

# NORTHERN TERRITORY OF AUSTRALIA

## DE FACTO RELATIONSHIPS ACT

As in force at 17 March 2004

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# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 17 March 2004

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## DE FACTO RELATIONSHIPS ACT

**An Act to make provision with respect to the property rights of de facto partners, to validate certain agreements relating to de facto relationships and make provision with respect to their effects, and for related purposes**

### **Part 1                      Preliminary**

#### **1                      Short title**

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

#### **2                      Commencement**

This Act shall come into operation on 1 October 1991.

#### **3                      Definitions**

(1) In this Act, unless the context otherwise requires:

***applicant*** includes a cross-applicant.

***child***, in relation to de facto partners, means:

- (a) a child born as a result of sexual relations between the partners;
- (b) if one of the partners is a woman – a child of the woman if her de facto partner is presumed to be a parent of the child under section 5D or 5DA of the *Status of Children Act*, or
- (c) a child adopted by the partners.

**cohabitation agreement** means an agreement (whenever entered into) between 2 adults, whether or not there are other parties to the agreement, which:

- (a) is made:
  - (i) in contemplation of their entering into a de facto relationship; or
  - (ii) during the existence of a de facto relationship between them; and
- (b) makes provision with respect to financial matters (whether or not it also makes provision with respect to other matters).

**de facto partner**, of a person, means a person who is in a de facto relationship with the person.

**de facto relationship** has the meaning in section 3A.

**financial matters**, in relation to de facto partners, means matters with respect to any one or more of the following:

- (a) the maintenance of either or both of the partners;
- (b) the property of either or both of those partners; and
- (c) the financial resources of either or both of those partners.

**financial resources**, in relation to de facto partners or either of them, includes:

- (a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided;
- (b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the de facto partners or either of them;
- (c) property, the alienation or disposition of which is wholly or partly under the control of the de facto partners or either of them and which is lawfully capable of being used or applied by or on behalf of the de facto partners or either of them in or towards their or his or her own purposes; and
- (d) any other valuable benefit.

**married** means validly married under the *Marriage Act 1961* of the Commonwealth.

**periodic maintenance** means maintenance payable by means of a weekly, fortnightly, monthly, yearly or other periodic amount.

**property**, in relation to de facto partners or either of them, includes:

- (a) real and personal property and any estate or interest (whether present, future or contingent) in real or personal property;
- (b) money;
- (c) any debt or cause of action for damages; and
- (d) any other chose in action or right with respect to property.

**separation agreement** means an agreement (whenever entered into) between 2 adults, whether or not there are other parties to the agreement, which:

- (a) is made in contemplation of terminating a de facto relationship between them or after terminating it; and
- (b) makes provision with respect to financial matters (whether or not it also makes provision with respect to other matters).

(2) In this Act:

- (a) a reference to a de facto partner of an Aboriginal or Torres Strait Islander includes a reference to an Aboriginal or Torres Strait Islander to whom the person is married according to the customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person identifies; and
- (b) a reference to a de facto relationship includes a reference to the relationship between 2 persons who are de facto partners by virtue of paragraph (a).

### **3A De facto relationships**

- (1) For this Act, 2 persons are in a de facto relationship if they are not married but have a marriage-like relationship.
- (2) To determine whether 2 persons are in a de facto relationship, all the circumstances of their relationship must be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:
  - (a) the duration of the relationship;
  - (b) the nature and extent of common residence;

- (c) whether or not a sexual relationship exists;
  - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
  - (e) the ownership, use and acquisition of property;
  - (f) the degree of mutual commitment to a shared life;
  - (g) the care and support of children;
  - (h) the performance of household duties;
  - (i) the reputation and public aspects of their relationship.
- (3) For subsection (2), the following matters are irrelevant:
- (a) the persons are different sexes or the same sex;
  - (b) either of the persons is married to another person;
  - (c) either of the persons is in another de facto relationship.

## **Part 2                      Power of courts to declare existence of relationships, to declare and adjust interests in property, and make maintenance orders**

### **Division 1              Jurisdiction**

#### **4                      Supreme Court and Local Court to have jurisdiction**

Jurisdiction to make orders and declarations and grant other relief under this Part is vested in:

- (a) the Supreme Court; and
- (b) subject to section 5, the Local Court.

#### **5                      Limitation on jurisdiction of Local Court**

- (1) Subject to subsection (2), the Local Court does not have jurisdiction under this Part to declare any title or right in respect of, or adjust any interest in, property of a value or amount which exceeds the jurisdictional limit within the meaning of the *Local Court Act*.
- (2) Subsection (1) does not prevent the making of a declaration or adjustment in any proceedings to the hearing and determination of which by the Local Court the parties have consented in writing.



## **6 Transfer from Local Court of proceedings exceeding jurisdictional limit**

- (1) Where proceedings are instituted in the Local Court with respect to an interest in property the value or amount of which exceeds the jurisdictional limit within the meaning of the *Local Court Act*, the Local Court shall transfer the proceedings to the Supreme Court unless the parties consent in writing to their being heard and determined by the Local Court.
- (2) The Local Court may of its own motion transfer to the Supreme Court proceedings to which subsection (1) applies, even if the parties are willing that the proceedings be heard and determined by the Local Court.
- (3) Before transferring any proceedings by virtue of this section, the Local Court may make such orders as it considers necessary pending the disposal of the proceedings by the Supreme Court.
- (4) Where proceedings are transferred by virtue of this section, the Supreme Court shall, subject to the rules of court, proceed as if the proceedings had been originally instituted in that Court.
- (5) Without prejudice to its duty to comply with subsection (1), failure by the Local Court to do so does not invalidate any order of that Court in the proceedings.

## **7 General power of transfer between courts**

- (1) Where it appears to a court in which proceedings under this Part have been instituted that it is in the interests of justice that the proceedings be dealt with by another court having jurisdiction under this Part, the court may transfer the proceedings to that other court.
- (2) A court proposing to transfer any proceedings by virtue of subsection (1) may make such orders as it considers necessary pending the disposal of the proceedings by the court to which they are to be transferred.
- (3) The court to which any proceedings are transferred by virtue of subsection (1) shall, subject to any rule of court, proceed as if the proceedings had been originally instituted in that court.

## **8 Stay or dismissal where proceedings instituted in 2 courts**

Where it appears to a court in which proceedings under this Part have been instituted by or in relation to a person that proceedings by or in relation to the same person have also been instituted under this Part in another court, the first-mentioned court may:

- (a) stay the proceedings for such time as it thinks fit; or
- (b) dismiss the proceedings.

## **9 Courts to act in aid of each other**

The courts having jurisdiction under this Part shall act in aid of, and be auxiliary to, each other in all matters under this Part.

## **Division 2 Declarations**

### **10 Declaration as to existence of de facto relationship**

(1) A person:

- (a) who alleges that a de facto relationship exists or has existed between himself or herself and another named person; or
- (b) whose pecuniary interests, or whose rights or obligations at law or in equity, are affected according to whether a de facto relationship exists or has existed between 2 other persons,

may apply to a court for a declaration as to the existence of such a de facto relationship.

- (2) If any person whose interests would, in the opinion of the court, be affected by such a declaration is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of the application, the court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing to enable that person to be given that opportunity.
- (3) If the court is satisfied that a de facto relationship exists or has existed or does not exist or did not at a particular time or during a particular period exist (whether or not it previously or subsequently existed), it may make a declaration (which shall have effect as a judgment of the court) that persons named in the declaration have or have had a de facto relationship or are not in, or were not at a particular time or during a particular period in, a de facto relationship.

- (4) The court shall state in its declaration that the de facto relationship existed or did not exist:
  - (a) at a date specified in the declaration; or
  - (b) between dates specified in the declaration,or both.
- (5) A declaration may be made whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.
- (6) While a declaration remains in force, the persons named in the declaration are to be presumed conclusively for all purposes to have had (or, as the case may be, not to have had) a de facto relationship at the date specified in the declaration, or between the dates so specified, or both at that date and between those dates as the case may require.

## **11 Annulment of declaration in light of new facts**

- (1) A court may make an order annulling a declaration under section 10:
  - (a) on the application of a person who applied for the declaration, or could have applied for it, or is affected by it; and
  - (b) if satisfied that new facts or circumstances have arisen which have not previously been disclosed to the court, and could not by the exercise of reasonable diligence have been so disclosed.
- (2) If any person whose interests would, in the opinion of the court, be affected by the making of such an order is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of the application, the court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing to enable that person to be given that opportunity.
- (3) A declaration ceases to have effect on the making of an order of annulment, but the annulment does not affect anything done in reliance on the declaration before the making of the order.
- (4) Where a court makes an order annulling a declaration, it may if it thinks it would be just and equitable to do so make such ancillary orders (including orders varying rights with respect to property) as may be necessary to place any person affected by the annulment in

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the same position (as far as practicable) as that person would have been in if the declaration had not been made.

## **12 Declaration of interests in property**

- (1) In any proceedings between de facto partners with respect to existing title or rights in respect of property, a court may declare the title or rights, if any, that a de facto partner has in respect of the property.
- (2) A court may make orders to give effect to a declaration under subsection (1), including orders as to possession.
- (3) An order under this section is binding on the de facto partners, but not on any other person.

## **Division 3 Orders for adjustment of Interests in property**

### **13 Application for order for adjustment**

- (1) A de facto partner may apply to a court for an order under this Division for the adjustment of interests with respect to the property of the de facto partners or either of them.
- (2) An application may be made under subsection (1) whether or not an application for any other remedy or relief has been made, or may be made, under this Act or any other Act or law.

### **14 Time limit for making application**

- (1) Subject to subsection (2), where de facto partners have ended their de facto relationship, an application under section 13(1) must be made before the expiry of a period of 2 years beginning with the day after that on which the relationship ended.
- (2) A court may grant leave to a de facto partner to make an application under section 13(1) at any time after the period allowed by subsection (1) if the court is satisfied that greater hardship would be caused to that partner by refusing leave than would be caused to the other partner by granting it.

### **15 Conditions for making of order – living within Territory, &c.**

A court shall not make an order under this Division unless it is satisfied:

- (a) that one or both of the de facto partners lived in the Territory on the day on which the application for the order was made; and

(b) that:

- (i) both partners have lived together in the Territory for not less than one third of the period of their de facto relationship; or
- (ii) substantial contributions of the kind referred to in section 18(1)(a) or (b) have been made in the Territory by the applicant.

## **16 Conditions for making of order – length of relationship, &c.**

- (1) Except as provided by subsection (2), a court shall not make an order under this Division unless it is satisfied that the de facto partners have lived together in a de facto relationship for a period of not less than 2 years.
- (2) Where the court is not satisfied that the partners have lived together as mentioned in subsection (1), it may nevertheless make an order under this Division if satisfied:
  - (a) that there is a child of the de facto partners; or
  - (b) that the partner who applied for the order:
    - (i) has made substantial contributions of the kind referred to in section 18(1)(a) or (b) for which that partner would otherwise not be adequately compensated if the order were not made; or
    - (ii) has the care and control of a child of the other partner,and that failure to make the order would result in serious injustice to the partner who applied for the order.

## **17 Relevant facts and circumstances**

The facts and circumstances that a court may take into account in deciding whether or not to make an order under this Division include facts and circumstances that arose or occurred before the commencement of this Act or outside the Territory.

## **18 The order for adjustment**

- (1) The order which a court may make under this Division with respect to the property of de facto partners or either of them is such order adjusting the interests of the partners in the property as the court considers just and equitable having regard to:
  - (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the partners to the acquisition, conservation or improvement of any of the property or to the financial resources of the partners or either of them; and
  - (b) the contributions (including any made in the capacity of homemaker or parent) made by either of the partners to the welfare of the other partner, or to the welfare of the family constituted by the partners and one or more of the following:
    - (i) a child of the partners;
    - (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners; or
    - (iii) any person dependent on the partners who has been accepted by the partners or either of them into the household of the partners.
- (2) A court may make an order in respect of property whether or not it has declared the title or rights of a de facto partner in respect of the property.

## **Division 4 Special provisions with respect to applications and orders under Division 3**

### **19 Adjournment of application – likelihood of significant change in circumstances**

- (1) A court may adjourn an application for an order under Division 3 to adjust interests with respect to the property of de facto partners or either of them if the court is of the opinion:
  - (a) that there is likely to be a significant change in the financial circumstances of one or both of the partners, and that it is reasonable to adjourn the proceedings having regard to the time when that change is likely to take place; and

- (b) that an order that the court could make with respect to the property if that significant change in financial circumstances occurs is more likely to do justice between the partners than an order that the court could make immediately.
- (2) The court may adjourn an application:
  - (a) at the request of either partner; and
  - (b) until such time, before the end of a period specified by the court, as the partner requesting the adjournment applies for the application to be determined.
- (3) Before a court adjourns an application it may make any order that it considers appropriate with respect to the property.
- (4) In forming an opinion as to whether there is likely to be a significant change in the financial circumstances of one or both of the de facto partners, a court may have regard to any change in the financial circumstances of a partner that may occur because of a financial resource of one or both of the partners becoming vested in or used for the purposes of one or both of the partners.
- (5) Nothing in this section:
  - (a) limits the powers of the court to grant an adjournment in relation to any proceedings before it;
  - (b) requires the court to adjourn an application in any particular circumstances; or
  - (c) limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of one or both of the partners.

interests with respect to the property of the partners or either of them, the court may adjourn its hearing of the application for the order.

## **20      Adjournment of application – proceedings in Family Court**

- (1) If proceedings in relation to the property of de facto partners or either of them are commenced in the Family Court of Australia at any time before a court has made a final order under Division 3 to adjust interests with respect to the property of the partners or either of them, the court may adjourn its hearing of the application for the order.

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- (2) Where the hearing of the application has been adjourned, either the applicant for the order or the respondent to the application may apply to the court for the hearing to proceed if the proceedings in the Family Court are delayed.
- (3) Nothing in this section limits the power of the court to grant or refuse an adjournment in relation to any proceedings before it.

## **21 Deferment of operation of order**

Where a court is of the opinion that a de facto partner is likely, within a short period, to become entitled to property which may be applied in satisfaction of an order under Division 3, the court may defer the operation of the order until such date, or the occurrence of such event, as is specified in the order.

## **22 Effect of death of party on application**

- (1) If either party to an application for an order under Division 3 dies before the application is determined, the application may be continued by or against the legal personal representative of the deceased party.
- (2) A court may make an order on an application continued by virtue of subsection (1) if it is of the opinion that:
  - (a) it would have adjusted interests in respect of property if the deceased party had not died; and
  - (b) despite the death of the deceased party, it is still appropriate to adjust those interests.
- (3) An order made by virtue of subsection (2) may be enforced on behalf of, or against the estate of, the deceased party.
- (4) The rules of a court may provide for the substitution of the legal personal representative as a party to the application.

## **23 Effect of death of party on order**

If a party to an application for an order under Division 3 dies after an order is made against the party, the order may be enforced against the estate of the deceased party.



## **Division 5            Maintenance**

### **24            No general right of de facto partner to maintenance**

- (1) A de facto partner is liable to maintain the other de facto partner and a de facto partner is entitled to claim maintenance from the other de facto partner only as provided by this Division.
- (2) A de facto partner may apply to a court for an order under this Division for maintenance whether or not an application for any other remedy or relief has been made, or may be made, under this or any other Act or law.
- (3) Sections 15, 16 and 17 shall apply in relation to an order under this Division as they apply in relation to an order under Division 3.

### **25            Time limit for applying for order and conditions for making it**

- (1) Subject to subsection (2), section 14 shall apply to an application for an order under this Division as it applies to an application under section 13(1) for an order under Division 3.
- (2) Section 14(2) shall not apply to an application for an order under this Division if the grounds on which the application is made are or include the grounds specified in section 26(1)(b).
- (3) Sections 15, 16 and 17 shall apply in relation to an order under this Division as they apply in relation to an order under Division 3.

### **26            Order for maintenance**

- (1) A court may make an order for periodic or other maintenance if it is satisfied as to either or both of the following:
  - (a) that the partner applying for the order is unable to support himself or herself adequately because of having the care and control of a child of the de facto partners, or a child of the other partner, who has not attained the age of 18 years on the day on which the application is made;
  - (b) that the partner is unable to support himself or herself adequately because the partner's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court:
    - (i) an order for maintenance would increase the partner's earning capacity by enabling the partner to undertake a course or program of training or education; and

- (ii) it is reasonable to make the order, having regard to all the circumstances of the case.
- (2) In determining whether to make an order under this Division for maintenance and in fixing an amount to be paid, a court shall have regard to:
  - (a) the income, property and financial resources of each de facto partner;
  - (b) the physical and mental capacity of each de facto partner for appropriate gainful employment;
  - (c) the financial needs and obligations of each de facto partner;
  - (d) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under a law of the Commonwealth or a State or Territory of the Commonwealth, or of another country, and the rate of any such pension, allowance or benefit being paid to either party;
  - (e) the responsibilities of either de facto partner to support any other person;
  - (f) the terms of any order made or proposed to be made under Division 3 with respect to the property of the de facto partners; and
  - (g) any payments made for the maintenance of a child or children in the care and control of the partner applying for the order.
- (3) In making an order, a court shall disregard any entitlement of the partner applying for the order, or of any child of whom that partner has the care and control, to an income tested pension, allowance or benefit within the meaning of the *Family Law Act 1975* of the Commonwealth.

## **27 Interim maintenance**

Where it appears to a court that the partner applying for an order under this Division is in immediate need of financial assistance, but it is not practicable in the circumstances to decide immediately if any order should be made, the court may order the other partner to pay to the applicant such periodic or other amounts until the application is determined as the court considers reasonable.

**28 Effect of subsequent marriage or de facto relationship**

Where de facto partners have ended their de facto relationship, a partner who has subsequently married or entered into another de facto relationship may not apply for an order under this Division against the previous de facto partner.

**29 Application cannot continue after death of party**

An application for an order under this Division cannot be continued if either party to the application dies before the application is determined.

**30 Cessation of order – generally**

- (1) An order under this Division ceases to have effect:
  - (a) on the death of either de facto partner; or
  - (b) on the marriage of the de facto partner in whose favour the order was made.
- (2) Where a de facto partner in whose favour an order under this Division is made marries, he or she must, without delay, notify the de facto partner against whom the order was made of the date of the marriage.
- (3) A de facto partner who, after a marriage referred to in subsection (1)(b) takes place, paid any amount under an order under this Division providing for periodic maintenance may recover the amount as a debt due and payable by the previous de facto partner.

**31 Cessation of order – child care responsibilities**

An order under this Division for periodic maintenance, being an order made where the court is satisfied solely as to the matters specified in section 26(1)(a), ceases to have effect on the day on which the de facto partner in whose favour the order was made ceases to have the care and control of the child or the children in respect of whom the order was made.

**32 Duration of orders for periodic maintenance**

- (1) An order under this Division for periodic maintenance, being an order made where the court is satisfied solely as to the matters specified in section 26(1)(a), applies for such period as the court decides, not exceeding the period ending when the child in respect of whom the order was made, or the younger or youngest child,

attains the age of 18 years.

- (2) An order under this Division for periodic maintenance, being an order made where the court is satisfied solely as to the matters specified in section 26(1)(b), applies for such period as the court decides, being a period not exceeding:

- (a) 3 years after the day on which the order was made; or
- (b) 4 years after the day on which the de facto partners last lived together,

whichever is the shorter.

- (3) An order under this Division for periodic maintenance, being an order made where the court is satisfied as to the matters specified in both paragraph (a) and paragraph (b) of section 26(1), applies for such period as the court decides, being a period not exceeding the relevant period permissible under subsection (1) or (2), whichever is the longer.
- (4) Nothing in this section or in an order under this Division for periodic maintenance prevents the order from ceasing to have effect pursuant to section 30 or 31.

### **33 Discharge, suspension, revival or variation of periodic maintenance orders**

- (1) On application by a de facto partner in respect of whom an order under this Division has been made for periodic maintenance, a court may by order:
- (a) discharge the order;
  - (b) suspend the operation of the order wholly or in part and either until a further order is made or until a fixed time or the happening of a future event;
  - (c) revive, wholly or in part, the operation of an order suspended under paragraph (b); or
  - (d) vary the order so as to increase or decrease an amount directed by the order to be paid, or in any other manner.
- (2) Subject to subsection (2A), a court must not make an order under subsection (1) unless it is satisfied that:
- (a) the circumstances of either of the de facto partners have changed in such a way; or

- (b) the cost of living has changed to such an extent,  
as to justify making the order.

(2A) A court must discharge an order if satisfied:

- (a) the de facto relationship has ended; and
  - (b) the de facto partner in whose favour the order was made has entered into another de facto relationship.
- (3) In satisfying itself for the purposes of subsection (2)(b), a court shall have regard to any changes that have occurred, during the relevant period in:
- (a) the Consumer Price Index (All Groups Index) issued by the Australian Statistician; or
  - (b) a group of numbers or of amounts, relating to the price of goods and services, issued by the Australian Statistician which is prescribed for the purposes of this paragraph.
- (4) A court shall not, in considering the variation of an order, have regard to a change in the cost of living unless not less than 12 months have elapsed since the order was made, or last varied because of a change in the cost of living.
- (5) A court may make a retrospective order decreasing the amount of a periodic amount payable under an order.
- (6) For the purposes of this section, a court must have regard to sections 24 and 26.

### **34 Extension of order for periodic maintenance**

- (1) Where a court has made an order under this Division for periodic maintenance for a period less than the maximum period permissible under section 32, the de facto partner in whose favour the order is made may apply to the court at any time before that maximum period ends for an extension of the period for which the order applies.
- (2) A court shall not make an order to extend periodic maintenance unless it is satisfied that there are circumstances which justify an extension.
- (3) An order may not extend the period beyond the maximum period permissible under section 32.

- (4) For the purposes of this section, a court must have regard to sections 24 and 26.

### **35 Recovery of arrears**

Nothing in section 30 or 31 affects the recovery of arrears due and payable under an order under this Division for maintenance at the time when the order ceased to have effect.

## **Division 6 Supplementary**

### **36 Duty of court to end financial relationship**

In proceedings for an order under Division 3 or 5 a court shall, as far as is practicable, make orders that will finally determine the financial relationships between the de facto partners and avoid further proceedings between them.

### **37 General powers of court for purposes of Part 2**

A court may, in exercising its powers under this Part other than section 10, do any one or more of the following:

- (a) order the transfer of property;
- (b) order the sale of property, and the distribution of the proceeds of sale in any proportions that the court thinks fit;
- (c) order that any necessary instrument be executed, and that such documents of title be produced or other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
- (d) order payment of a lump sum, whether in one amount or by instalments;
- (e) order payment of a weekly, fortnightly, monthly, yearly or other periodic amount;
- (f) order that the payment of any sum ordered to be paid be wholly or partly secured in any manner that the court directs;
- (g) appoint or remove trustees;

- (h) make an order or grant an injunction:
  - (i) for the protection of, or otherwise relating to, the property or financial resources of one or both of the parties to an application; or
  - (ii) to aid the enforcement of any other order made in respect of an application,or both;
- (j) impose terms and conditions;
- (k) make an order by consent;
- (m) make any other order or grant any other injunction which it considers necessary to do justice.

### **38 Execution of instruments by order of court**

- (1) Where:
  - (a) an order under this Part has directed a person to execute an instrument; and
  - (b) the person has refused or neglected to comply with the direction or, for any other reason, a court thinks it necessary to exercise its powers under this subsection,the court may appoint an officer of the court or other person to execute the instrument in the name of the person to whom the direction was given, and to do everything necessary to make the instrument valid and operative.
- (2) The execution of the instrument by the appointed person has the same force and validity as if it had been executed by the person directed by the order to execute it.
- (3) A court may make any order it thinks just about the payment of the costs and expenses of and incidental to the preparation and execution of the instrument.

### **39 Orders and injunctions in the absence of a party**

- (1) In the case of urgency, a court may, in the absence of a party, make or grant:
  - (a) an order under section 27; or

- (b) an order or injunction for either or both of the purposes specified in section 37(h).
- (2) An application for relief under this section may be made orally or in writing or in any form the court considers appropriate.
- (3) If an application under this section is not made in writing, the court shall not make an order or grant an injunction unless it considers that it is necessary to do so because of the extreme urgency of the case.
- (4) The court may give directions with respect to the filing, serving and further hearing of a written application.
- (5) An order or injunction granted by virtue of this section shall be expressed to operate or apply only until a specified time or the further order of the court.
- (6) The court may give directions with respect to:
  - (a) the service of an order or injunction granted by virtue of this section and any other documents it thinks fit; and
  - (b) the hearing of an application for a further order.

#### **40 Variation and setting aside of orders in special cases**

- (1) Where a court is satisfied, on the application of a person in respect of whom an order has been made under Division 3 or 5:
  - (a) that there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
  - (b) that in the circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out; or
  - (c) that a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order,

the court may vary the order or set the order aside and, if it thinks fit, make a substitute order in accordance with that Division.



- (2) An order under Division 5 for maintenance, other than periodic maintenance, may not be varied except in accordance with this section.

#### **41 Transactions to defeat claims**

- (1) On an application for an order under Division 3, the court may set aside, or restrain the making of, any instrument or disposition made or proposed to be made by or on behalf of a party to the application, or by the direction of or in the interest of such a party, which is, irrespective of intention, likely to defeat an existing or anticipated order relating to the application (being an order adjusting interests with respect to the property of the parties or either of them, or an order for costs).
- (2) Without limiting section 37, the court has power to order:
  - (a) that any property dealt with by an instrument or disposition referred to in subsection (1) may as the court directs be taken in execution, or used or applied in or charged with the payment of any amounts payable under:
    - (i) an order adjusting interests with respect to the property of the parties or either of them; or
    - (ii) an order for costs; and
  - (b) that the proceeds of a sale shall be paid into court to await its order.
- (3) The court may order a party, or a person acting in collusion with a party, to pay the costs of:
  - (a) the other party; or
  - (b) a purchaser in good faith or other interested person,in relation or incidental to an instrument or disposition referred to in subsection (1) and to the setting aside or restraining of the instrument or disposition.
- (4) In this section, **disposition** includes a sale and a gift.

#### **42 Interests of other persons**

- (1) In the exercise of its powers under Divisions 3, 4 and 6, a court shall have regard to the interests of, and make any order proper for the protection of, a purchaser in good faith or other interested person.

- (2) A court may order that a person be given notice of the proceedings, or be made a party to the proceedings, on the application of that person or if it appears to the court that the person may be affected by an order under any of those Divisions.

#### **43 Enforcement of orders and injunctions**

- (1) If a court having jurisdiction under this Part is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Part, the court may:
  - (a) order the person to give to the court any documents the court thinks fit; and
  - (b) make any other orders that the court considers necessary to enforce compliance with the order or injunction.
- (2) Nothing in subsection (1) affects any other power of a court to enforce its orders or its power to punish a person for contempt.

### **Part 3 Cohabitation agreements and separation agreements**

#### **44 Validity of agreements**

- (1) Two adults who are not married to each other may enter into a cohabitation agreement or separation agreement.
- (2) Except as otherwise provided by this Part, a cohabitation agreement or separation agreement is subject to and enforceable in accordance with the law of contract.
- (3) Nothing in a cohabitation agreement or separation agreement affects the power of a court to make an order with respect to:
  - (a) the right to custody or maintenance of;
  - (b) the right of access to; or
  - (c) any other matter relating to,the children of the parties to the agreement.

**45 Effect of agreements in proceedings for adjustment of property rights or maintenance orders**

- (1) This section applies where a de facto partner applies to a court for an order under Division 3 or 5 of Part 2 and the court is satisfied on the application that there is a cohabitation agreement or separation agreement between that partner and the other.
- (2) Where the court is also satisfied that the agreement is in writing and is signed by the other de facto partner, the court may make an order under Division 3 or 5 of Part 2 notwithstanding that the agreement purports to exclude its jurisdiction to do so, but (except as provided by sections 46 and 47) shall not make an order which is in any respect inconsistent with the terms of the agreement.
- (3) Where the court is not satisfied as mentioned in subsection (2), the court may make such order under Division 3 or 5 of Part 2 as it could have made if there were no such agreement between the partners, but may nevertheless have regard to the terms of the agreement.

**46 Variation and setting aside of agreements**

- (1) On an application by a de facto partner for an order under Division 3 or 5 of Part 2, the court may, in the circumstances specified in this section, vary or set aside all or any of the provisions of a cohabitation agreement or separation agreement made between that de facto partner and the other, being an agreement which is in writing and is signed by that other.
- (2) The court may exercise its powers under subsection (1) in respect of a cohabitation agreement or separation agreement only if, in its opinion:
  - (a) enforcement (whether on the application before the court or on any other application for any remedy or relief under any other Act or law) of the agreement would lead to serious injustice between the parties; or
  - (b) circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out.
- (3) A court may exercise its powers under subsection (1) notwithstanding any provision to the contrary in a cohabitation agreement or separation agreement.

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**47        Disregarding of spent agreements in proceedings to adjust property rights or for maintenance orders**

On an application by a de facto partner for an order under Division 3 or 5 of Part 2, a court is not required to give effect to the terms of a cohabitation agreement or separation agreement entered into by that partner if the court is of the opinion:

- (a) that the de facto partners have, by their words or conduct, revoked the agreement or consented to its revocation; or
- (b) that the agreement has otherwise ceased to have effect.

**48        Death of partner – effect on periodic maintenance under agreements**

- (1) The provisions of a cohabitation agreement or separation agreement requiring a de facto partner to pay periodic maintenance to the other de facto partner:
  - (a) are, on the death of the first-mentioned partner, unenforceable against that partner's estate except insofar as the agreement otherwise provides; and
  - (b) are, on the death of the second-mentioned partner, unenforceable by that partner's estate.
- (2) Subsection (1) does not affect the right to recover arrears of periodic maintenance due and payable under an agreement at the time of a partner's death.

**49        Death of partner – effect on lump sum payments, &c., under agreements**

The provisions of a cohabitation or separation agreement between de facto partners relating to property and lump sum payments may, on the death of one of the partners, be enforced on behalf of, or as the case may require against, the estate of the deceased partner, except in so far as the agreement provides to the contrary.

**Part 4                    Miscellaneous**

**50        Exemption of certain instruments from stamp duty**

An instrument is exempt from stamp duty to the extent that it makes provision for or with respect to the conveyance to de facto partners, or either of them, of property of the partners or either of them if the Commissioner of Taxes is satisfied that the instrument is made by reason of the breakdown of the partners' de facto relationship.

**52      Saving for other rights of de facto partners**

Nothing in this Act affects any right of a de facto partner to apply for any remedy or relief under any other Act or law.

**53      Regulations**

- (1) The Administrator may make regulations, not inconsistent with this Act, prescribing matters:
  - (a) required or permitted by this Act to be prescribed; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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## ENDNOTES

### 1 KEY

Key to abbreviations

<b>amd</b> = amended	<b>od</b> = order
<b>app</b> = appendix	<b>om</b> = omitted
<b>bl</b> = by-law	<b>pt</b> = Part
<b>ch</b> = Chapter	<b>r</b> = regulation/rule
<b>cl</b> = clause	<b>rem</b> = remainder
<b>div</b> = Division	<b>renum</b> = renumbered
<b>exp</b> = expires/expired	<b>rep</b> = repealed
<b>f</b> = forms	<b>s</b> = section
<b>Gaz</b> = <i>Gazette</i>	<b>sch</b> = Schedule
<b>hdg</b> = heading	<b>sdiv</b> = Subdivision
<b>ins</b> = inserted	<b>SL</b> = Subordinate Legislation
<b>lt</b> = long title	<b>sub</b> = substituted
<b>nc</b> = not commenced	

### 2 LIST OF LEGISLATION

***De Factor Relationships Act 1991 (Act No. 38, 1991)***

Assent date	28 September 1991
Commenced	1 October 1991 (s 2)

***Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 (Act No. 1, 2004)***

Assent date	7 January 2004
Commenced	17 March 2004 (Gaz G11, 17 March 2004, p 8)

### 3 SAVINGS AND TRANSITIONAL PROVISIONS

s 35 *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003*  
(Act No. 1, 2004)

### 4 LIST OF AMENDMENTS

s 3	amd No. 1, 2004, s 30
s 3A	ins No. 1, 2004, s 31
s 28 hdg	amd No. 1, 2004
s 33	amd No. 1, 2004, s 32
s 44	amd No. 1, 2004, s 33
s 51	rep No. 1, 2004, s 30