

Russell Kennedy Women's Network

De Facto Relationships

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback

Question 1:

A couple need to be living together for six months to qualify as being in a de facto relationship

True or false?

Question 2:

If we break up after being in a de facto relationship, my partner can claim 50% of my assets

True or false?

Definition of De Facto from a Family Law Perspective

Section 4AA of the *Family Law Act 1975 Cth* sets out the meaning of a “de facto relationship” as:

- (1) A person is in a ***de facto relationship*** with another person if:
 - (a) the persons are **not legally married** to each other;
and
 - (b) the persons are **not related by family** (e.g. siblings)
and
 - (c) having regard to all the **circumstances** of their relationship, they have a **relationship as a couple living together on a genuine domestic basis**

Definition of De Facto from a Family Law Perspective

The “circumstances” of whether a person is in a de facto relationship may include any or all of the following:

- (a) the duration of the relationship
- (b) nature and extent of their common residence
- (c) whether a sexual relationship exists
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them
- (e) the ownership, use and acquisition of their property
- (f) the degree of mutual commitment to a shared life
- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship
- (h) the care and support of children
- (i) the reputation and public aspects of the relationship

****Note a de facto relationship can include two persons of the same sex or two persons of different sexes and a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.****

Time Limits for Making an Application to the Family Court

Proceedings in the Family Court/Federal Circuit Court for a property settlement or spousal maintenance for de facto relationships must be made within **2 years of the relationship ending**

After this time, you would need to seek leave from the Court to commence proceedings and establish that you would suffer financial hardship if the Court did not entertain the application

Amy and Richard*

Facts:

- Amy and Richard have been in a relationship for less than two years
- Richard was in a relationship at the time he commenced a sexual relationship with Amy and living with his ex-partner
- Amy says they commenced a de facto relationship after their first sexual encounter and they disagree when their anniversary date is
- Richard says the relationship with Amy commenced officially after he broke up with his ex-girlfriend
- Amy has a child from a former relationship. Richard does not have any children. They have no children together
- A short time after breaking up with his ex-girlfriend, Richard invited Amy to move into his home. Amy does not pay Richard any rent for living there. She does however contribute to the cost of groceries each week
- After moving in, Richard undertook renovations to his home and an investment property
- Amy called various tradespeople for quotes for work and her family helped undertake some of the work at no cost
- Richard paid for the cost of all tradespeople he utilised and ultimately hired tradespeople he made enquiries with
- Amy and Richard have no joint assets and no joint bank accounts

Are Richard and Amy in a de facto relationship?

Kim and Matthew*

Facts:

- Kim and Matthew have been in a relationship for 10 years
- Matthew tells his friends that this is just a relationship of convenience but there is a sexual element to it
- Matthew owns four properties
- Kim owns one property
- Matthew and Kim do not intermingle their finances – they have no shared bank accounts or assets. Matthew pays for holidays for he and Kim to travel. Kim pays for some household expenses but Matthew pays more
- After 5 years, Kim moved into one of Matthew's investment properties with him. Prior to this, they frequently stayed at each other's home and they attended events together as a couple
- Matthew made some improvements to his home to build a workshop for Kim to run her business from home. Kim did not pay him any money for this and Matthew does not receive any financial benefit for the business being run from his home
- Matthew renovated his properties and paid for the cost of this. Kim assisted with interior decorating and manages Matthew's investment properties for him
- At some stage, Kim was diagnosed with cancer and Matthew assisted with her care
- Kim says she keeps the house spic and span and Matthew assists with some tasks. Matthew does not agree that Kim does more household duties

Are they in a de facto relationship?

Summary

- This is a very broad area of law
- The outcome of each case is entirely dependent upon the individual facts of the case

NSW Intestacy Provisions

Succession Act s104

“Spouse” definition includes someone who was a party to a **domestic partnership** immediately before death

*But what is a **domestic partnership**?*

Succession Act s105

a registered relationship or a **de facto relationship** that

- (a) has been in existence for **2 continuous years**; or
- (b) resulted in the birth of a **child**

and what then, is a **de facto relationship**? ...

NSW – Definition of De Facto

- Not defined in the Succession Act
- [Interpretation Act 1987 s21C](#)
- This definition applies to **both intestacy entitlements and Family Provision claims**
- A De Facto is an “Eligible Person” under s57(1)(b)

21C References to de facto partners and de facto relationships

- (1) Meaning of “**de facto partner**” For the purposes of any Act or instrument, a person is the de facto partner of another person (whether of the same sex or a different sex) if—
 - (a) the person is in a **registered relationship** or interstate registered relationship with the other person within the meaning of the Relationships Register Act 2010, or
 - (b) the person is in a **de facto relationship** with the other person
- (2) Meaning of “**de facto relationship**” For the purposes of any Act or instrument, a person is in a de facto relationship with another person if—
 - (a) they have a **relationship as a couple living together**, and
 - (b) they are not married to one another or related by family

A de facto relationship **can exist even if one of the persons is legally married to someone else** or in a registered relationship or interstate registered relationship with someone else

VIC – Domestic Partner

*Definition applies to both intestacy and estate challenges

Domestic partner

Section 3(1) of the *Administration and Probate Act 1958* (**APA**) defines a domestic partner of a person who dies to mean “a registered domestic partner or an unregistered domestic partner of that person”;

Unregistered domestic partner

“an unregistered domestic partner of someone who dies means a person (other than a registered domestic partner of the person), who although not married to the deceased, was:

- (a) Living with the person at the time of their death as a couple in a genuine domestic basis; and
- (b) Either:
 - (i) Had lived with that person continuously for 2 years immediately before the person’s death; or
 - (ii) Is the parent of a child of the person, being a child who was under 18 years of age at the time of the person’s death.

Factors - domestic relationship / relationship as a couple

S35(2) Relationships Act 2008 (VIC) “domestic relationship”

In determining whether a domestic relationship (other than a registered domestic relationship) exists or has existed, all the circumstances of the relationship are to be taken into account, including any one or more of the following matters as may be relevant in a particular case—

- (i) the degree of mutual commitment to a shared life
- (ii) the duration of the relationship
- (iii) the nature and extent of common residence
- (iv) whether or not a sexual relationship exists
- (v) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties
- (vi) the ownership, use and acquisition of property
- (vii) the care and support of children
- (viii) the reputation and public aspects of the relationship

S21C(3) Interpretations Act 1987 (NSW) “relationship as a couple”

In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case—

- a) the duration of the relationship
- b) the nature and extent of their common residence
- c) whether a sexual relationship exists
- d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them
- e) the ownership, use and acquisition of property
- f) the degree of mutual commitment to a shared life
- g) the care and support of children
- h) the performance of household duties
- i) the reputation and public aspects of the relationship

No particular finding in relation to any of those matters is necessary in determining whether 2 persons have a relationship as a couple

How is the Legislation Applied?

- All the circumstances of the relationship are to be taken into account as a whole
- No individual factors or matters are specifically required
- Holistic approach with a consideration of the individual circumstances

“...it is not essential that there be entire harmony, entire fidelity, entire satisfaction with the relationship, or even entire commitment; the degree of commitment may be high even though there are qualifications.

Dissatisfactions, infidelities, expressed complaints and grievances, and less than entire commitment are often found in personal relationships, including marriages, and are not inconsistent with a relationship of two parties having a relationship as a couple living together, but not married to one another.”

Hallen AsJ, Marando v Rizzo [2012] NSWSC 739 at [52]

“Living together”

In *Re Estate of Sigg*,² Pagone J stated he agreed with the observations of Cummins J in *Dow v Hoskins & Ors* and added that:

“... [I]t would be wrong to assume that the test of whether people are living in a genuine domestic relationship is to be judged against a model of a couple living together full-time, sharing fully domestic, financial and other responsibilities”

- Question of fact that depends on length and circumstances of the relationship
- Do not have to live together on a full-time basis eg. ‘staying over at each other’s house’ may qualify
- Can have more than one ‘home’
- The determination of whether a person was living with the deceased should not be construed on *‘narrow, formal, pedantic or merely geographical criteria but should be considered taking into account the human reality of the personal, emotional and cultural complex’* (*Dow v Hoskins 2003*)
- Re Gleeson
- Poll – Were they in a domestic relationship?

Did a De Facto Relationship / Domestic Partnership Exist?

- Shirley died **intestate**, Marco claimed to be her **de facto**.
- **Marco** was with Shirley's daughter **Gaye-Marie** for 20 years before her early death.
- Gaye-Marie and Marco lived in a **self contained apartment downstairs in Shirley's property**. Marco also had **another property** in the country
- Marco and Shirley **became close after Gaye-Marie's death**. Marco said that they then became a couple, the **relationship lasting 9 years**.
- Marco **moved upstairs** into Shirley's portion of the house although in a separate bedroom.
- Marco said there was a **sexual relationship** between him and Shirley. Some third parties testified that they **had seen them be affectionate** towards each other while others testified that they **hadn't seen anything** like this.
- They kept **separate bank accounts**, Marco didn't pay rent but **contributed to household expenses**. Shirley bought Marco **gifts**. Marco **paid for Shirley's funeral**.
- Marco kept his country property and **split his time between the two residences**, keeping his belongings at both. Marco and Shirley spoke on the phone regularly when apart.
- Marco and Shirley often **described each other as son-in-law and daughter-in-law** and rarely as a spouse/partner. Shirley **denied they were in a relationship** to many people and asked Marco to deny it as well.
- Marco and Shirley **shared domestic duties, socialised** and holidayed together and cared for each other when sick.

Relationships Act & Interpretations Act– Other Factors

- ***Liang v Broadfoot 2020***
 - Poll – Do you think there was a domestic relationship?
- ***Liu v Muraca***
 - Poll – Do you think there was a domestic relationship?

Superannuation

Super death benefits can only be paid to a superannuation industry dependent (SIS) either in accordance with a binding death benefit nomination (BDBN) or in accordance with the trustee's discretion to a:

- Spouse/domestic partner
- Child
- Anyone who the person has an interdependency relationship with
- Legal Personal Representative (ie Estate)

The spouse of a person includes:

- another person who is legally married to the person;
- another person (whether of the same sex or a different sex) with whom the person is in a prescribed kind of relationship that is registered under a State or Territory law prescribed for the purposes of the *Acts Interpretation Act 1901* (Cth); or
- another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

Key Lessons

- Grey area
- Get advice early
- How to protect yourself from a family law perspective
 - Binding Financial Agreement (BFA)
 - Consider registering your relationship
 - Update your records
- How to protect yourself from an estate planning perspective
 - Will
 - BDBN
 - Consider registering your relationship

Disclaimer

The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed please contact the presenter directly.

Contacts



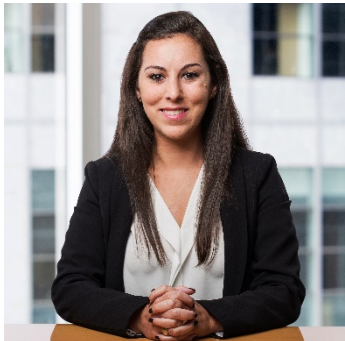
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