether to make an order for maintenance, the court must consider all relevant matters including the:

- income, property and financial resources of each partner;
- physical and mental capacity of each partner for suitable employment;
- financial needs of each partner;
- responsibilities of each partner to support someone else; and
- terms of any property adjustment order.

Financial agreements

The current legislation clearly provides the opportunity for de facto couples to contract out of these laws by entering into a financial agreement.

If a de facto couple has entered into a recognised financial agreement, then the agreement will be enforceable by the court.

The court can vary a financial agreement in cases of serious injustice, where there has been a material change in circumstances or if it is impracticable for the agreement to be carried out.

Death of a partner

The current laws do not just cover de facto couples who separate. Prior to December 1, 2002 There were many cases where, upon the death of their loved one, a de facto partner was disadvantaged because the law did not recognise that relationship.

The current law allows de facto partners to make claims against the estate of their deceased partners.

Parenting orders

The current laws also provide for improvements in parenting orders for children born outside a marriage.

This is an important measure that ensures that all Western Australian children are treated equally.

Based on Commonwealth legislation, it provides for a three-tiered compliance regime of prevention, education and punitive sanctions.

The first stage is prevention. The aim is to ensure that parents are aware of their obligations and responsibilities imposed by any orders and the consequences of failing to comply.

The second stage is educative remedial measures. When a first-time breach occurs, the court can order attendance at post-separation parenting programs. The aim is to help parents resolve issues of conflict about the parenting of the child.

Where there are persistent or serious breaches, the court can impose a range of penalties, including community service orders, fines, bonds or prison.

Legal advice

The Family Court recommends separating couples seek legal advice before making an application to the court. This does not mean a lawyer has to be employed.

Legal advice is available from a family lawyer, community legal centres or Legal Aid WA. Many of these services are low cost.

A printed version of the text above is available by clicking on the "Fact sheet for separating de facto couples " link in the Downloads section below.