

Defacto/Same Sex Property Settlements

The law in relation to de facto and same sex couples has changed in Tasmania. A de facto relationship is between two adults of the opposite sex or two adults of the same sex. A de facto property settlement is now governed by the *Family Law Act 1975 (Cth)*.

Which Law Applies?

If your relationship breaks down on or after 1 March 2009 then the new laws apply and property settlement is governed by the *Family Law Act*.

If your relationship had broken down before 1 March 2009, State laws apply and the relevant legislation is the *Relationships Act 2003 (Tas)* in this Act a de facto relationship is defined as a "significant" relationship. However, parties can 'opt in' and choose to have the new laws apply to them.

How to Opt In?

The parties can opt in if they both agree. The choice needs to be in writing and signed by both parties. Each party must obtain independent legal advice and the legal practitioner must provide a signed statement to say that the advice was given.

Parties cannot opt in to the new law if they have obtained final court orders under State law or if they have made a written agreement binding courts under State law.

What is Property?

Property is anything that is capable of being owned. For de facto property settlements, it comprises anything that was bought during the relationship or with funds acquired during the relationship. However, items owned or acquired by one party prior to the relationship may form part of the property settlement.

Property includes land, houses, shacks, businesses including partnerships or companies, motor vehicles, bank accounts, shares, household goods and furniture, tools of trade or other equipment and superannuation.

Pre-requisites For Obtaining A Property Settlement:

A de facto relationship is where two people who are not married or related by family have a relationship as a couple living together in a domestic basis.

In addition to being in a de facto relationship, to make an application for the division of property the court must be satisfied that one of the four 'gateway' requirements are met:

- that the period of the de facto relationship is at least 2 years; or
- that there is a child of the de facto relationship; or
- one of the partners made substantial financial or non-financial contributions to the relationship and serious injustice to that partner would result if the order was not made; or
- that the de facto relationship was registered

When Can Property Be Divided?

If the partners have ceased to be in a de facto relationship, an application to a court is to be made before the expiration of the period of 2 years after the day on which they ceased or last ceased to be in the relationship. However, leave may be granted by the court to make an application after the 2-year period has elapsed.

How is the Property Divided?

The Act sets out a number of factors that the court must take into account when dividing property. Broadly speaking, these can be divided into two categories – *Contributions* and *Future Needs*.

Contributions Of Both Parties

This includes *financial* and *non-financial* contributions of each party to the relationship. *Financial contributions* include such things as wages and the paying of household bills, inheritances, gifts of a financial nature and other financial contributions. *Non-financial contributions* includes performing household duties and parenting duties. The contributions may be direct or indirect.

Future Needs Of Both Parties

This includes such factors as the age and health of the parties, their educational qualifications in terms of relevance to future work prospects and their need to care for any dependent children.

The Court generally weighs up contributions and future needs and adjusts the division accordingly.

How To Obtain A Property Settlement?

1. Family Dispute Resolution:

The parties of a relationship may choose to participate in family dispute resolution at a dispute resolution service.

Participating in mediation may allow the issues in dispute to be identified and the partners of the relationship may come to an agreement. If this occurs, the partners may choose to file Consent Orders in the court.

2. Consent Orders:

Consent Orders set out how the parties have agreed to divide the property. They are legally binding which means if one party does not comply, they have breached the court Order.

If you are under the old law, relevant forms can be found on the Supreme Court's website (www.supremecourt.tas.gov.au) or the Magistrates Court website (www.magistratescourt.tas.gov.au). If under the new law the relevant forms can be found on the Family Court website (www.familylawcourts.gov.au).

3. Starting an Application in Court:

If no agreement can be made, one partner of a relationship may decide to start an application in a Court. If the relationship had broken down before 1 March 2009 an application can be made in either the Magistrates Court or the Supreme Court of Tasmania. If the relationship breaks down on or after 1 March 2009, or if both parties opt in, an application can be made in either the Family Court or the Federal Magistrates Court.

For relationships that broke down after 1 March 2009, or have chosen to opt-in to the new system, the application is an Initiating Application and the required forms can be found from the Family Court website (www.familycourt.gov.au), the Federal Magistrates Court website (www.fmc.gov.au) or by calling the Enquiries line on 1300 352 000.

Magistrates Court:

Applications can be made for property with a total value of not more than \$50,000.00. However, the parties can by agreement ask the Magistrates Court to consider cases where the property is worth more than \$50,000.00.

Supreme Court:

All applications can be made for property with any total value but those settlements involving property valued more than \$50,000.00 must be conducted in this court.

Family or Federal Magistrates Court

In the Family Court and Federal Magistrates Court there is a filing fee for an Initiating Application. The applicant may be able to apply for a reduction of the court fees based on financial hardship.

The Federal Magistrates Court generally deals with less complex matters that are likely to be decided quickly. The Federal Magistrate may order that the parties attend conciliation to resolve the matter.

For matters in the Family Court, a Case Assessment Conference will be conducted initially with the Registrar. Both parties will be required to attend and it is a final opportunity to negotiate the matter, prior to taking it before a Judge. If the matter can be resolved at this stage, then the parties will be able to file for consent orders as to what has been agreed.

If the matter is unable to be resolved at the Case Assessment Conference, then the case will be listed for a hearing before a Judge. The Judge will then make the ultimate decision.

Transferring real estate

Where the court orders that real estate is to be transferred to one partner of the relationship, no stamp duty is payable on that transfer. This is an exemption provided under section 57 of the *Duties Act 2001*.

Contacts

The Women's Legal Service can be contacted on **1800 682 468**.

"De Facto/Same Sex Property Settlement" is intended to give general information to people who have or who are contemplating a division of property after their relationship has ended. Whilst we have made every effort to ensure the contents of this publication are accurate at the time of publication the law and services do change. Legal and service exactness is not possible in a publication of this nature. This publication should not be used as a substitute for legal advice.

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