

South Australia

DE FACTO RELATIONSHIPS ACT 1996

An Act to facilitate the resolution of property disputes arising on the termination of de facto relationships; and for other purposes.

This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at 3 February 2002.

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

DE FACTO RELATIONSHIPS 1996

being

De Facto Relationships Act 1996 No. 51 of 1996
[Assented to August 1996]¹

as amended by

Statutes Amendment (Courts and Judicial Administration) Act 2001 No. 69 of 2001 [Assented to
6 December 2001]²

¹ Came into operation 16 December 1996: *Gaz.* 28 November 1996, p. 1744.

² Part 5 (ss. 9-11) came into operation 3 February 2002: *Gaz.* 24 January 2002, p. 346.

NOTE:

- *Asterisks indicate repeal or deletion of text.*
- *For the legislative history of the Act see Appendix.*

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LEGISLATIVE HISTORY**

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *De Facto Relationships Act 1996*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Definitions

3. In this Act—

"**certificated agreement**"—an agreement is a certificated agreement if—

- (a) the agreement contains a provision (the **warranty of asset disclosure**) under which each party warrants that he or she has disclosed all relevant assets to the other; and
- (b) the signature of each party to the agreement is attested by a lawyer's certificate and the certificates are given by different lawyers;

"**child**" of de facto partners means—

- (a) a child of which the de facto partners are the natural parents; or
- (b) a child of the female partner whose male partner is presumed to be the father of the child under an Australian law; or
- (c) a child adopted by the partners;

"**court**" means—

- (a) the Supreme Court; or
- (b) the District Court; or
- (c) if an application relates to property valued at \$80 000 or less, the Magistrates Court;

"**de facto partner**" means a person who lives in a de facto relationship and includes—

- (a) a person who is about to enter a de facto relationship; and
- (b) a person who has lived in a de facto relationship;

"**de facto relationship**" means the relationship between a man and a woman, who although not legally married to each other, live together on a genuine domestic basis as husband and wife;

"**lawyer**" means a person who is admitted as a barrister and solicitor of the Supreme Court and holds a current practising certificate;

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"**lawyer's certificate**" means a certificate signed by a lawyer, and endorsed on an agreement, certifying that—

- (a) the lawyer explained the legal implications of the agreement to a party to the agreement, named in the certificate, in the absence of the other party to the agreement; and
- (b) the party gave the lawyer apparently credible assurances that the party was not acting under coercion or undue influence; and
- (c) the party signed the agreement in the lawyer's presence;

"**property**" of a person includes—

- (a) a prospective entitlement or benefit under a superannuation or retirement benefit scheme;
- (b) property held under a discretionary trust that could, under the terms of the trust, be vested in the person or applied for the person's benefit;
- (c) property over which the person has a direct or indirect power of disposition and which may be used or applied for the person's benefit;
- (d) any other valuable benefit.

Application of this Act

4. This Act does not apply to a de facto relationship that ended before the commencement of this Act.

**PART 2
COHABITATION AGREEMENTS**

Cohabitation agreements

5. (1) De facto partners may make an agreement (a "cohabitation agreement") about—

- (a) the division of property on the termination of the de facto relationship; or
- (b) other financial matters related to the de facto relationship.

(2) A cohabitation agreement must be—

- (a) in writing; and
- (b) signed by the de facto partners.

Cohabitation agreement enforceable under law of contract

6. A cohabitation agreement is subject to, and enforceable under, the law of contract.

Consensual variation or revocation of cohabitation agreement

7. (1) A cohabitation agreement may be varied or revoked by a written or oral agreement.

(2) However, if a cohabitation agreement is a certificated agreement, it may only be varied by a certificated agreement.

Power to set aside or vary cohabitation agreement

8. (1) If a court is satisfied that the enforcement of a cohabitation agreement would result in serious injustice, the court may set aside or vary the agreement to avoid the injustice.

(2) A court may exercise its powers under this section—

- (a) on the court's own initiative; or
- (b) on the application of either de facto partner.

(2) However, a court cannot set aside or vary a cohabitation agreement under this section if—

- (a) the agreement provides for the exclusion of the court's power to set aside or vary the agreement; and
- (b) the agreement is a certificated agreement.

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**PART 3
ADJUSTMENT OF PROPERTY INTERESTS**

Property adjustment order

9. (1) After a de facto relationship ends, either of the de facto partners may apply to a court for the division of property.

(2) However, an application for the division of property may only be made if—

- (a) the applicant or respondent is resident in the State when the application is made; and
- (b) the de facto partners were resident in the State for the whole or a substantial part of the period of the relationship; and
- (c) the de facto relationship existed for at least three years or there is a child of the de facto partners.

(3) An application for the division of property must be made within one year after the end of the de facto relationship unless the court, after considering the interests of both de facto partners, is satisfied that extension of this period of limitation is necessary to avoid serious injustice to the applicant.

(4) An application for the division of property may be made or continued by or against the legal personal representative of a deceased de facto partner.

(5) However, an application against the legal personal representative of a deceased de facto partner may only relate to property that is undistributed at the date of the application.

Power to make orders for division of property

10. (1) On an application for the division of property, the court may make orders it considers necessary to divide the property of either or both the de facto partners between them in a way that is just and equitable.

(2) For example, the court may make orders for—

- (a) the transfer of property from one de facto partner to the other; or
- (b) the sale of property and the division of the net proceeds between the de facto partners in proportions decided by the court; or
- (c) the payment by one de facto partner of a lump sum to the other.

Matters for consideration by the court

11. (1) In deciding whether to make an order for the division of property under this Part, and if so the terms of the order, the court—

- (a) must consider the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to—
 - (i) the acquisition, conservation or improvement of property of either or both partners; or
 - (ii) the financial resources of either or both partners; and

- (b) must consider the contributions (including homemaking or parenting contributions) made by either of the de facto partners to the other partner or to children of the partners or either of them; and
- (c) must have regard to the terms of any relevant cohabitation agreement; and
- (d) may have regard to other relevant matters.

(2) If a relevant cohabitation agreement—

- (a) is a certificated agreement; and
- (b) provides for the exclusion of the court's power to set aside or vary the agreement,

an order for the division of property under this Part must be consistent with the terms of the agreement.

Duty of court to resolve all outstanding questions

12. In proceedings under this Part, the court must (as far as practicable) finally resolve questions about the division of property between the de facto partners and avoid further proceedings between them.

Small claims

13. (1) If the aggregate amount claimed by the applicant on an application under this Part is \$6 000 or less, the application is a minor statutory proceeding.¹

(2) To ascertain the amount claimed by an applicant on an application under this Part, all monetary amounts and the value of interests in property claimed must be aggregated.

¹ A **minor statutory proceeding** includes a proceeding declared by statute to be a minor statutory proceeding. (See definition of **minor statutory proceeding** in section 3(1) of the *Magistrates Court Act 1991*.) The characterisation of a proceeding as a minor statutory proceeding means that (subject to certain rules stated in section 3 of the *Magistrates Court Act 1991*) the proceeding is to be dealt with under the special rules for minor civil actions prescribed in Division 2 of Part 5 of the *Magistrates Court Act 1991*.

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**PART 4
MISCELLANEOUS**

Transactions to defeat claims

14. (1) If a court is satisfied that a transaction has been entered into to defeat, or has the effect of defeating, an order, or an anticipated order, for the division of property, the court may set aside the transaction and give consequential orders and directions.

(2) A court may grant an injunction to restrain a person from entering into a transaction that might defeat an order, or an anticipated order, for the division of property.

(3) In exercising its powers under this section, the court must have regard to all interests in the property to which the proceedings relate.

Protection of purchaser in good faith, for value and without notice of claim

15. An order or injunction under this Act cannot prejudice the interests of a person who acquires an interest in property of a de facto partner in good faith, for value, and without notice that the property may be the subject of an application under this Act.

Non-exclusivity of remedies

16. This Act does not exclude other forms of remedy or relief.

Regulations

17. The Governor may make regulations for the purposes of this Act.

APPENDIX

LEGISLATIVE HISTORY

Transitional Provisions

(Transitional provision from Statutes Amendment (Courts and Judicial Administration) Act 2001, s. 11)

11. The amendments made to the principal Act by this Part—

- (a) do not apply in respect of proceedings commenced before the commencement of this Part (and those proceedings may continue as if this Act had not been enacted); and
- (b) apply in respect of proceedings commenced after the commencement of this Part (including proceedings in respect of a claim arising before the commencement of this Part).

Legislative History

Section 3: definition of "court" amended by 69, 2001, s. 9
Section 13(1): amended by 69, 2001, s. 10