
RELATIONSHIP PROPERTY (MARRIED OR DE FACTO) ON COMMENCEMENT OF OR DURING A RELATIONSHIP

These notes are a very basic guideline on the main issues many people encounter when considering what needs to be included in a Relationship Property Agreement. They are not tailored to your own individual situation which needs to be looked at in detail before advice can be given.

WHAT CAN BE CHANGED BY AGREEMENT

You can agree to change virtually any of the rules set out in the Property (Relationships) Act 1976 for the division of property. This needs to be done in accordance with the formalities set out in the Act. That means that the agreement needs to be in writing and both parties need to receive independent legal advice. It is not possible to complete a binding Relationship Property Agreement in any other way.

These notes set out the general basis for division of relationship property if no agreement has been signed. This is intended to enable you to consider what needs to be changed by agreement between you and what you are happy to leave to be dealt with under the Act. As the Act is subject to future amendment by Parliament many people prefer to record even those agreements that are currently the same as would be found under the Act.

"RELATIONSHIP PROPERTY" OR "SEPARATE PROPERTY"

The Act defines Relationship Property by listing certain types of property and bringing in other property depending on how it is used by you as a couple or the circumstances in which it was acquired. Separate Property is everything else.

Generally on a division of property you share Relationship Property equally but do not share Separate Property.

How to establish whether something falls within the definition of Relationship Property or Separate Property is sometimes simple and sometimes extremely complex. Determining the proportion in which you share Relationship Property or whether you have any claim on Separate Property is not always straight forward. The purpose of these notes is just to give you an overview of the basic principles without going into complexities.

Family Home and Chattels

The Property (Relationships) Act provides that the family home and chattels are Relationship Property which, if a claim is made, are split equally between the relationship partners. There are some exceptions to this - for example, if your relationship is of short duration or if either party makes a hugely greater contribution to the relationship than the other.

Family chattels include your household furniture and artwork, your car, boat, caravan, and any other item that is generally used for family purposes. If you have a family bach the same rules tend to apply. Trade tools or other items in the family home used principally for business purposes are not automatically treated as Relationship Property.

If you both had a house when your relationship started and one of you was able to sell your house and keep the proceeds for separate investment, then an adjustment is available to offset

what would otherwise be quite an unfair situation. If there was no family home at all the court can make an order to compensate for that lack against other Relationship Property.

If the family home is in the sole name of just one of you then a notice of claim may be lodged by the other partner against the title. That would prevent the registered owner dealing with the home without consulting the other partner.

Life Insurance and Superannuation

The rule is now that the value of life insurance or superannuation that existed before the relationship started is the Separate Property of the legal owner of the policy. The value of life insurance and superannuation that is built up during the relationship is Relationship Property to be divided equally between you.

If the value to be built up during the relationship is to be shared but the part accrued before that kept separate it is advisable to have the policy valued at the commencement of the relationship. Your insurance company will usually be able to send you a letter outlining the value if you contact them and ask for it. For complex or high value policies a valuation is required from a professional valuer (at a cost of several hundred dollars at least).

Inheritances and Gifts

Inheritances, gifts and trust property received from third parties are usually the Separate Property of the person who received them unless they mix them in with other Relationship Property and it is unreasonable or impracticable to treat them as separate. So if you receive money by gift or inheritance and use it to pay off the mortgage on your house then you may lose that as Separate Property and it might become part of the Relationship Property which is to be divided between you.

If you put any inheritance or gift into a trust which then lends the money to you and your partner to pay off your mortgage then that is probably still recoverable by the trust as a debt and would not have become Relationship Property.

If you have made gifts between you, such as engagement rings, those are generally the Separate Property of the person receiving them unless they have been used for your mutual benefit.

Taonga, and Family Heirlooms

Taonga (treasures) and family heirlooms may well be the Separate Property of the person who brought them into the relationship. The rules are complex in this regard and each asset would need to be looked at individually.

Heirlooms almost certainly need to come through several generations. Taonga may be something that has been acquired fairly recently but clearly needs to be of exceptional character to qualify as Taonga.

Businesses and Separate Investments

If one of you owned a business before your relationship began then it is possible that it has continued as Separate Property. However, if the other party has made any contribution to that business, or in some cases a contribution to the relationship that enabled you to make a greater contribution yourself to the business, then it is possible they will have a claim on it.

Having a claim on the business does not mean that they are entitled to half of it. It means that they may have a claim on anything from a very small amount up to a half in some circumstances. Their claim may be limited to just the increase in value of the business from the time of their first

contribution. Again, it is a case of looking very carefully at the detail of the history and amounts involved before any determination could be made on the value of any such claim.

The same rules apply to other separate investments such as rental property or shares.

Salary or Wages

Earnings from your personal endeavour, such as wages or salary, is Relationship Property. So bank balances and share investments or rental property bought out of salary or wages earned after your relationship began have actually been acquired out of Relationship Property. And if any of your salary or wages have been spent on your separate business or other Separate Property then it is possible that your partner will have a claim on the business or other Separate Property because they have allowed their Relationship Property to be contributed towards it.

Debts

Debts can either be separate debt or a relationship debt. Debts that have been incurred for family purposes are relationship debts which need to be paid by you both equally. Debts that have been incurred for the individual purposes of one of the parties, such as student loans in most cases, are the separate debt of that particular party.

Bank Accounts

It is important to note that the mortgage over your home or other asset usually secures all lending to either of you, whether in your joint names or separately. Either of you can usually increase any overdraft facilities or revolving credit facilities and that would be covered by the joint mortgage security. Some people like to agree that they won't do that.

Guarantees

As part of any future separation process is important to cancel any guarantees either of you have given in favour of the other. This needs to be carefully managed because a sudden withdrawal of a guarantee for seasonal or business overdraft purposes could stop finance needed for a business which is supplying the family with money. If you know that there is likely to be a need for guarantees in the future you may want to agree the basis on which they would be given.

OTHER FACTORS

Relationship of short duration

The Property (Relationships) Act 1976 rules about the division of property apply to marriages from the date of marriage but tend not to apply for relationships of short duration, that is, usually less than three years. Any de facto relationship period that occurred before you married is counted as part of the length of the marriage.

The rules don't usually apply to de facto couples until they have been together for three years although if a child is living with you as part of the family, even someone else's child, that can bring application of the rules forward.

In calculating the length of any marriage or de facto relationship any period of reconciliation up to three months in total can usually be discounted.

It is important to note the dates as accurately as possible as to when the relationship started, when you married, and any periods of separation or reconciliation.

Greater Contribution or Special Circumstances

If either partner is likely to make a clearly greater contribution to the relationship or there is some other special factor that would make the normal sharing provisions seriously unjust, we need to know that because if a claim is made that can affect the division of property by the Court and therefore needs to be taken into account.

Unequal future living standards or income

If the future standard of living or income of the two partners is likely to be significantly different because of the division of functions within the relationship we need to know that because there may be a lump sum compensation claimable if you separate in the future. You may want to specify in advance how any compensation like that is to be calculated.

HOW TO ESTABLISH IF A DE FACTO RELATIONSHIP EXISTS

The Property (Relationships) Act 1976 tells us how to establish whether a de facto relationship exists. The people involved have to be (i) 2 people of either sex who (ii) live together as a couple and (iii) who are both over the age of 18 years.

The difficulty comes in determining whether people are "living together as a couple". The Act provides that all the circumstances of the relationship are to be taken into account, including (so other matters may also be taken into account) any of the following matters which are relevant in a particular case:

- The duration of the relationship
- The nature and extent of common residence (i.e. do you reside together all the time or part time or not at all?)
- Whether or not a sexual relationship exists
- The degree of financial dependence or interdependence, and any arrangements for financial support between them
- The ownership, use and acquisition of property (e.g. do you share use of cars, furniture, a house, a bach?)
- The degree of mutual commitment to a shared life (e.g. do you always holiday together?)
- The care and support of children (any children, not necessarily your own)
- The performance of household duties
- The reputation and public aspects of the relationship (e.g. do your friends, relatives or workmates see you "as a couple").
- None of the above factors or any combination is necessary (so it/they can be absent) and the court can attach any weight they consider appropriate to any of the factors.

You will appreciate that it is often impossible to say whether a de facto relationship exists. The law is also so new that we do not have the benefit of much case law setting out more detailed guidelines from the judges. In those circumstances we suggest that a conservative approach is taken and when in doubt take steps as though a de facto relationship exists.

You can enter into a Contracting Out Agreement under the Act in contemplation of entering into a marriage or de facto relationship. Our advice is to enter into an agreement earlier rather than later, and to discuss with us other asset protection options in the early stages of building up your assets.

THE ACT AND CONTRACTING OUT

The Act applies from the time of a claim

You should be aware that the Property (Relationships) Act does not affect your property rights until a claim under the Act is made. So before separation you are legally free to deal with property in your own name just as though your partner has no claim on it. The court may make a compensatory award to your partner if they lose the benefit of property because of anything you have done, such as putting it into a trust after the relationship started.

Who the agreement affects

Clearly the agreement binds the parties to it. What many people don't consider is that it also binds their personal representatives (attorneys and trustees) as well as the people who stand to inherit their property if they die. This means that an agreement could be useful to protect the inheritance of your children from a prior relationship, or to protect the use of your home for a second spouse should you predecease them.

Review

We recommend that provision is made to review any written Relationship Property Agreement regularly, usually about every 5 years, or if any significant alteration occurs in the circumstances of the parties. That is to ensure that the agreement remains fair as between the parties and the other people it may affect.

WRITTEN AGREEMENT & COST

The need for a written agreement and independent legal advice

Many people with significant separate property assets do get a written Relationship Property Agreement completed before marriage or within the first 2 or so years of a relationship, or they take other asset protection steps, such as setting up a trust.

Having a written agreement does provide you with a very good level of security for the particular relationship it relates to because once it has been signed with independent legal advice given to both sides then it is very hard to have it forcibly amended or put aside by the Court. This leaves both parties free to deal with their assets knowing exactly what their position is and that they will not have to re-litigate their agreement in the future.

In the absence of a written agreement either side can make claims on the other for up to a year after the date of dissolution of marriage and for several years after the end of a de facto relationship.

There is also a risk with a verbal agreement in the event of anything happening to your partner (accident, death, or illness) that would mean that knowledge of your verbal agreement was lost except to you. The personal representatives of your partner (trustees or attorneys) might not accept your word on what the agreement was and might have a very different approach to that taken by your partner. Those representatives may well bring claims that your partner might not have brought or might have agreed not to bring.

Costs

When calculating the expense of a Relationship Property Agreement you need to allow for the expense of two lawyers, one of whom will draft the agreement on behalf of one party and the

other who will review it on behalf of the other. We can provide a general estimate of the cost on application.

We do our best to keep expenses down for you by advising you of the information that we need and encouraging you to obtain that yourselves. Both lawyers will need to be given all the information about your family and assets so that they can provide advice before certifying the agreement. That is a requirement set out in statute and we have no power to alter it. If you provide the information promptly and fully it will help to reduce costs.

We also encourage you to reach agreement on the important points yourselves so that we are not involved in complicated and expensive negotiations. The main cause of expensive agreements are disagreements between the parties which leads to our spending a lot more time on completing the agreement (this does happen even in the early stages of a relationship, particularly where there is an inequality of assets or one party has children from a prior relationship and the other does not). Unfortunately it is not within our control whether things go smoothly or not and that means that we can only give estimates of cost and not fixed quotes. Obviously, a complex asset or debt situation will increase the costs somewhat.

We find it is often possible to keep the costs down by getting a draft agreement to a point where you are both happy with it and only then having it taken to another solicitor for your partner to be given independent advice. This is only appropriate where your respective interests in your property are reasonably clear and / or you have reached clear and fair agreement on the status and application of property.

How can you prepare for the legalities?

Do not delay coming to see us in order to get this information but do gather as much of it together as you can before your first appointment.

In due course we will need:

- The full names of you, your partner, and your children including any middle names.
- The residential and postal address (if different) of you and your partner including place and address of work and contact phone numbers.
- Dates of birth of children, the date of marriage or approximate date of the commencement of your de facto relationship, and the approximate dates of any periods of separation that may have occurred.
- Copies of loan statements or investment statements, insurance and superannuation policy statements etc which have reference numbers can be useful.
- A note of car make and model etc.
- Any particular items of furniture each of you wish to retain as heirlooms or taonga.
- A brief history of how you acquired your major assets.

This is the basic starting information we need. Once we have this outline there may be further information required clarifying such things as the source of assets or debts and their value at the start of the relationship.

Please feel free to make an appointment to discuss your asset protection needs at any time. We look forward to working with you to manage your risks and plan solutions.