



PLAIN ENGLISH GUIDE

DEFACTO RELATIONSHIPS AND PROPERTY SETTLEMENT

What is a de facto relationship?

A de facto relationship is a relationship between two people who live together as a couple and who are not married to one another, nor are they related to one another. They do not have to be of the opposite sex. When considering whether a de facto relationship exists, it is necessary to consider several aspects of the relationship, including:

- The length of the relationship
- The living arrangements
- Whether there is a sexual relationship
- The financial arrangements
- Care of children
- How much the couple has a shared life
- How others view their relationship
- Household duties

Other Domestic relationships

- Two people live together in a close personal relationship, whether or not they are related, where one person provides domestic support and care for the other (eg elderly parent and child)

Relationships that give rise to a property claim

If any of the above relationships break down, that can give rise to a property claim under the Property (Relationships) Act.

Prerequisites for making a claim

- Generally, both people must have lived in NSW for the substantial part of their relationship,
- Both people must have lived together for at least 2 years

You can apply for property settlement even if you have not been living together for more than two years IF:

- You have a child together, or
- The person seeking settlement has made substantial contributions to the relationship that would mean that they would suffer a loss if settlement was not granted, or
- The person seeking settlement is looking after the child of the other party and would suffer a loss if settlement were not granted.

What will be considered when settling a property claim?

- Financial contributions to the relationship,
- Non financial contributions to the relationship
- Contributions made by either party to the care and welfare of the other party and of any children

De facto relationship property claims are a bit different from property settlement when the people are married. When you are married the court must consider future needs of the parties



when they think about settlement. This does not have to happen in de facto relationship claims.

Domestic Relationship Agreements:

What are they?

For de facto couples, it is possible to have a binding financial agreement in place that covers what happens to your property and financial resources if you separate. The couple needs to discuss thoroughly what they wish to be included within the agreement before it is made.

This guide is intended to be general in nature, and Commins Hendriks recommend that you seek legal advice tailored to your needs before entering into a domestic relationship agreement. Commins Hendriks' teams of family law professionals can help you with your questions.

Who can make them, and when?

Domestic relationship agreements are made under the Property (Relationships) Act and can be made by:

- Same sex couples
- Heterosexual de facto couples; and
- Others living in a domestic relationship, where one provides domestic help and support for the other party, such as friends, or a mother and daughter.

They can be made before the relationship, during, and after the relationship has ended. The agreement can cover property, financial resources of either or both parties, as well as maintenance of either or both parties.

Why have one?

Some couples, particularly those who have had prior relationships or marriages, or children or prior partnerships often choose to enter into a domestic relationship agreement with their current partner, to ensure that everyone's interests are protected in the event that the relationship breaks down. It can also serve to simplify the property settlement process after you separate.

What is involved?

This is a complex agreement to create, as many contingencies need to be accounted for. You will need to carefully consider with your partner things like:

- Do you both intend to work during the relationship?
- Do you plan to have, or do you already have children?
- Do you have children from previous relationships?
- What will happen if either of you are injured and can no longer work?
- What will happen if a child has a disability or illness that requires significant care?
- Do you intend to have a joint bank account, or separate ones?
- What is your plan to meet your living expenses?
- Do you expect to receive any inheritance? If so, how much do you expect to receive, do you wish to make any specific provision in relation to that inheritance and what do you plan on doing with it?

To make a domestic relationship agreement binding, there are some requirements that must be met, and they include:

- It must be in writing
- It must be signed by both parties
- Each person must seek independent legal advice regarding the document



Each person must provide evidence that they have sought independent legal advice (ie a certificate signed by the lawyer that they saw)

What is the effect of a domestic relationship agreement?

In general, if a domestic relationship agreement satisfies all the requirements, then a court cannot make an order regarding things that are covered by the agreement that is inconsistent with the agreement. If the agreement does not satisfy all of the requirements the court is not bound to take notice of the agreement.

Situations when the agreement is not binding:

- If the general laws of contract are not adhered to. There are complex legal concepts involved here which your lawyer can explain to you.
- If the opinions of the parties have changed so much since making the agreement that the court could not enforce the agreement, as it would be so unfair.
- If the parties have by their actions, words or other methods, revoked the agreement.
- If one party has not made a full disclosure of their financial situation to the other party.

Advantages and Disadvantages:

Advantages:

- Knowledge that your well-drafted domestic relationship agreement will protect both your interests in the event of a relationship breakdown. This can be very reassuring if you have already been through the breakdown of a relationship before.

Disadvantages:

- Because the law in this area is fairly complex, there is some uncertainty about when these agreements can and will be set aside, and how the courts will interpret the law.
- If all contingencies have not been thought of prior to the agreement, the actual use of the agreement could be unfair to one or both of the parties.

What should I do if I would like a domestic relationship agreement?

If you wish to enter into a domestic relationship agreement, the following are some of the things that you will need to discuss with your partner beforehand. It is very important that you discuss exactly what you would like your domestic relationship agreement to cover as a couple.

Domestic relationship agreements can make provisions for maintenance of either of the parties during or after the relationship, and they can state how the parties' property and financial resources are to be dealt with in the event of a breakdown of the relationship. You will need to try and think of everything that might happen during your relationship.

- Do you both intend to work during the relationship?
- Do you plan to have, or do you already have children?
- Do you have children from previous relationships?
- What will happen if either of you are injured and can no longer work?
- What will happen if a child has a disability or illness that requires significant care?
- What provisions would you like to make for your retirement?
- Do you intend to have a joint bank account, or separate ones?
- What is your plan to meet your living expenses?
- Do you expect to receive any inheritance? If so, how much do you expect to receive, do you wish to make any specific provision in relation to that inheritance and what do you plan on doing with it?



Once you have discussed these things, you should make an appointment with your lawyer. You will need to bring with you to that appointment detailed statements of your current income, assets and liabilities, and preferably valuations of any substantial assets you have. Bank account statements, shareholdings, superannuation interests and other investment documents would be helpful to bring along also. The more information you provide, the better and more secure the agreement we will be able to draft for you.

Once you have discussed all of the above with your lawyer, we will draft an agreement for you. Once you are both satisfied with the agreement, you will sign it, and we will provide each of you with a copy, in case you need to rely on it down the track.

Termination agreements:

This is an agreement made regarding financial and property arrangements once a relationship has broken down. This benefit of this is that the two of you can agree without going to court, and the agreement will still be binding. It can also have certain taxation benefits, which your lawyers can explain to you.