

DE FACTO RELATIONSHIPS AND FAMILY LAW



This fact sheet provides information about the laws affecting de facto couples. The laws cover property division, maintenance, financial agreements and the superannuation of people in de facto relationships.

All de facto couples have the same rights as married couples under the Family Law Act in relation to the distribution of property. Same-sex relationships are included within the definition of 'de facto couple' in federal laws. The Child Support (Assessment) Act also applies to same-sex couples.



Who do the laws about de facto relationships apply to?

You can make an application to the Court for a property settlement or for maintenance under the *Family Law Act* provisions if any one or more of the following conditions apply:

- your de facto relationship with your partner lasted for at least two years in total;
- you have a child with your de facto partner;
- you have made a substantial contribution to the property or finances of your partner;
- the relationship was registered under a State or Territory law; and
- you lived for at least one-third of your relationship in NSW or another state where the laws apply (currently all Australian states and territories except Western Australia.)

What is the definition of a de facto relationship?

If there is a dispute about whether two people were in a de facto relationship, the Court will look at:

- the length of the relationship;
- the living arrangements;
- whether there is or was a sexual relationship;
- the way finances were arranged;
- whether you owned property together and how you bought it;
- whether your relationship was registered under state or territory law;
- whether you had or cared for children together; and
- the way you presented your relationship in public.

The sex of the partners is not a relevant consideration. The laws state specifically that a de facto relationship can exist between two people of the same sex, or of the opposite sex. The laws also state that a de facto relationship can exist even if one of the partners is legally married to another person at the time.

When did the current laws start?

The laws apply to de facto relationships that broke down on or after 1 March 2009 in NSW.

If your relationship broke down before this date, you can apply to the Court for a property settlement if you and your ex-partner agree to have the new laws apply. That agreement must be in writing and must be signed by both parties. You both need to obtain independent legal advice. You will both need a signed statement from your lawyer that the advice has been given. As an alternative, you may be able to seek a property settlement through the State courts.

If you have already obtained final court orders about a property settlement or spouse maintenance you cannot choose to apply the new laws.

The provisions in relation to same-sex parents and child support commenced on 1 July 2009.

When can I apply?

You must apply to the Family Court in relation to property and maintenance issues within two years of your relationship ending. Applications in relation to children can be made at any time.

Property

De facto couples, including same-sex couples who have separated, can make an application to the Family Court or the Federal Circuit Court for a property settlement under the *Family Law Act* if they are unable to reach an agreement about how their assets are to be divided.



How will the courts decide how to divide our property?

When deciding how your property will be fairly and justly divided, the Family Court will consider:

- What each of you owned before the relationship. How relevant this is will depend on both the length of the relationship and the contributions each person made to the upkeep and improvement of any assets brought into the relationship.
- The net value of your current assets – this includes the value of any property such as houses, shares, boats, caravans or superannuation.
- Contributions made by each person over the course of the relationship. This includes:
 - direct financial contributions (for example wages, or payments for properties or improvements to properties)
 - indirect financial contributions (for example gifts, inheritances from relatives or payment of household expenses)
 - non-financial contributions (such as do-it-yourself renovations and contributions to the welfare of the family, caring for children or domestic tasks).
- Your future needs, including considerations such as who will have the care of any children, your relative earning capacities, and any financial resources available to either of you.

Once the Court has decided what proportion of the assets should be given to each party, it can make orders about how this is to occur. For example the Court may order:

- that assets such as the family home be sold and divided in a particular manner;
- that the ownership of assets be transferred into one person's name;
- that ongoing maintenance be paid; and/or
- that superannuation funds be split.

What if I make an agreement with my partner?

Many couples are able to come to an agreement about how their assets are to be divided without needing to ask the Court to decide. If you are able to do this, it is a good idea to speak to a lawyer about the possibility of registering your agreement with the Family Courts in the form of Consent Orders.

This will mean that neither you nor your ex-partner can change your mind at a later date and ask for more of the assets. Consent Orders usually mean that you are exempted from paying stamp duty if any properties are sold or transferred.

De facto couples can also make "binding financial agreements" about the way they will manage their assets together. This can be done before moving in together, during the relationship or after separation. You should speak to a lawyer if you wish to make such an agreement, because both partners must receive independent legal advice, and the agreement must comply with certain formal requirements in order to be binding.

You should also speak to your lawyer if you made a financial agreement with your partner before 1 March 2009, to discuss whether the agreement is still binding under the current law.

Do the laws affect my superannuation?

Superannuation held by each de facto partner can be split by agreement or by court order.



Children of same-sex couples

Under family law legislation, most children born to or adopted by same-sex couples will be recognised as children of both parents. This will include:

- children born through assisted/artificial conception to lesbian couples;
- children adopted by same-sex couples; and
- children born under certain surrogacy arrangements recognised under a state or territory scheme; the NSW Parliament has recently passed legislation to allow recognition of certain surrogacy arrangements.

Can same-sex parents can be recognised as the child's parents?

One party of a separated de facto couple may make an application for the other party to pay maintenance to them for their financial support.

If you make a maintenance application, the court will consider the relative financial position of each of the partners, and will make an order for maintenance if:

- you cannot adequately support yourself financially for reasons of health, having the care of a child of the relationship or another reason; and
- your former partner is able to support you financially.

If a maintenance order is made, it will usually last for a limited period of time.

Same-sex parents are able to be recognised as legal parents in relation to parenting matters and child support. Parenting matters include where the children will live, who they will spend time with, who they will communicate with and who will make major long-term decisions. Decisions are made by considering what parenting arrangement would be in the best interest of the child.

Recognition of same-sex parents in some other matters, such as consent for medical treatment, fall under state laws. Recent changes to NSW law mean that in most cases:

- lesbian mothers are recognised as parents of children born into a relationship through assisted reproduction;
- same sex couples will be able to adopt children; and
- there will be legal recognition of parentage in certain non commercial surrogacy arrangements.

My partner and I have separated: will I have to pay child support?

Child support laws have applied to same-sex parents since 1 July 2009. This includes cases where the children were born through assisted conception or were adopted.

If your name appears on the child's birth certificate, if there is a court finding, or if you have signed a statutory declaration that you are a parent, then it is likely that you will be seen as a parent with a child support liability. It will also be possible for a parent to ask the Court for a declaration that a child support assessment should be issued for their child, payable by their former same-sex partner.

Where can I get more information?

This fact sheet is intended as a guide to the law and you are advised to seek expert advice when faced with specific problems. Advice can be obtained from the following organisations:

LawAccess NSW: A free government telephone service that provides legal information, referral, and in some cases, free legal advice for people who have a legal problem in NSW. Ph: 1300 888 529
www.lawaccess.nsw.gov.au

Legal Aid NSW: Free advice is available at all Legal Aid offices – see our website for office locations
www.legalaid.nsw.gov.au

Legal Aid NSW Child Support Service: Provides free specialised advice on child support matters.
Ph: 9633 9916 or 1800 451 784

Department of Human Services: Child Support:
Free call 131 272.
www.humanservices.gov.au.

Community Legal Centres NSW: For the CLC closest to you, refer to the CLC NSW website:
www.nswclc.org.au

Inner City Legal Centre: Provides specialist gay and lesbian legal advice. Ph: 9332 1966 :
www.iclc.org.au

Gay and Lesbian Rights Lobby: Advocates on policy and law reform issues on behalf of lesbians and gay men. See the factsheets on their website:
www.girl.org.au

Attorney General's Department (Federal):
Information about same sex reforms can be found at: www.ag.gov.au

Produced by the Family Law Division of Legal Aid NSW. Printed copies of this factsheet can be ordered online or call 02 9219 5028.

This publication is intended as a general guide to the law. It should not be relied on as legal advice and it is recommended that you talk to a lawyer about your particular situation.

At the time of printing, the information shown is correct but may be subject to change.

For more information contact LawAccess NSW on 1300 888 529.

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