

# Relationship Property, Family and Defacto Issues

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## Divorce (dissolution of marriage)

**Irreconcilable difference** is the only ground for a married couple obtaining a divorce or legally dissolving that marriage.

Irreconcilable difference is proved by living apart for two years.

After the period of two years living apart has elapsed, either spouse can apply to the District Court for dissolution of marriage.

The application may be also made jointly.

If one spouse files the application for a "dissolution order", that spouse has to arrange for service of the application on the other spouse, who has a period of 21 days to defend the application.

If neither spouse oppose the application for dissolution order, the application will be dealt with by the Family Court on the papers without the need for either spouse to appear in Court.

If one spouse opposes the application, then the application will be heard before a Family Court judge. In granting a dissolution order, the Court must be satisfied that the parties have been living apart for two or more years and arrangements have been made for children of the marriage.

## Separation

A married couple can agree to separate and the agreement can be verbal or written. One advantage of a "separation agreement" is that it records the date both spouses agreed was the date of separation.

If one spouse does not wish to separate then the other spouse can apply to the Family Court for a "separation order".

If you have a separation agreement drawn up by a solicitor generally the agreement will deal with issues of matrimonial property and the disposition of the family home.

## Occupation order

If a married couple have agreed to separate but cannot reach agreement on occupation of the family home, that spouse can apply to the Family Court for an "occupation order" which will enable the spouse to remain in the family home for a specified period of time.

The occupation order can be made to protect the interests of children and to protect one spouse's safety and welfare.

## Remarriage

The parties are free to marry as soon as the dissolution order has taken effect as the final order. The dissolution order takes effect immediately if made by a judge, otherwise if the dissolution has been made on the papers, it will not take effect for one month after the date on which it was granted.

A marriage licence may be applied for on the day a dissolution order is granted, but the licence generally takes three days to issue.

## Protection

If your spouse is violent towards you or the children, you can contact the Police. You can also obtain special orders in the Family Court.

## Non-molestation order

This order will make it an offence for your spouse to come to your property or annoy or threaten you or your children.

## Non-violence order

If this order is made it will give the Police the right to detain your spouse for up to 24 hours if he or she is violent or threatening toward you or the children.

## Financial support for children

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When a family separates, who makes sure that money is provided to support any children who cannot support themselves and where, as is often the case, the parent who looks after them is not working?

A person who has the day to day care of a child is often called the custodian. This person will usually be one of the child's parents although there are others who can be custodians.

If a parent of the child is not the custodian that parent will be required to pay money to help support the child. Such a person is often called "the liable person".

The financial payment paid by the liable person is called "child support". [This was formerly called "maintenance"].

The amount of child support payable will be determined in one of two ways.

The most common method will be for the Inland Revenue Department to determine the amount payable by using a calculation provided by law. If the custodian is receiving a benefit the child support will be paid to the Inland Revenue Department who will in turn pay it to the Work and Income NZ [as a contribution to the cost of the benefit].

If the custodian is not receiving a benefit the child support is still paid to the IRD which pays the money direct to the custodian.

The other method for determining the amount of child support is for the custodian and the liable person to voluntarily agree on the amount of money to be paid. The money is then paid either direct by the liable parent to the custodian or alternatively through the IRD.

If the custodian is receiving a benefit the liable person may voluntarily pay more than the amount determined and the additional amount is paid to the custodian in addition to the benefit.

Either the custodian or the liable person may apply to the Family Court if they are unhappy with the amount determined by the IRD.

There are different considerations applying where two or more people share the custody of a child.

## **Property (Relationships) Act 1976**

The Property (Relationships) Act applies to anyone who is married or lives in a de-facto relationship or civil union, including same sex couples.

The law is intended to embrace changes in social attitudes to marriage and relationships.

The Act makes an important distinction between the rights of married and de-facto couples, depending on the length of their relationship or marriage. In the case of married couples, the Act applies to all marriages of any length.

If the marriage does not last for three years however the equal division of the relationship property is generally modified and the property is divided according to the parties' contributions. For a de-facto couple the Act will usually only apply if the relationship has lasted for three years or more – although there are some exceptions to this general principle. The approach of the three year anniversary of any de facto relationship should be a time for reviewing commitment, and both partners should consider the legal and financial implications of continuing their relationship.

## **The general principles**

In general, the Property (Relationships) Act ("the Act") provides that a couple's property is to be divided equally between the couple.

However, the Act differentiates between "relationship property" (formerly called matrimonial property) and "separate property".

On the one hand, in all but the most exceptional cases, relationship property is divided equally between the parties.

On the other hand, separate property, so long as it is kept separate during the marriage, civil union or de facto relationship, is not divided between the parties and remains the property of the owner.

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## Definition of “relationship property”

The Act provides that relationship property includes:

- the family home whenever acquired (unless it is on Maori land);
- family chattels whenever acquired;
- common or jointly owned property; and
- property bought in contemplation of the relationship for the use or benefit of the family;

### Example 1

*Harry and Sally become engaged in March 2000. In December the same year, before their marriage, Harry buys a batch at Waiheke Island for their common use or benefit. Harry and Sally are married in March 2001.*

*The Waiheke batch is relationship property even though it was acquired by Harry before marriage because it was intended for the common use or benefit of both Harry and Sally.*

### Example 2

*In December 2000, instead of buying the batch at Waiheke, Harry buys a block of flats in Grafton as a personal investment.*

*The flats are separate property because the requirement that they were intended for the common use or benefit of both partners is not met.*

- income earned and assets acquired after the relationship began (other than property acquired out of separate property, or by gift from a third person, inheritance, or as a beneficiary of a trust);
- property acquired, after the marriage, civil union or de facto relationship began, for the common use or common benefit of both spouses or partners, even if -

The property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union or de facto relationship began; or

The property was acquired out of the proceeds of any disposition of any property owned by either

spouse or partner or by both of them before the marriage, civil union or de facto relationship began.

### Example 3

*Nigel and Margaret have lived together as de facto partners for 4 years.*

*Before the relationship commenced Nigel had \$50,000 invested in Air New Zealand shares.*

*A year after the relationship commenced Nigel sells the Air New Zealand shares and invests the proceeds in a managed fund for his and Margaret's retirement.*

*Nigel's interest in the managed fund becomes relationship property.*

### Example 4

*Margaret has \$300,000 invested in a term deposit which are the proceeds of the sale of a house she owned with her former partner.*

*After Margaret and Nigel start living together they decide to use the term deposit funds to buy a small “lifestyle block” farm in Warkworth where they intend to live and farm ostriches.*

*The farm becomes relationship property.*

- any increase or gain in relationship property;
- the proceeds of any disposition of any relationship property;
- the increase in the value of one spouse's or partner's separate property that can be traced back to the use of relationship property, or to the direct or indirect actions of the other spouse or partner;
- any other property that is relationship property by virtue of any other provision of the Act or by virtue of any other Act; and
- all other property that is relationship property under a contracting-out agreement

Whether the property is owned in one spouse or partner's name and not in the other's is irrelevant. The Act cuts across legal title if property falls into one of the categories of relationship property.

### The “family home”

The “family home” is defined as the house the either or both of the spouses or partners use habitually or

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from time to time as the only or principal residence, together with any land, buildings, or improvements used wholly or principally for the purposes of the household.

When a property becomes a family home, it is considered relationship property, and is divided equally between the partners, regardless of whether it was acquired before or after the marriage, civil union or de facto relationship commenced or whether it is owned in the name of one or both parties.

## The “family chattels”

The “family chattels” include the following items that either or both of the spouses or partners own;

- household furniture;
- household appliances, effects or equipment;
- articles of household or family use or amenity or of household ornament, including tools, garden effects and equipment;
- motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for family purposes and associated accessories;
- household pets; and
- any of the above chattels that are in the possession of either or both spouses or partners under a hire purchase or conditional sale agreement or an agreement for lease or hire.

## The “family chattels” do not include:

- chattels used wholly or principally for business purposes;
- money or securities for money;
- heirlooms; and
- taonga.

Like the family home, the family chattels are divided equally between the parties regardless of when they were acquired or who is the legal owner.

## Definition of “separate property”

In general terms of the Act “separate property” in a negative sense as all property of either spouse or partner that is not relationship property. This is not particularly helpful.

In broad terms separate property includes:

- property owned by either spouse or partner before the marriage, civil union or de facto relationship commenced (other than the family home or family chattels);
- property acquired by either spouse or partner before the marriage, civil union or de facto relationship from third parties either by a gift, inheritance or as a beneficiary under a trust;
- all property acquired out of separate property, and the proceeds of any sale of separate property (unless that property is used for the common use or common benefit of both spouses or partners).

## Example 5

*Kerry and Rosie have been married for 10 years. Before their marriage Rosie owned shares in a privately owned company CIP Limited. During the marriage Rosie receives dividends from her shareholding which she uses to buy additional shares in CIP Limited. The additional shares are Rosie’s separate property.*

## Example 6

*Rosie sells her shares and purchases a holiday home at Pauanui. The holiday home becomes relationship property.*

- any increase in the value of separate property, and any income or gains derived from separate property; and
- property that one spouse or partner gives to the other spouse or partner is not relationship property unless the gift is used for the benefit of both spouses or partners (ie jewellery given by one partner to the other is normally considered separate property, whereas a gift for use for the benefit of both spouses or partners ie an outdoor furniture set, is relationship property).

## When separate property becomes relationship property

By acquiring property for common use

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If separate property is sold, or the income or gains from separate property is used to acquire further property for the common use or benefit of both spouses or partners, the further property loses the character of separate property and becomes relationship property (see examples 5 and 6).

By increase in value

Normally the income from separate property and any increase in value of separate property is also separate property. But, if the value of any separate property increases, or if income or gains are derived from separate property and that increase in value or income or gains are attributable (either in whole or in part):

- to the application of relationship property; or
- to the actions of the other spouse or partner;

then the income or gains are considered to be relationship property.

## **Example 7**

*Al and Lorrie have been living together as a de facto couple since 2000. Al works as a chef in a restaurant which he purchased in 1996 for \$20,000. The restaurant is separate property. After they began living together Lorrie starts work in the restaurant 3 nights a week as maitre-d. Al also assists with the promotion of the restaurant. In 2004 Al and Lorrie decide to sell a classic car they had bought the year before and use the sale proceeds to re-fit the dining area of the restaurant. As a result the turnover of the restaurant doubles and in 2007 the restaurant is sold for \$100,000. That part of the increase in the value of the restaurant which is attributable to Lorrie's efforts and the proceeds of the sale of Al and Lorrie's car is relationship property.*

By use for acquisition or improvement of relationship property

If separate property (including income or gains or sale proceeds) is used with the consent of the owner;

- for the acquisition of relationship property; or
- for the improvement of relationship property; or
- to increase the value of relationship property.

Then the separate property is lost, and the resulting property (or increase in value of the property) is relationship property.

## **Example 8**

*Brian and Anne are married. Before marriage Anne owned a valuable stamp collection. 5 years after their marriage Anne sells the stamp collection for \$5,000 and uses the money to build a new deck for the family home. The \$5,000 sale proceeds are no longer separate property.*

By intermingling with relationship property

If property acquired from third parties by gift, inheritance or trust is intermingled with other relationship property so that it is unreasonable or impracticable to regard that property or those proceeds as separate property, then the property will become relationship property.

## **Example 9**

*Victoria and Ronnie live together in a de facto relationship. Victoria owns a house in Ponsonby where she and Ronnie live during the week, and Victoria and Ronnie own a hobby farm at Whenuapai where they live in the weekend. 4 years into the relationship Ronnie inherits \$30,000 from her great aunty's estate and uses the money to pay off part of the mortgage over the Ponsonby home and part to pay for some maintenance needed at the farm. The inheritance money becomes relationship property because it has been intermingled with relationship property.*

## **Example 10**

*Ronnie pays the \$30,000 inheritance into a term deposit account "for a rainy day". The funds remain separate property.*

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## “Future earnings” cases

The Act allows the Court to make orders to redress economic disparities arising from the division of functions in a marriage, civil union or de facto relationship.

If the Court is satisfied that, after a marriage, civil union or de facto relationship ends, the income and living standards of one spouse or partner (party A) are likely to be significantly higher than the other spouse or partner (party B) because of the effects of the division of functions within the marriage, civil union or de facto relationship while the parties were living together, then the Court can make orders, for the purpose of compensating party B;

that party A pay party B a sum of money out of party A's relationship property;  
that party A transfer to party B any other property out of party A's relationship property.

The same applies if the value of party A's separate property has increased because of the actions or efforts of party B.

In determining whether or not to make such orders, the Court can have regard to –

- the likely earning capacity of each spouse or partner;
- the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union or de facto relationship;
- any other relevant circumstances.

### Example 11

*Pam and Hal meet when they are both going through law school together and start living together after only a few months.*

*After they complete their LLB degrees Pam gets a job at a large law firm in the city.*

*Hal decides to continue on for another year to obtain a masters degree. Pam supports both of them out of her graduate income.*

*The following year Hal completes his degree and takes a job at a competing firm in town and starts to work his way toward partnership. Pam also shows*

*a lot of promise as an up and coming lawyer in the rival firm.*

*Two years later, after having just been made an associate partner Pam becomes pregnant and eventually leaves her job to have the child. Hal and Pam have three more children together and Pam stays at home to raise the children while Hal continues working. Eventually Hal is made a partner in his firm and earns \$250,000 per year from his, by now, substantial legal practice.*

*Unfortunately, the happy couple separate about the time of the oldest child's 10th birthday and Hal moves out of the home.*

*Pam who had been a full time mother to that point realises that she has to get a job to support herself and starts working part-time at the local library for a salary of \$15,000 per year. Pam cannot afford to pay the mortgage and the matrimonial home and chattels are sold for \$700,000, and the proceeds are deposited to the trust account of Pam's solicitors while she and Hal commence Court proceedings to resolve the division of their relationship property.*

*The Court holds that because of the division of the functions in their relationship Hal's earning capacity, at least for the foreseeable future, is likely to be far greater than Pam's.*

*The Court accordingly orders that the proceeds of the sale of the family home and chattels, are to be divided 50/50 (ie \$350,000 each) but also that Hal pay Pam a further sum of \$150,000 out of his share of the relationship property as compensation. In effect, Pam's share of the relationship property is increased to \$500,000 and Hal's share is decreased to \$200,000.*

### Warning

The information contained in this paper is intended to provide general information only and not specific legal advice. We recommend you to contact us immediately if you have any questions about “relationship” and “separate” property.

### For More Information

Visit our website at [www.gellertivanson.co.nz](http://www.gellertivanson.co.nz) or call us on (09) 575 2330.

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