

SAME SEX RELATIONSHIPS



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WHEN IS A SAME-SEX RELATIONSHIP RECOGNISED BY LAW?

A same-sex relationship recognised by the 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 recognisable 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 before your relationship is recognised. In other situations, partners may not be entitled to certain rights unless they have lived together for a minimum amount of time.

When same-sex relationships are recognised under State law, the relationship is called a 'domestic partnership'. Under Commonwealth law, the relationship is called a 'de facto relationship'.

For some legal purposes, a formal declaration from a court is required before the relationship can be recognised. For most legal purposes, partners do not have to take any formal step to have the relationship recognised. Once the criteria are met, the relationship is recognised automatically. If there is doubt about whether two people were, on a given date, in a de facto relationship (or domestic partnership), a court can be asked to make a declaration on this.

IS A SAME-SEX RELATIONSHIP TREATED THE SAME AS AN OPPOSITE-SEX RELATIONSHIP?

Same-sex relationships are treated in the same way as opposite-sex relationships, except in the areas of marriage and reproductive technology.

As of 17 February 2017 same-sex couples are eligible to adopt under South Australian law provided they meet the relevant criteria.

Under the Marriage Act 1961 (Cth) it is not possible for same-sex couples to be legally married in Australia. Nor may an Australian court make a declaration of validity in relation to a same-sex marriage entered into overseas.

While all infertile women can obtain fertility treatment, fertile same sex partners cannot access reproductive technology in South Australia. In other words, lesbian women who are not medically infertile cannot access treatment for artificial insemination through a licensed clinic.

AUTOMATIC RECOGNITION OF SAME-SEX RELATIONSHIPS

- A same-sex relationship of any length will be recognised in some areas of law. There is no time requirement for recognition of the relationship for:
- agreements about property
- applying for legal aid
- pensions and benefits
- tax
- children
- child support
- restraining orders

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.

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PROPERTY DISPUTES

Property matters between same-sex partners are dealt with in the Family Law Courts under the same principles as for legally married partners. A former partner can also seek maintenance for themselves from the other partner. It is not true that if you live with someone they are automatically entitled to half of everything you own. Applications can only be made for the court to resolve a property or maintenance dispute if the relationship existed for at least two years, or one of the partners has made substantial financial or non-financial contributions to their property or as homemaker or parent, and serious injustice would result to that partner if an order was not made. A claim for property or maintenance must be made within 2 years after the relationship ends, unless there are special reasons. See our booklet *Family Law and You* for more information.

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

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. This can be done through the Family Law Courts. The person must be able to show they are concerned with the care, welfare and development of the child.

Former same-sex partners can access family mediation services to negotiate matters concerning children. Following mediation, you may decide a court order is not necessary, or you may agree to have parenting orders made by consent.

In determining whether to grant a parenting order, the court must put the interests of the child first. It will consider a variety of issues, including maintaining any established arrangements, the relationship between the applicant and the child, the wishes of the child and the child's safety.

CHILD SUPPORT

Since 1st July 2009, 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 co-parent.

For help in making an application for child support following the breakdown of a same-sex relationship, contact the Child Support Unit at the Legal Services Commission, tel: 8111 5576.

A SAME-SEX RELATIONSHIP MAY ALSO BE RECOGNISED WHEN:

- one partner dies without a will
- one partner wants to challenge a will made by a deceased partner
- there are compensation claims arising 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.

In these situations, the relationship will be considered a domestic partnership and the partners must have been together for three years, or for periods totalling three years over four years.

If the relationship was for less than three years, either of the former partners may seek a declaration from the court that they were domestic partners, on the basis that they were living together in a close personal relationship and that the interests of justice require that a declaration be made. This application is made under the Family Relationships Act 1975, which sets out what the court must consider when making its decision.