

DE FACTO RELATIONSHIPS



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WHEN IS A RELATIONSHIP RECOGNISED BY LAW?

A de facto relationship recognised by law is one where two adults live together as a couple. It is not enough just to live in the same house, or even to sleep in the same bed. To have a recognised relationship you must both intend to live together as a couple.

In some situations, there is no set time that you must live with someone as a couple before your de facto relationship is recognised. In other situations, partners may not be entitled to certain rights unless their relationship is registered or they have lived together for a minimum amount of time or have a child together.

When a relationship is recognised under South Australian law, the relationship is called a 'domestic partnership'. Under Commonwealth law, the relationship is called a 'de facto relationship'.

For some legal purposes, if the relationship is not registered, a formal declaration from a court is required before the relationship can be recognised. However, for most legal purposes, partners do not have to take any formal step to have the relationship recognised. Once the relevant amount of time for living together is met, the relationship is recognised automatically. If there is doubt about whether a relationship can be recognised, a court can be asked to make a declaration on this.

IS A SAME OR INTERSEX RELATIONSHIP TREATED DIFFERENTLY?

No. Same and intersex relationships are recognised under both Commonwealth and South Australian laws. Commonwealth laws have for some time recognised such relationships for purposes such as Centrelink payments and benefits and income tax deductions. Since 9 December 2017, changes to the Marriage Act 1961 (Cth) have also provided for the marriage of "2 people", irrespective of their sex or gender identity. Changes to South Australian laws earlier in 2017, such as those regarding adoption, surrogacy and access to reproductive technology have ensured that same and intersex relationships are treated the same as heterosexual relationships.

IS A DE FACTO RELATIONSHIP THE SAME AS A MARRIAGE?

In some areas of law, a de facto relationship is treated like a marriage, where there is no time requirement for recognising the relationship, and in other areas it is not. There is no time requirement for recognising a de facto relationship for:

- making agreements about property
- applying for Legal Aid
- Centrelink payments and benefits
- income tax deductions
- getting an intervention order against a violent partner
- reproductive technologies
- court orders for the care of children
- child support

De facto partners may also be entitled to the same rights as married persons when:

- one partner dies without a will
- one partner leaves the other partner out of their will
- there are compensation claims from the death or injury of a partner
- a partner is ill and needs someone to make medical decisions for them
- organ donation is being considered.

However, in these situations, the relationship must either be one:

- that is registered under the Relationship Register Act 2016 (SA);
- where the partners have been living together as a couple for three years, or for periods totalling three years over four years, or
- where the partners are living together as a couple and they have had a child together.

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If the relationship has not been registered and has been for less than three years without a child born to them, either of the former partners may seek a declaration from the court recognising the relationship on the basis that they were living together as a couple and that the interests of justice require that a declaration be made. This application is made under the Family Relationships Act 1975 (SA), which sets out what the court must consider when making its decision.

WHAT IS THE BENEFIT OF REGISTERING A RELATIONSHIP?

If your de facto relationship is registered under the Relationship Register Act 2016 (SA), it is recognised automatically and a formal declaration from the court is not required where it otherwise would be. For example where one partner dies without a will, or where one partner leaves the other partner out of their will, and the relationship is not registered, a declaration that the partners were in a 'domestic partnership' must be obtained from the court before making a claim.

In addition, the Wills Act 1936 (SA) provides that a partner's will is revoked by the registration of a relationship unless it is made in contemplation of the relationship, and any gift or power given to a partner under a will are cancelled by the end of their registered relationship.

SHOULD WE JUST GET MARRIED TO ENJOY THESE BENEFITS?

A registered relationship is similar to marriage in that it provides automatic recognition in various important areas of the law in South Australia. However, there are two main differences between them. The first is that marriage provides recognition both interstate and internationally. The second is that marriage cannot end as quickly or abruptly as a registered relationship. A marriage cannot officially end unless it has broken down irretrievably evidenced by 12 months separation. A registered relationship, by contrast, can end by application of either partner without proof of actual separation, after 90 days cooling off, or sooner by way of the marriage of either partner.

PROPERTY AGREEMENTS

A couple living or intending to live together can draw up a binding financial agreement under the Family Law Act 1975 (Cth) saying how property will be divided should the relationship end. A binding financial agreement can also be made after the relationship has ended. To be binding, agreements must be in writing and signed by both partners. Each partner must get independent legal advice (each partner must have their own lawyer). Each lawyer must sign a statement stating the required advice was given and a copy of the statement must be sent to the other partner. In some circumstances, a court may set aside or vary an agreement, for example if there has not been full disclosure, or there has been fraud or unconscionable conduct.

PROPERTY DISPUTES

Applications can only be made for the court to resolve a property or maintenance dispute if:

- the relationship was registered or existed for at least two years; or
- there is a child of the relationship; or
- serious injustice would result if an order was not made.

A claim for property or maintenance must be made within two years of the relationship ending, unless there are special reasons. Property matters between de facto partners are dealt with in the Family Law Courts under the same principles as for married partners.

It is not true that if you live with someone they are automatically entitled to half of everything you own. See our booklet Family Law and You for more information.

DEBTS

In any relationship, there is no rule that a partner is responsible for the debts of the other. If you both sign a contract, or if an account is in both names, then you are both responsible for any payments. Beware of signing as a guarantor for a partner as you may become responsible for the debt.

PROPERTY IN JOINT NAMES

Disputes can be minimised by not putting property into joint names unless each person contributes equally, by keeping a record of who pays for what, and by keeping receipts. Avoid making statements that property is 'ours' or 'shared' unless that is your real intention. Give special thought to your home. If the home is in joint names, the other partner will own it all if you die first. You cannot make a will leaving your share to someone else. This may not be what you want, especially if you have children from another relationship. There is another way of putting a house in both names, called 'tenants in common'. If you do it this way, you can leave your share of the house to someone else in your will, and you can sell your portion of the property. Get legal advice if you are not sure which type of ownership will suit you best.

CHILDREN

Children have the same rights whether their parents are married or not. They are entitled to be cared for and to be supported. When a parent dies, children are entitled to share in the property if there is no will, or to challenge a will that is unfair.

If a child has been present during the relationship, a person who is not the parent of the child may wish to continue to spend time with, communicate with or care for the child. If agreement cannot be reached, the person is able to make an application for a parenting order through the Family Law Courts. The person must be able to show they are concerned with the care, welfare and development of the child. In determining whether to grant a parenting order, the court must put the

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interests of the child first. It will consider a variety of issues, including maintaining any established arrangements, the relationship between the person and the child, the child's safety and the wishes of the child. Former de facto partners can access family mediation services, which are generally compulsory, to negotiate matters concerning children, before resorting to court.

It is best if separated parents can decide together how to care for their children. A family relationships counsellor can often help you reach agreement. If you cannot agree, a Family Law Court can make orders about the care of children. Family Law Court orders for the children of de facto couples are decided in the same way as if the parents were married.

CHILD SUPPORT

The parent who cares for a child is entitled to child support payments from the other parent. If there is a dispute about who is the father of the child, seek advice about parentage testing procedures. A separated parent from a same-sex relationship can apply for child support from a co-parent who is recognised as a parent under the Family Law Act 1975 (Cth). Centrelink may also require parents to apply for an assessment of child support payable by the other parent.

A person who starts a de facto relationship with a person who already has children does not have a legal obligation to support those children except in special circumstances. However, Centrelink payments may be affected if you live together. If you receive Centrelink payments, Centrelink must be told of the relationship as soon as it starts.

For help in making an application for child support, contact the Legal Services Commission for child support help on telephone: 8111 5576.

REPRODUCTIVE TECHNOLOGIES

Assisted reproductive technology, such as artificial fertilisation and insemination, is accessible on the basis that it would "be unlikely that, in the person's circumstances, the person will become pregnant other than by an assisted reproductive treatment".

Under the Family Relationships Act 1975 (SA), the female partner of a woman who has given birth due to assisted insemination or assisted reproductive treatment can be recognised as a co-parent on the child's birth certificate. Recognition of the co-parent is subject to some conditions. A woman can be recognised as the co-parent if the two women are living together in a marriage-like relationship, the child is conceived, with the consent of her partner, through a fertilisation procedure under South Australian law and they elect to have parentage determined according to the Act. Both women can be registered as parents even if they are no longer living together as domestic partners at the time of the birth, or at the time of registration of the birth.

If a birth was previously registered with only the mother as a parent, it is possible to change a child's birth certificate through Births, Deaths and Marriages to include a female partner as a co-parent, as long as the conditions outlined above apply.

SURROGACY

To be commissioning parents to a surrogacy agreement, a couple must be either married, in a registered relationship or have lived together continuously in a marriage-like relationship (irrespective of their sex or gender identity) for at least the last 3 years, or 3 of the last 4 years.

ADOPTION

To be eligible to adopt under the Adoption Act 1988 (SA), a couple must be in a 'qualifying relationship', defined as a marriage or marriage-like relationship (irrespective of their sex or gender identity) and must have been living together continuously for at least 5 years.

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