



Are you in a qualifying de facto relationship?

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Under the Property (Relationships) Act 1976 (Act), when a couple have been in a de facto relationship for three years or more, it is presumed that their relationship property will be divided equally between them[1]. That is, each partner of the relationship will be entitled to a half share of the total relationship property pool.

Relationship property is defined in section 2 of the Act, and includes the family home whenever acquired (and regardless of who owns the property), family chattels whenever acquired, and property acquired during the relationship. More specifically, it may include your income, KiwiSaver accounts, vehicles, bank

accounts (regardless of whose name is on the account), shares in a Company, interests in a Trust, or a house or investment property (even if you are the only person recorded on the property title).

The classification of property and your respective entitlements to it will depend on when your de facto relationship commenced.

Understanding whether your relationship qualifies as a de facto relationship is key in determining your rights and obligations under the law. Section 2D of the Act sets out that a qualifying de facto relationship exists when two people (who are not married or in a civil union) are “living together as a couple”.

That said, two people in a relationship can be considered as living together as a couple without physically living in the same residence. To determine whether parties are living together as a couple, a Court will have regard to all the circumstances of the relationship. The Act sets out the following non-exhaustive list of factors that a Court will consider when determining whether a de facto relationship exists:

2D

- the duration of the relationship:
- the nature and extent of common residence:
- whether or not a sexual relationship exists:
- the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
- the ownership, use, and acquisition of property:
- the degree of mutual commitment to a shared life:
- the care and support of children:
- the performance of household duties:
- the reputation and public aspects of the relationship.

As above, this list is non-exhaustive and the Court can have regard to any other relevant factors in determining whether the couple is de facto or not. If sufficient

pieces of evidence exist which, when viewed together and through the application of common sense and proper reasoning, would satisfy a Judge that the relationship is a de facto relationship, then the statutory test is met.[2]

Generally, the starting point is whether the couple have lived together in the same home for three or more years. However, a de facto relationship may commence even before the couple share a home.

The nature and extent of the relationship is relevant, and generally speaking the relationship should resemble a marriage or civil union in nature. Sharing a common residence, combining financial resources, and supporting each other emotionally are all indicators of a de facto relationship. For example, staying over-night at each other's houses and/or spending money on each other for the benefit of the relationship (i.e. taking trips and overseas holidays together), may be sufficient to establish a de facto relationship.

Even if you have kept your finances relatively separate, that will not necessarily mean that a de facto relationship has not yet commenced. The Court has found that a couple who had no joint bank accounts and kept all of their income and finances separate was not a reliable indicator of the nature of the relationship, on the basis that it has become more normal nowadays for couples to arrange their finances separately.[3]

A mutual commitment to each other can be inferred from things such as socialising together at public events as partners. The existence of a mutual commitment in the early stages of a relationship alone may not be enough to establish a de facto relationship, but this along with some of the other factors in section 2D present, may be. Further the public recognition aspect can be demonstrated through joint social activities, shared social circles, and the perception of family and friends about your relationship.

The Family Court has found that a de facto relationship did exist where a couple were in a sexual relationship, often visited each other's homes and had gradually began to mix their finances[4]. Although the couple did not begin living together in the same home until September 2004, the Court held that they began "living together as a couple" more than a year beforehand, in around June 2003.

If you and your partner have children together, it strengthens the case for a qualifying de facto relationship. The care and support provided by each parent for the children are important considerations. The law recognises the significance of protecting the interests of children in de facto relationships and whether or not a couple have children together will be highly relevant.

Taking into account the above factors, it is important to be mindful that you may have commenced a de facto relationship with your partner even before you are physically living in the same house together. As a starting point, after three years of being in a qualifying de facto relationship, you and your partner will each be entitled to a 50/50 share in the total relationship property pool (subject to further claims available).

Determining whether your relationship qualifies as a de facto relationship is essential to understanding your legal entitlements. However, the law surrounding de facto relationships can be complex, and each case is unique.

In the event of separation, each person of the relationship should obtain independent legal advice. Generally, your agreements will be recorded in a formal Separation Agreement pursuant to section 21A of the Act, to achieve a full and final settlement between you. A formal Separation Agreement is the only way to achieve a full and final settlement between two people in respect of the division of their relationship property (other than by Court Orders).

On the other hand, if you have not separated, but would like some assurances around the property you consider to be your own, there are avenues for protecting assets from claim by partner in the event of separation or death (typically through a Contracting Out Agreement pursuant to section 21 of the Act, sometimes referred to as a 'pre-nup'). Whether or not you are already in a qualifying de facto relationship or marriage will be relevant to the advice you require.

It is advisable to seek legal advice if you are uncertain about the legal status of your relationship. We have a very experienced team of family lawyers who would be happy to assist you with legal advice. If you would like further information, please feel free to contact us.

[1] In some instances, the Act may still apply to relationships of short duration

(meaning of less than three years), where there is a child of the relationship, or, where one party has made a substantial contribution to the relationship, or, if the Court is satisfied that failure to make an order to divide property would result in serious injustice.

[2] *Scragg v Scott* (2006) 25 FRNZ 942, [2006] NZFLR 1076 (HC) at [64].

[3] *Watene v Lord* [2017] NZHC 388, (2017) 31 FRNZ 241 at [31].

[4] *A v S* FC Dunedin FAM-2006-045-58, 26 November 2007