



## PROPERTY (RELATIONSHIPS) ACT 1976

### FEATURES OF THE NEW ACT

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#### **1. De Facto & Same Sex Relationships:**

- (a) S2D(i) of the Act defines a de facto relationship. For the purposes of this Act, a de facto relationship is a relationship between two persons (whether a man and a woman, or a man and a man, or a woman and a woman) -
  - (i) Who are both aged 18 years or older. and
  - (ii) Who live together as a couple. and
  - (iii) Who are not married to one another.
- (b) A de facto relationship, therefore, cannot commence until such time as both parties have attained the age of 18 years, eg. if a couple begin living together at 16 and live together for four years and separate at age 20, then as far as the Act is concerned they have only lived together for two years. They will not be covered by the Act.
- (c) In determining whether a couple "live together" Section 2D(ii) the Court must take into account the following factors:
  - (i) The duration of the relationship.
  - (ii) The nature and extent of common residence.
  - (iii) Whether or not a sexual relationship exists.
  - (iv) The degree of financial dependence or inter-dependence and any arrangements for financial support, between the parties.
  - (v) The ownership, use and acquisition of property.
  - (vi) The degree of mutual commitment to a shared life.
  - (vii) The care and support of children.
  - (viii) The performance of household duties.
  - (ix) The reputation and public aspects of the relationship.
- (d) Unlike a marriage, a de facto relationships lasting less than three years will normally fall outside the scope of the Act and less able to be brought within the scheme of S2E and 14A.

- (e) S14A(ii) allows the Court to make an order for division of property in a relationship of short duration if:
  - (i) That there is a child of the de facto relationship. or
  - (ii) That the Applicant has made a substantial contribution to the relationship. and
  - (iii) The Court is satisfied that failure to make the order would result in serious injustice.
- (f) Therefore, you should note the rules for a de facto relationship of short duration and a marriage of short duration are treated differently.
- (g) If there is a child of the de facto relationship, then it is still possible to ask the Court to use its discretion in S14A(ii).

## 2. **Relationship Property**

- (a) **Relationship property includes:**
  - (i) The family home - whether acquired before or during the de facto relationship or marriage.
  - (ii) Family chattels - whether acquired before or during the de facto relationship or marriage.
  - (iii) All property jointly owned.
  - (iv) Property owned immediately before the relationship began, if it was acquired in contemplation of the relationship and it was intended for the common use or the common benefit of the partners.
  - (v) All property acquired after the relationship began.
  - (vi) Increases or gains in the relationship property.
  - (vii) Increases in the value of one partner's separate property, if the increase is attributable to:
    - the use of relationship property. or
    - the direct or indirect actions of the other spouse or partner.
  - (viii) Section 8(i)(g) (life insurance) and Section 8(i)(i) (superannuation) are a significant change from the old Act. Now only the contributions of these assets made during the course of the relationship and/or marriage are taken as relationship property.

If contributions were made prior to the commencement of the relationship and/or marriage, or after the cessation of the relationship and/or marriage, then they will remain that person's separate property. Professional valuation and actuarial advice will now be necessary in apportioning the value of these assets.

- (b) **Common use and benefit/common use or benefit.** Section 9(d) in the old Act dealt with property acquired in contemplation of the marriage and Section 8(ee) of the old Act dealt with property acquired out of separate property which could be matrimonial property if it was shown it was used for the "*common use and common benefit*".

The test in the new Act for these items is you now only have to show "*common use or common benefit*".

eg. In *Campbell* a fish and chip shop was found to be the separate property of the husband because the wife had not used it, although it was clear that the whole family had benefited from the business. The fish and chip shop under the old Act in *Campbell* was held to be separate property. Under the new Act, it would now be "*relationship property*".

- (c) **Heirlooms & Taonga** - these items are now taken out of the definition of family chattels and are to be treated as separate property.

- (d) **Benefits from Trusts:**

S10(i)(a)(iv) state that any benefits from Trusts settled by a third person are caught within the definition of relationship property.

This raises an issue as to whether the interest of a discretionary beneficiary comes within this definition. This may be an area which will require some judicial interpretation.

- (e) **Increase in Value of Separate Property** - under S9(ii) you only needed to show a minimal contribution to the increased value and all the increase was treated as matrimonial property.

S9A(ii) now states that the share of the claimant partner to relationship property is to be determined in accordance with the contribution made. This, therefore, sees a significant difference in terms of treating increase/gains to separate property. A minimal contribution could result in receiving half of the total increase under the old Act. Now only the increased value as a result of that spouse's contribution will be treated as relationship property.

3. **Rules for Dividing Property:**

- (a) Once property has been classified as relationship property, there is to be a presumption of a 50/50 split unless *“extraordinary circumstances make this repugnant to justice”*.
- (b) As opposed to the old Act where family home/chattels were split 50/50 and the balance of matrimonial property was split in accordance with the old Section 14, (ie contribution to the marriage partnership)

4. **Economic Disparity:**

- (a) This will become the most controversial part of the new Act. S15 enables the Court to adjust the shares in relationship property for the purpose of compensating the disadvantaged party.
- (b) S15A is more specific and operates where the advantaged party's actions during cohabitation have enhanced the value of that party's separate property.
- (c) S15 reads as follows:
  - (i) This Section applies if, on the division of relationship property, the Court is satisfied that, after the marriage or de facto relationship ends, the income and living standards of one spouse or de facto partner (Party B) are likely to be significantly higher than the other spouse or de facto partner (Party A) because of the effects of the division of functions within the marriage or de facto relationship while the parties were living together.
  - (ii) In determining whether or not to make an order under the Section, the Court may have regard to -
    - a. The likely earning capacity of each spouse or de facto partner.
    - b. The responsibilities of each spouse or de facto partner for the ongoing daily care of any minor or dependant child of the marriage or, as the case requires, any minor or dependant children of the de facto relationship.
    - c. Any other relevant circumstances.
  - (iii) If this Section applies, the Court, if it considers it just may, for the purpose of compensating Party A, -
    - a. Order Party B to pay Party A a sum of money out of Party B's relationship property.

- b. Order Party B to transfer to Party A any other property out of Party B's relationship property.
- (iv) This Section overrides Sections 11 to 14A [the usual division rules].
- (d) Section 15A is drafted in much the same way except that, under sub-Section (1), it must be shown, in addition to the different incomes and living standards:

*That any increase in the value of Party B's separate property was attributable, wholly or in part, and whether directly or indirectly to the action of Party B while the spouses or de facto partner were living together.*
- (e) To summarise:
  - (i) The powers do not apply on death.
  - (ii) Must show the other Party's income and living standards are "*significantly higher!*"
  - (iii) Causation - the disparity must be a direct result of the effects of the divisions of functions during the relationship/marriage (see S63 & 64 Family Proceedings Act 198).
  - (iv) The Court still has an overall discretion in sub-Section 2.
- (f) S15A works much in the same way but allows the Court to use the discretion where the division of functions in the relationship or marriage have resulted in the other party's separate property increasing the value.

5. **Contracting Out of the Act:**

- (a) The Act effects some important changes to the contracting out provisions. The changes appear in new Sections 21 - 21T which form Part 6 of the Act.
- (b) The Law has been amended to make it harder to challenge an agreement by changing the ground on which an agreement can be set aside. The new test determines that an agreement may be set aside by the Court "*of having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice*".
- (c) Please note an important change brought about in the new Act is that of the inclusion of a de facto relationship that immediately precedes the marriage as part of the marriage (see S2B):

- (i) Please note that agreements made by de facto partners prior to 1 August 2001 cannot be challenged under the Act. Those agreements will be enforceable but the normal laws as to contract will prevail. This may allow a party to escape the enforcement of the contract if they could show duress or mistake. This may be insufficient under the Act to constitute "*serious injustice*".
- (ii) All agreements made under Section 21 of the old Act will be tested under the new Act, i.e. "*Serious injustice*" test.
- (iii) All agreements made after 1 August 2001 where the relationship ends after 1 February 2002 fall under the new Act.

6. **Trusts and Companies:**

- (a) The normal remedies to attach Trusts/Companies are unaffected by the Act.
- (b) See Sections 44A - 44F. These Sections represent a major attempt to overcome the previous difficulties. In contrast to the phrase "*in order to defeat*" a party's claim or rights under the Act, the key phrase in the new Sections is "*has the effect of defeating the claims or rights*" of the other party.

The focus, therefore, shifts away from the purpose of disposing of property to a Trust or Company to the result of that disposition.

- (c) A Family Court Judge has no power under the new Act to remove trustees or directors. A separate application to the High Court under the Trustee Act/Companies Act would still be necessary.
- (d) The Trust does not need to be set up during the marriage or relationship. It could have existed before the commencement of the relationship and/or marriage.
- (e) For the Court to have power under Section 44C the following conditions must be satisfied:
  - (i) There must have been a disposition of relationship property to a Trust.
  - (ii) It does not matter which spouse or partner has disposed of the property nor whether both disposed of the property.
  - (iii) The disposition must have taken place after the marriage or de facto relationship began. This appears to include post separation.



- (iv) The effect of the disposition must be to defeat the claim or rights of a spouse or partner.
- (f) An order under Section 44C is discretionary. In deciding whether to make an order under this Section, the Court must be sure that it is *“just”* to do so. In considering the question of justice, the Court will have to assess each case on its merits, but it must have regard to the following matters (see S44C(4):
  - (i) The value of the relationship property disposed of to the Trust.
  - (ii) The value of the relationship property available for division.
  - (iii) The date or dates on which relationship property was disposed of to a Trust.
  - (iv) Whether the Trust gave consideration for the property, and if so, the amount of consideration.
  - (v) Whether the spouses or de facto partners or either of them or any child of the marriage or child of the de facto relationship, or has been a beneficiary of the Trust. and
  - (vi) Any other relevant matter.
- (g) The two principal orders that the Court can make are:
  - (i) To order the payment of the sum of money. or
  - (ii) The transfer of an item of property.
- (h) You should note:
  - (i) The sum of money and the property may come from the pool of either relationship or separate property.
  - (ii) It follows that, where this is little relationship property, the other party's own financial resources can be tapped.
  - (iii) These kinds of orders will not be effective where the other party has little or no property of any kind.
  - (iv) The Court cannot order a sum of money to be raised for instance by borrowing.
  - (v) The Court may require the trustees to make payments from the Trust's income (but not from its capital). This order cannot be



made if a third party (such as one of the child beneficiaries) has altered their position relying on the receipt of income from the Trust if such an order would be unjust.

- (i) Most of the points already made in respect of the Trusts also apply to the dispositions of relationship property to companies.

7. **Creditors and Debtors:**

- (a) The term "*personal debt*" remains but the term "*non personal debt*" disappears in favour of "*relationship debt*".
- (b) The big change is to Section 20(1)(c) which used to refer to debts incurred for the purpose of acquiring, improving or repairing the home or chattels. The language now reads "*for the purpose of acquiring, improving or maintaining relationship property*".

8. **Death:**

Another important change is that upon death a married or de facto partner can make a claim against your estate. This may have an impact upon the amount of your estate available for your children.

We advise very strongly that unless you are absolutely certain that all of your assets are to be split equally, that you should contact us to prepare an agreement pursuant to S21 of the Act which records any other intention.

9. **Summary:**

Please note that the enclosed booklet is for information purposes only and is not to be relied upon. It constitutes a brief plain English summary of the contents of the Act. Before relying on any of the information set out herein, it is important you consult a solicitor first.

**IF YOU REQUIRE FURTHER ADVICE CONSULT  
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