

# Relationships and Asset Protection

The Property (Relationships) Act 1976 ("Act") applies to all domestic relationships between two adults. The Act applies to marriages, civil unions and de facto relationships.

The Act sets out the formula as to how property is to be divided. Property is classified as either "relationship property" or "separate property". This classification determines whether property will be shared and in what proportions.

## Relationship Property

Generally where couples have been living together for three years or more, all property acquired during their relationship will be deemed "relationship property" and divided equally.

Relationship property includes:

- the family home (whenever acquired);
- the family chattels (whenever acquired);
- common or jointly owned property;
- property purchased in contemplation of the relationship for the use or benefit of the family;
- income earned or assets acquired during the relationship.

## Separate Property

Generally separate property includes:

- An inheritance or gifts, unless they have become intermingled or are used for the "common use and benefit" of the family, or any assets acquired from the inheritance are placed in joint names.
- Property owned prior to the relationship, unless it can be shown that the property has been used jointly or "intermingled" with other property.

As a relationship progresses the distinction between separate property and relationship can become murky. Separate property may become relationship property if it is used by the family. For example, if a beach home is bought from an inheritance (separate property) and is used by the family the beach home may not remain separate property.

Commonly an inheritance will be used to pay off the mortgage on the family home. If the relationship ends the recipient of the inheritance may not be able to claim the inheritance back as separate property, it has been used for family purposes so has become relationship property.

A partner may be able to claim a share in the increase in value of separate property if that increase can be attributed to the actions of the other partner. For example, one partner is at home looking after the children, freeing up the other partner to work in a business which is separate property. The stay at home partner has contributed to the value of the other partner's business and may be able to claim a share in the increase in value.

## Exceptions to Equal Sharing

There are three exceptions to the equal sharing principle:

**Extraordinary circumstances:** If there are "extraordinary circumstances" rendering equal sharing "repugnant to justice" the Courts will make an exception to the equal sharing principle. This exception is difficult to prove as the Court has interpreted this provision stringently.

**Short relationships:** If the parties' relationship is less than three years (including any de facto period) the individual contributions of each party to the relationship are compared and the assets will be divided in accordance with their contributions. This may change if there is a child of the relationship, or the applicant has made a substantial contribution to the relationship, and failure to make an order in either of these cases would result in serious injustice.

**Economic disparity:** The Act seeks to address the issue of economic disadvantage suffered by a non-career partner when a relationship breaks down. The Court looks at the relative earning capacity of each party and whether any disparity is due to the roles each party assumed in the relationship. An example of this would be where one goes out to work and the other looks after the children and forgoes career opportunities. However, in light of the decision in the **X v X** case the compensation received after a Court battle may not justify the expense of pursuing a claim.

## How can you avoid equal sharing?

Couples can make their own rules about the ownership of their property. They can decide how they want to divide their property instead of being bound by the rules in the Act. This is known as "contracting out". Married, civil union and de facto couples can enter into contracting out agreements setting out who owns the property and how the property is to be divided should the relationship come to an end.

## What can contracting out agreements include?

Contracting out agreements can deal with all the couple's property, or just one asset. The agreement can set out what assets will be shared and in what percentages. It can also detail what assets are not to be shared and how assets are to be valued if the relationship ends. An agreement can even be made about future property – such as future income or capital gains. A contracting out agreement can be made to apply during the parties' lifetimes and/or after the death of one party or both.

## Do I need an agreement?

Agreements are recommended if you fall into one of the following categories:

- It is a second marriage or relationship for one or other partner, particularly where there are children from a previous relationship.
- Where both parties have their own home at the commencement of the relationship.
- In situations where one party has significantly more assets than the other.
- Where parties have separated.

A couple may also want to make an agreement for tax purposes, creditor protection and estate planning.

To be valid, relationship property agreements must be signed and witnessed and each party must receive advice from their solicitor. The solicitors must certify they have given that advice. This means that the parties involved must have their own solicitor and be independently advised.

## Can an agreement be overturned?

An agreement can only be set aside if giving effect to it would cause "serious injustice" to one of the parties, or the Court is satisfied that either party was not properly advised as to the effects and implications of the agreement. Only then will the Court interfere and overturn an agreement. Setting aside contracting out agreements is uncommon.

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