

Domestic Relationships and Property Settlements

This information is based on the law as at July 2010. It is intended for the use and benefit of women who contact the Women's Legal Centre (ACT) and is to be read in conjunction with the specific advice given to those women when they contact the Centre.

This information is for women in the ACT whose same sex or *de facto* or *domestic relationship* has ended. The laws governing your situation will depend upon whether you separated before or after 1 March 2009.

If you separated before 1 March 2009 your matter will be dealt with in either the Magistrates Court or the Supreme Court under the Domestic Relationships Act. If you separated after 1 March 2009 your matter will be dealt with in either the Federal Magistrates Court or the Family Court under the Family Law Act.

WHAT IF WE SEPARATED BEFORE 1 MARCH 2009 ?

Although the law governing property division and maintenance in your case is the Domestic Relationships Act you can choose to have your matter dealt with under the Family Law Act if you and your ex-partner both agree to do this.

What is a 'domestic relationship'?

A domestic relationship is one:

- that was between two adults who were not legally married to each other
- that was personal*, although not necessarily sexual, or living in the same household that has lasted at least two years
- in which one partner provided personal or financial commitment and support of a domestic nature for the material benefit of the other
- includes a domestic partnership

* A relationship of a personal nature would include carer relationships as long as the person providing domestic services was not being paid for their services, or providing them on behalf of another person, through a charitable organisation.

It is possible for you to be involved in two or more domestic relationships at once, for example, you have a relationship with your domestic partner, another with your elderly parent who you support in a nursing home and a third relationship with your other parent who lives in a granny flat attached to your house.

What if I have children ?

If there are children involved you may apply for property orders even if the relationship lasted for less than two years.

For orders relating to where your children should live see the Centre's tip sheet on *Parenting Orders in the Family Court and the Federal Magistrates Court*.

The Child Support Agency provides a system for the collection of child support payments for the majority of parents who are separated, whether or not they were married. See the Centre's tip sheet *Child Support through the Child Support Agency (CSA)*.

Must we have shared the same house?

No, you do not have to have lived with the other person, as long as you can show that there was a personal or financial commitment and support of a domestic nature for the material benefit of that person.

Who can apply under the Act?

Either party to the relationship can apply to the Court. You do not have to be physically separated from your former partner before making an application. The following conditions apply:

- you and/or your former partner must be a resident in the ACT when the application to Court is made *and*
- you and your former partner must have lived in the ACT for at least one third of the relationship *or* the person applying to Court has made *substantial contributions* in the ACT (see below)

The Court may allow an application where all the conditions are not met (for example, when the relationship is shorter than two years) if:

- you have children *or*
- you have made *substantial contributions* *and*
- failure to make an order regarding property and/or maintenance would result in serious injustice

Which Court deals with these problems?

The Magistrates Court will deal with cases in which the amount claimed is less than \$50,000. Cases involving larger amounts go to the Supreme Court. However, if both parties agree, cases involving over \$50,000 may be dealt with in the Magistrates Court. It is much more costly to take action in the Supreme Court than in the Magistrates Court.

Is there a time limit to apply to Court?

Yes. You must apply within two years of the relationship ending. The Court may allow you to apply later than that but you will have to show hardship.

What kind of orders can a Court make?

The Court can make orders that share out your property (*property settlement orders*) or that require the payment of maintenance (*maintenance orders*). The Court can make any adjustment of property interests that it considers 'just and equitable'. This may mean that your ex partner has to transfer to you property, money or other

belongings. The Court can also make an order (*an injunction*) that stops your ex-partner from disposing of or selling any property before the Court has decided how it should be divided up.

What counts as 'property'?

Property can include anything of value which belongs to either or both of you, such as a house, a car, furniture, bank accounts, shares, insurance policies and business interests. Superannuation entitlements are not property but are a 'resource'. Resources can be taken into account by the Court in deciding how the property should be fairly divided.

How would a Court decide what is 'just and equitable'?

In deciding what is a just and equitable property settlement, the Court will consider what contribution you have each made to the build-up of assets in the relationship. This includes financial and non-financial contributions. The Court will also consider the present and future needs and resources of each person in the relationship.

The following factors are relevant:

- the nature of your relationship, including the degree of mutual commitment, interdependence and support, and how long it has lasted
- the contribution you have made to the family as a home maker and/or parent (this is a non-financial contribution)
- any financial contributions that you have made (salary, gift, inheritance, savings)
- any contributions you have made to improve the home or the business such as decorating the house or unpaid work in the business
- your income, property and financial resources
- your physical and mental capacity for employment
- any financial needs or obligations you have
- any responsibilities you have to support another person, such as your children
- any payments that are or will be made to you in respect of child support

What if all the property is in my former partner's name?

The Court has the power to make orders distributing your property in a fair way, regardless of whether your property is held in joint names or individually. If you are claiming a share of property held in your ex-partner's sole name, you will have to show that you made a contribution, whether financial or non-financial, to the purchase, maintenance and improvement of the property. In some cases, where the asset was jointly developed and its value increases, that increase may be distributed between you and your ex-partner.

If you think that your former partner may sell or dispose of property in their name, you can prevent this by applying to the Court for an order stopping them from disposing of the property until the dispute about your share has been resolved. Just because you may have left a home you shared with your former partner does not mean you lose your claim on the house.

How do I prove my claim?

To prove a financial contribution, it helps if you can produce the appropriate documentation, such as receipts and bank statements. Non-financial contributions can be more difficult to quantify and to prove. You will have to provide as much detail as you can about the kinds of contributions you have made and over what period of time. The longer your relationship has lasted, the more likely the Court is to accept that you have earned a share of the property by your domestic, caring and emotional work in the home.

If being a homemaker over many years has reduced your prospects of getting decent paid employment, again the Court may make some adjustment in your favour.

Although non-financial contributions and future needs issues are relevant, the Supreme Court does usually place a greater emphasis upon your financial contributions towards the assets.

Can I apply for maintenance?

You can apply to the Court for maintenance (money for your support) from your ex-partner. It can be paid either as a lump sum or periodically, for example, weekly or monthly.

To obtain a maintenance order you must show that you cannot support yourself adequately because either:

- a) you have the care and control of a child of the relationship (the child must be under 12 years of age, or under 16 years of age if he/she is mentally or physically disabled) or
- b) your earning capacity was affected by the relationship (for example, you may have given up work and training opportunities in order to carry out domestic responsibilities) and that an order for maintenance would enable you to study or to improve your skills.

In considering your application for maintenance the Court will take into account your respective financial positions, your needs and obligations, your capacities for employment and your responsibilities for children.

What if I need money urgently?

The Court can make emergency interim (temporary) orders for maintenance if you are in immediate need of financial assistance. In such a situation, the Court can order your former partner to pay you such maintenance as it considers reasonable.

If the law applies to me, do I have to go to Court?

If you and your former partner can agree on how to divide the property, and/or the payment of maintenance, you can make the agreement binding by making a joint application to Court. The application can be made by post or in person - for details see below. If you cannot agree then you will have to attend Court, first for a conference with a Registrar and then for a hearing.

What does it cost?

An application under the Domestic Relationships Act costs \$119 in the Magistrates Court and \$725 in the Supreme Court. The same fee applies to consent applications.

Can we get help to reach agreement?

To work out a fair agreement you should consider how a Court would approach it, by considering the factors as previously outlined. There are a number of mediation services in the ACT which may be able to help you work out an agreement. It is also sensible for you both to seek independent legal advice from different solicitors to ensure the agreement you are proposing is fair. See the Centre's tip sheet *Family Dispute Resolution*.

How do we make an agreement between ourselves legally binding?

If you have come to an agreement as to how your property should be divided, there are two different ways you can make it enforceable:

1.Consent order

You can file a general form of consent order (form 2.44) in the Magistrates Court, together with the other forms as set out in the Court Procedures Rules 2006, being a form 2.7 originating application and a form 6.11 affidavit.

The Court will then check your application for consent orders to make sure that you have provided all the necessary information. If they are satisfied that your agreement is fair an order will be made in the terms you have requested, normally within two to four weeks of your application. You should not need to go to a Court hearing.

2.Termination agreement

If each of you obtains a certificate of independent legal advice from different solicitors you can both sign a termination agreement. The agreement may then be filed at the Magistrates Court. Making a termination agreement can involve higher legal costs than a consent order because there is additional legal drafting of documents and because of the requirement for you to each obtain a certificate of advice from a solicitor.

You do not have to register or file your termination agreement at Court. However, a termination agreement certified in this way by the Court may have a greater degree of finality than consent orders.

Stamp duty exemption

If you are transferring a house or land you can get an exemption from stamp duty if you have either a Court order (including those made by consent) or a termination agreement, with the accompanying certificates of independent legal advice.

What if some of the property is outside the ACT?

If your relationship is covered by the Act, all the property that is owned by you and your former partner in Australia can be dealt with, providing there is agreement. The Court's powers are less clear if there is a disagreement between you and your former partner. The ACT Supreme Court can, however, make orders about property in NSW. If there is property overseas you will need to get legal advice.

What if we cannot agree?

If you and your former partner cannot agree, you can ask the Court to decide how the property should be divided and/or the amount of maintenance payable by one of you to the other. Remember you must file an application *within two years of the end of the relationship*. Either of you can request that the matter goes to 'out of Court' mediation at any time, or the Court may itself refer the matter to mediation or arbitration.

Do we each pay our own costs of going to Court?

If you are successful, the Court may order that the other party must pay your costs. This is different to the Family Court, where the Court does not generally order that one party pay the other party's legal costs. Furthermore, if you or your former partner make no attempt to reach agreement, or unreasonably refuse to participate in mediation or other dispute resolution processes, the Court may order substantial costs against the party who has not co-operated

What if I can't afford a solicitor?

Some private solicitors will provide a free initial consultation and/or will act for you on a *deferred payment* basis. This means that you do not have to pay your legal bills until you have received your property settlement. The Women's Legal Centre can advise you about how to make the most of your solicitor, and not run up unnecessary costs.

Can I get Legal Aid?

If you are on a very low income and cannot make a deferred payment arrangement with a private solicitor (because you do not stand to gain any money from the settlement) then it is worth applying for Legal Aid. The Legal Aid Office has guidelines which you must satisfy before they can grant you aid. There is both a *means* test and a *merits* test. This means that as well as being financially eligible, you will only get Legal Aid if you have a reasonable chance of success with your application. Application forms for Legal Aid are available from the Legal Aid Office or from here at the Centre.

WHAT IF WE SEPARATED AFTER 1 MARCH 2009 ?

The law which governs property division and maintenance in your case is the Family Law Act.

What are the main changes?

1. You will have access to your ex-partner's superannuation (and s/he to yours), and those amounts will be taken into account as part of the property pool.
2. More notice will be taken of your *future needs*, and a fairer adjustment will be made in your favour if, for example, the children reside mainly with you or your income-earning capacity is less than his or hers.
3. More notice will be taken of your *non-financial contributions* to the relationship, and the division of your property will be less of a simple accounting exercise than it was before the changes.
4. As is the case for married couples, you and your ex-partner can now enter into a *Binding Financial Agreement* under the Act before, during, or after your relationship, to state how you wish your property to be distributed, if you do not want the Family Law Act to govern what happens.
5. It is somewhat easier to obtain an order for maintenance (money paid by your partner for your support, as opposed to child support).
6. If there are children of the relationship, you can now deal with all your matters in the one Court. Previously, children's issues were dealt with in the Family Law Courts, and property issues in a state or territory court.
7. It is now possible for de facto couples to obtain an *exclusive occupancy order*, which allows you to reside in your home and prevents your ex-partner from entering or remaining on the premises.
8. If you are in another de facto relationship or are still married, your partner in that relationship or marriage is entitled to become a party to any Court proceedings under the new laws, and may have to be served with any Court documents relating to this dispute.

Will the new laws automatically apply to me?

In addition to your relationship breaking down on or after 1 March 2009 you will also have to show:

1. Your relationship must meet the definition of a *de facto relationship* under the new laws. It will do so if:
 - (a) you are not legally married to the other person
 - (b) you are not related to the other person
 - (c) you are a couple living together on a genuine domestic basis
2. *One* of the four following sub-paragraphs must apply:
 - (a) the de facto relationship lasted at least two years in total (subtracting any periods of separation)
 - (b) there is a child of the de facto relationship

- (c) one of you has made a substantial financial or non-financial contribution and serious injustice would result if the order was not made
 - (d) your de facto relationship has been registered under the relevant law
3. There must be a geographical connection between you and the participating states and territories. *One* of the three following sub-paragraphs must apply:
- (a) You lived in a participating state or territory for at least one third of the time you were in the de facto relationship
 - (b) The applicant for orders (you or your ex-partner) must have made substantial financial or non-financial contributions to the acquisition, conservation or improvement of your property, or as a homemaker or parent
 - (c) You and/or your former partner were living in a participating state when your relationship broke down
4. You must not:
- (i) already have final orders about property or maintenance under a state or territory law; or
 - (ii) have made a written agreement bound by those laws (except where the agreement has ceased to have effect without the property being distributed or maintenance paid).

What if my former partner denies that we were in a de facto relationship and/or claims that the new laws don't apply to us?

You should first attempt to resolve the argument through mediation. If this does not work, you can make an application to either the Federal Magistrates Court (or the Family Court for very complex matters), and it will look at the following things to help it decide whether it can make orders:

- (a) the duration of your relationship (the *total* time you were together)
- (b) whether you lived together all the time or some of the time or not at all
- (c) whether a sexual relationship exists
- (d) the degree of financial interdependence between you, and if there are any arrangements in place for your financial support
- (e) who acquired, owned and used your property
- (f) whether you were both committed to a shared life
- (g) the care and support of any children
- (h) whether your friends and family considered you to be a couple

Are there any time limits in which I need to file my application ?

Yes, you need to apply for Court orders within two years of your relationship coming to an end. In limited circumstances it is possible to apply for an extension. If you are filing consent orders then it does not matter if you have been separated for more than two years.

Where do I go for information and advice?

Legal Aid Office (ACT)

general enquiries	6243 3411
appointments for advice	6243 3471
legal advice line (weekdays 9am to 4pm)	1300 654 314

Magistrates Court 6217 4444

Supreme Court 6267 2707

Consumer Law Centre 6257 1788

About the Women's Legal Centre

The Women's Legal Centre (ACT & Region) Inc. is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice. The Centre offers free, confidential telephone advice Monday to Friday from 9.30am to 12.00 noon, and face to face appointments, when appropriate.

The numbers for legal advice (weekdays 9.30am to 12 noon) are:

Local	6257 4499
Outside Canberra	1800 634 669

The Women's Legal Centre is funded by the Indigenous Justice and Legal Assistance Division, Commonwealth Attorney General's Department.