

Queensland



PROPERTY LAW AMENDMENT ACT 1999

Act No. 89 of 1999



PROPERTY LAW AMENDMENT ACT 1999

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Queensland



Property Law Amendment Act 1999

Act No. 89 of 1999

An Act to amend the *Property Law Act 1974* to facilitate the resolution of financial matters at the end of a de facto relationship, and for other purposes

[Assented to 21 December 1999]

The Parliament of Queensland enacts—

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the *Property Law Amendment Act 1999*.

PART 2—AMENDMENT OF PROPERTY LAW ACT 1974

Act amended in pt 2

2. This part amends the *Property Law Act 1974*.

Amendment of title

- 3.(1) Title, ‘**contract, and**’—

omit, insert—

‘**contract,**’.

- (2) Title, after ‘**statutes**’—

insert—

‘, to facilitate the resolution of financial matters at the end of a de facto relationship, and for other purposes’.

Amendment and relocation of s 3 (Definitions)

- 4.(1) Section 3, heading to ‘In this Act—’—

omit, insert—

‘SCHEDULE 6**‘DICTIONARY**

section 3’.

(2) Section 3, definition **“court”**—

omit.

(3) Section 3—

insert—

‘ **“account of a de facto proceeding”**, for part 19, see section 268.

“child” of de facto spouses, for part 19, see section 259.

“cohabitation agreement”, for part 19, see section 264.

“court” means—

(a) for part 19¹—a court having jurisdiction under the part;² and

(b) otherwise—the Supreme Court.

“court document”, of a proceeding, for part 19, see section 259.

“de facto relationship”, for part 19, see section 261.

“de facto spouse”, for part 19, see section 260.

“financial matters”, for part 19, see section 262.

“financial resources”, for part 19, see section 263.

“monetary limit”, for part 19, see section 259.

“property adjustment order”, for part 19, means an order under section 286.

“publish”, for part 19, see section 267.

“recognised agreement”, for part 19, see section 266.

1 Part 19 (Property (De Facto Relationships))

2 See section 329 (Courts having jurisdiction under pt 19)

“**separation agreement**”, for part 19, see section 265.’.

(4) Section 3—

relocate to after schedule 5.

Insertion of new s 3

5. After section 2—

insert—

‘Dictionary

‘3. The dictionary in schedule 6 defines particular words used in this Act.’.

Renumbering of pt 19 (Miscellaneous)

6.(1) Part 19—

renumber as part 20.

(2) Sections 255 to 261—

renumber as sections 345 to 351.

Insertion of new pt 19

7. After part 18—

insert—

‘PART 19—PROPERTY (DE FACTO RELATIONSHIPS)

‘Division 1—Preliminary

‘Main purposes of pt 19

‘255. This part has the following main purposes—

- (a) to facilitate the resolution of financial matters at the end of a de facto relationship;

- (b) to recognise de facto spouses should be allowed to plan their financial future, and resolve financial matters at the end of their relationship, by a cohabitation or separation agreement;
- (c) to facilitate a just and equitable property distribution at the end of a de facto relationship in relation to the de facto spouses and, in particular cases, any child of the de facto spouses;
- (d) to provide for declaratory relief to help persons ascertain their existing interests in property of de facto spouses;
- (e) to provide for injunctive relief to help persons protect their existing and adjusted interests in property of de facto spouses;
- (f) to provide for declaratory relief about the existence or non-existence of a de facto relationship and to avoid the duplication of proceedings if the existence or non-existence of a de facto relationship is relevant in 2 or more proceedings;
- (g) to facilitate the resolution of matters concerning a de facto relationship by the Supreme Court, the District Court or a Magistrates Court.

‘How main purposes are to be achieved

‘256. The way in which these purposes are to be achieved includes—

- (a) providing in division 3 for the resolution of financial matters by de facto spouses; and
- (b) providing in division 4 for the resolution of financial matters by courts; and
- (c) providing in division 5 for declaratory relief about the existence or non-existence of de facto relationships; and
- (d) providing in division 6 for the jurisdiction and powers of the Supreme Court, the District Court and Magistrates Courts to deal with matters under this part.

‘Application of pt 19

‘257.(1) This part applies to all de facto relationships other than relationships that ended before the commencement of this section.

‘(2) It does not matter whether a de facto relationship started before or after the commencement of this section.

‘Other rights not affected

‘**258.(1)** Nothing in this part affects a right of a de facto spouse to apply for a remedy or relief under another law.

‘(2) In this section—

“**law**” includes a law of the Commonwealth or a State.’.

‘Division 2—Interpretation

‘Subdivision 1—General

‘Definitions for pt 19

‘**259.** In this part—

“**account of a de facto proceeding**” has the meaning given by section 268.

“**child**” of de facto spouses means—

- (a) a biological child of the de facto spouses; or
- (b) a child of the female de facto spouse whose male de facto spouse is presumed or proved to be the father of the child under an Act of the Commonwealth or a State; or
- (c) a child adopted by the de facto spouses; or
- (d) a child who, at a time during the de facto relationship, is or was—
 - (i) treated by either de facto spouse as a child of the relationship; and
 - (ii) ordinarily a member of the de facto spouses’ household.

“**cohabitation agreement**” has the meaning given by section 264.

“**court**” means a court having jurisdiction under this part.³

³ See section 329 (Courts having jurisdiction under pt 19)

“court document” of a proceeding means—

- (a) a pleading in the proceeding; or
- (b) a transcript of evidence in the proceeding; or
- (c) another document used in relation to the proceeding.

“de facto relationship” has the meaning given by section 261.

“de facto spouse” has the meaning given by section 260.

“financial matters” has the meaning given by section 262.

“financial resources” has the meaning given by section 263.

“monetary limit”—

- (a) for the District Court—has the meaning given by the *District Court Act 1967*, section 68;⁴ and
- (b) for a Magistrates Court—means the maximum amount claimable under the *Magistrates Courts Act 1921*, section 4(a).⁵

“property adjustment order” means an order under section 286.

“publish” has the meaning given by section 267.

“recognised agreement” has the meaning given by section 266.

“separation agreement” has the meaning given by section 265.

‘Subdivision 2—De facto spouse and relationship concepts

‘Meaning of “de facto spouse”

‘260.(1) A **“de facto spouse”** is either 1 of 2 persons, whether of the same or the opposite sex, who are living or have lived together as a couple.

‘(2) For subsection (1)—

⁴ *District Court Act 1967*, section 68(2) (District Court’s civil jurisdiction)—**“monetary limit”** means \$250 000.’.

⁵ *Magistrates Courts Act 1921*, section 4(a)—
‘...the amount claimed is not more than \$50 000...’.

- (a) 2 persons are a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other; and
- (b) 2 persons are not a couple only because they are cotenants.

‘Meaning of “de facto relationship”

‘261. A **“de facto relationship”** is the relationship between de facto spouses.

‘Subdivision 3—Financial matters and financial resources concepts

‘Meaning of “financial matters”

‘262. De facto spouses’ **“financial matters”** are matters about the property or financial resources of either or both of them.

‘Meaning of “financial resources”

‘263. A person’s **“financial resources”** include the following—

- (a) a prospective claim or entitlement under a scheme, fund or arrangement under which superannuation, resignation, termination, retirement or similar benefits are provided to, or in relation to, the person;
- (b) property that, under a discretionary trust, may become vested in, or applied to the benefit of, the person;
- (c) property the disposition of which is wholly or partly under the control of the person and that may be used or applied by or on behalf of the person for the person’s benefit;
- (d) any other valuable benefit of the person.

‘Subdivision 4—Cohabitation, separation and recognised agreement concepts

‘Meaning of “cohabitation agreement”

‘264.(1) A **“cohabitation agreement”** is an agreement—

- (a) made by de facto spouses—
 - (i) in contemplation of starting their de facto relationship; or
 - (ii) during their de facto relationship; and
- (b) dealing with all or some of the de facto spouses’ financial matters.

‘(2) A **“cohabitation agreement”** includes a cohabitation agreement varying a cohabitation agreement.

‘(3) It does not matter whether—

- (a) a cohabitation agreement is made before or after the commencement of this section; or
- (b) there are other parties to a cohabitation agreement; or
- (c) a cohabitation agreement deals with other matters.

‘Meaning of “separation agreement”

‘265.(1) A **“separation agreement”** is an agreement—

- (a) made by de facto spouses—
 - (i) in contemplation of ending their de facto relationship; or
 - (ii) after their de facto relationship has ended; and
- (b) dealing with all or some of the de facto spouses’ financial matters.

‘(2) A **“separation agreement”** includes a separation agreement varying a cohabitation agreement or separation agreement.

‘(3) It does not matter whether—

- (a) a separation agreement is made before or after the commencement of this section; or

- (b) there are other parties to a separation agreement; or
- (c) a separation agreement deals with other matters.

‘Meaning of “recognised agreement”

‘266.(1) A **“recognised agreement”** of de facto spouses is a cohabitation or separation agreement of the de facto spouses that—

- (a) is a written agreement; and
- (b) is signed by the de facto spouses and witnessed by a justice of the peace (qualified) or solicitor; and
- (c) contains a statement of all significant property, financial resources and liabilities of each de facto spouse when the de facto spouse signs the agreement.

‘(2) Whether all significant property, financial resources and liabilities of a de facto spouse are stated depends on whether the value of a property, financial resource or liability of the de facto spouse that is not stated is significant given the total value of the de facto spouse’s stated property, financial resources and liabilities.

‘Subdivision 5—Publication and account of a de facto proceeding concepts

‘Meaning of “publish”

‘267.(1) A person **“publishes”** something if the person publishes the thing or causes the thing to be published to the public or a section of the public, including, for example—

- (a) in a newspaper, periodical or circular; or
- (b) through radio or television; or
- (c) by another form of communication, including, for example, telephone, fax or computer.

‘(2) In subsection (1)—

“section of the public” includes an individual.

‘Meaning of “account of a de facto proceeding”

‘268. An “**account of a de facto proceeding**” is an account of all or part of a proceeding under this part.

‘Division 3—Resolution of financial matters by de facto spouses***‘Subdivision 1—Purpose of division and use of agreements*****‘Purpose of div 3**

‘269.(1) The purpose of this division is to allow de facto spouses to plan their financial future and resolve financial matters at the end of their relationship.

‘(2) This purpose is achieved by permitting de facto spouses to make cohabitation and separation agreements that, in particular circumstances, exclusively regulate the resolution of financial matters at the end of their relationship.

‘Cohabitation and separation agreements are valid

‘270. De facto spouses may make cohabitation and separation agreements.

‘Court’s jurisdiction may not be excluded

‘271. A provision in an agreement purporting to exclude the jurisdiction of a court in relation to a cohabitation or separation agreement is invalid, but its invalidity does not affect the validity of the rest of the agreement.

‘Law of contract applies

‘272. A cohabitation or separation agreement is subject to, and enforceable according to, the law of contract except as otherwise provided by this part.

Example—

The effect of mistake, fraud, duress, undue influence or unconscionability in relation to a cohabitation or separation agreement is decided by the law of contract.

‘Effect of de facto spouse’s death

‘273. If a de facto spouse dies before the provisions of a cohabitation agreement or separation agreement have been carried out, the provisions may be enforced on behalf of or against the estate of the deceased de facto spouse unless the agreement expressly provides otherwise.

‘Subdivision 2—Relationship between recognised agreements and proceedings**‘No property adjustment order inconsistent with recognised agreement**

‘274.(1) If a court is satisfied there is a recognised agreement, the court must not make a property adjustment order inconsistent with the agreement’s provisions on financial matters.

‘(2) Subsection (1) is subject to sections 275 and 276.

‘Court to ignore revoked provision

‘275. For section 274, a court must ignore a provision on a financial matter if the de facto spouses have, in writing or by their conduct, revoked the provision or consented to its revocation.

‘Court may vary recognised agreement if serious injustice or impracticable

‘276.(1) On an application for a property adjustment order, the court may vary all or any of the provisions of the agreement if the court is satisfied—

- (a) enforcement of the agreement would result in serious injustice for a party to the agreement or a child of either of the de facto spouses; or

- (b) because of circumstances arising since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out.

‘(2) It does not matter whether the agreement purports to prevent a variation of all or any of the agreement’s provisions.

‘(3) If the court varies a provision of the agreement, section 274 applies to the agreement as varied.

‘(4) This section does not affect any other right a person may have to have the agreement varied under another law.

‘(5) In this section—

“**law**” includes a law of the Commonwealth or a State.

“**vary**” includes set aside.

Subdivision 3—Relationship between agreements other than recognised agreements and proceedings

Other cohabitation or separation agreements may be considered

‘277.(1) This section applies if, on an application for a property adjustment order, a court is—

- (a) satisfied there is a cohabitation or separation agreement of the de facto spouses; and
- (b) not satisfied the agreement is a recognised agreement.

‘(2) The court may make any order it could have made if there were no cohabitation or separation agreement.

‘(3) However, in making its order, the court may consider the agreement’s provisions on financial matters, in addition to the matters the court is required to consider under division 4, subdivision 2.⁶

⁶ Division 4 (Resolution of financial matters by court), subdivision 2 (Adjustment of property interests)

‘Court to ignore revoked provision

‘278. For section 277, a court must ignore a provision on a financial matter if the de facto spouses have, in writing or by their conduct, revoked the provision or consented to its revocation.

‘Division 4—Resolution of financial matters by court***‘Subdivision 1—Declaration of property interests*****‘Purpose of sdiv 1**

‘279.(1) The purpose of this subdivision is to help persons ascertain their existing rights in property of de facto spouses.

‘(2) This purpose is achieved by allowing a court to declare the title or rights of parties to a proceeding in property of de facto spouses.

‘Court may declare property interests

‘280.(1) In a proceeding between de facto spouses about existing title or rights in property, a court may declare any title or rights a de facto spouse or another party to the proceeding has in the property.

‘(2) It does not matter whether or not the de facto relationship has ended.

‘Court may give effect to declaration

‘281. A court may make orders to give effect to a declaration under this subdivision.

‘Subdivision 2—Adjustment of property interests***‘Subsubdivision 1—General*****‘Purpose of sdiv 2**

‘282.(1) The purpose of this subdivision is to ensure a just and equitable property distribution at the end of a de facto relationship.

‘(2) This purpose is achieved by—

- (a) providing de facto spouses who satisfy the requirements mentioned in subsubdivision 2⁷ with particular property rights; and
- (b) allowing applications to a court for an adjustment of interests in property.

‘De facto spouse may apply

‘283. After a de facto relationship has ended, a de facto spouse may apply to a court for an order adjusting interests in the property of either or both of the de facto spouses.

‘De facto spouses or child may benefit from adjustment

‘284. The application may be for the benefit of either or both of the de facto spouses or a child of the de facto spouses.

‘Not affected by other rights

‘285.(1) An application may be made under this subdivision whether or not an application for another remedy or relief has been made, or may be made, under this part or another law.

‘(2) In this section—

“law” includes a law of the Commonwealth or a State.

⁷ Subsubdivision 2 (Requirements for property adjustment proceedings)

‘Court may make property adjustment order

‘286.(1) A court may make any order it considers just and equitable about the property of either or both of the de facto spouses adjusting the interests of the de facto spouses or a child of the de facto spouses in the property.

‘(2) In deciding what is just and equitable, a court must consider the matters mentioned in subdivision 3.⁸

‘(3) It does not matter whether the court has declared the title or rights in the property.

‘(4) In this section—

“adjust”, for interests of persons in property, includes give an interest in the property to a person who had no previous interest in the property.

‘Subsubdivision 2—Requirements for property adjustment proceedings**‘Type of de facto relationship**

‘287. A court may make a property adjustment order only if it is satisfied—

- (a) the de facto spouses have lived together in a de facto relationship for at least 2 years; or
- (b) there is a child of the de facto spouses who is under 18 years; or
- (c) the de facto spouse who applied for the order has made substantial contributions of the kind mentioned in section 291 or 292⁹ and failure to make the order would result in serious injustice to the de facto spouse.

⁸ Subsubdivision 3 (Matters for consideration in deciding what is just and equitable)

⁹ Section 291 (Contributions to property or financial resources)
Section 292 (Contributions to family welfare)

‘Time limit for making application

‘**288.(1)** A court may make a property adjustment order only if—

- (a) the application was made within 2 years after the day on which the de facto relationship ended; or
- (b) the court has given the applicant leave to apply.

‘**(2)** The court may give leave only if it is satisfied hardship would result to the applicant or a child of the de facto spouses if leave were not given.

‘Disclosure of financial circumstances

‘**289.(1)** A party to a proceeding for a property adjustment order must disclose the party’s financial circumstances in the way prescribed by the rules, or a practice direction, of the relevant court.

‘**(2)** A court may make a property adjustment order in favour of a party only if the party has complied with subsection (1).

‘**(3)** Nothing in this section affects a court’s power to make an interim order.

‘Disclosure of child support and relevant orders

‘**290.(1)** A party to a proceeding for a property adjustment order who is aware of either of the following must inform the court about the support or order—

- (a) any child support under the *Child Support (Assessment) Act 1989* (Cwlth) provided, or to be provided, by a de facto spouse for a child of the de facto spouses;
- (b) any order affecting a de facto spouse or a child of the de facto spouses made under a law of the Commonwealth or a State concerning de facto relationships.

‘**(2)** However, an order made in the proceeding for a property adjustment order is not invalid only because the party does not inform the court about the support or order.

‘Subsubdivision 3—Matters for consideration in deciding what is just and equitable

‘Contributions to property or financial resources

‘291.(1) The court must consider the financial and non-financial contributions made directly or indirectly by or for the de facto spouses or a child of the de facto spouses to—

- (a) the acquisition, conservation or improvement of any of the property of either or both of the de facto spouses; and
- (b) the financial resources of either or both of the de facto spouses.

‘(2) However, the non-financial contributions of a child of the de facto spouses must be considered only if the child’s contributions are substantial.

‘(3) It does not matter whether the property or financial resources mentioned in subsection (1) still belong to either or both of the de facto spouses when the court is considering the contributions made.

‘Contributions to family welfare

‘292.(1) The court must consider the contributions, including any homemaking or parenting contributions, made by either of the de facto spouses or a child of the de facto spouses to the welfare of—

- (a) the de facto spouses; or
- (b) the family constituted by the de facto spouses and 1 or more of the following—
 - (i) a child of the de facto spouses;
 - (ii) a person who is—
 - (A) accepted by either of the de facto spouses into the household of the de facto spouses; and
 - (B) dependent on either of the de facto spouses.

‘(2) However, the contributions of a child of the de facto spouses must be considered only if the child’s contributions are substantial.

Example—

A de facto couple own and live on a farm. They have twins, a boy and a girl. The twins always lived on the farm. After the twins left school, the parents bought 2 additional farms. The son then worked on the farms for no wages assuming, in time, 1 of the farms would be his. The daughter looked after the family's home for no wages assuming, in time, 1 of the farms would be hers. In both cases, the children did much more than the household chores (such as mowing the lawn and doing the dishes) that a family might normally expect of family members. When the children were 31 years, the parents separated.

The son's contributions are substantial and would be considered under section 291. The daughter's contributions are also substantial and would be considered under this section.

‘Effect on future earning capacity

‘293. The court must consider the effect of any proposed order on the earning capacity of the de facto spouses.

‘Child support

‘294. The court must consider any child support under the *Child Support (Assessment) Act 1989* (Cwlth) provided, or to be provided, by a de facto spouse for a child of the de facto spouses.

‘Other orders

‘295. The court must consider any other order affecting a de facto spouse or a child of the de facto spouses made under a law of the Commonwealth or a State concerning de facto relationships the court considers should be taken into account.

‘Other matters

‘296. The court must consider the matters mentioned in subdivision 4 to the extent they are relevant in deciding what order adjusting interests in property is just and equitable.

‘Subsubdivision 4—Additional matters for consideration to the relevant extent in deciding what is just and equitable

‘Age and health

‘297. The court must consider the age and state of health of each of the de facto spouses.

‘Resources and employment capacity

‘298. The court must consider—

- (a) the income, property and financial resources of each of the de facto spouses; and
- (b) the physical and mental capacity of each of them for appropriate gainful employment.

‘Caring for children

‘299. The court must consider whether either de facto spouse has the care of a child of the de facto spouses who is under 18 years.

‘Necessary commitments

‘300. The court must consider the commitments of each of the de facto spouses necessary to enable the de facto spouse to support—

- (a) himself or herself; and
- (b) a child or another person whom the de facto spouse has a duty to maintain.

‘Responsibility to support others

‘301. The court must consider the responsibility of either de facto spouse to support another person.

‘Government assistance

‘302.(1) The court must consider—

- (a) the eligibility of either de facto spouse for—
 - (i) an Australian pension, allowance or benefit that is not income tested; or
 - (ii) a foreign pension, allowance or benefit; and
- (b) the amount of any pension, allowance or benefit mentioned in paragraph (a) being paid to either de facto spouse.

‘(2) The court must disregard—

- (a) the eligibility of either de facto spouse for an Australian pension, allowance or benefit that is income tested; and
- (b) the amount of any pension, allowance or benefit mentioned in paragraph (a) being paid to either de facto spouse.

‘(3) For this section, whether an Australian pension, allowance or benefit is income tested depends on whether it is an income tested pension, allowance or benefit within the meaning of the *Family Law Act 1975* (Cwlth).

‘(4) In this section—

“Australian pension, allowance or benefit” means a pension, allowance or benefit under the law of the Commonwealth or a State.

“foreign pension, allowance or benefit” means a pension, allowance or benefit under the law of a foreign country.

‘Appropriate standard of living

‘303. If the de facto spouses have separated, the court must consider what standard of living is reasonable for each of the de facto spouses in all the circumstances.

‘Contributions to income and earning capacity

‘304. The court must consider the contributions made by either of the de facto spouses to the income and earning capacity of the other de facto spouse.

‘Length of relationship

‘305. The court must consider the length of the de facto relationship.

‘Effect of relationship on earning capacity

‘306. The court must consider the extent to which the de facto relationship has affected the earning capacity of each of the de facto spouses.

‘Financial circumstances of cohabitation

‘307. If either de facto spouse is cohabiting with another person, the court must consider the financial circumstances of the cohabitation.

‘Child maintenance

‘308. The court must consider any payments provided for the maintenance of a child in the care of either de facto spouse.

‘Other facts and circumstances

‘309. The court must also consider any fact or circumstance the court considers the justice of the case requires to be taken into account.

‘Subsubdivision 5—Adjournment because of likely change in financial circumstances**‘Likelihood of significant change in financial circumstances**

‘310. A court may adjourn an application to adjust interests in the property of either or both of the de facto spouses, if the court considers—

- (a) there is likely to be a significant change in the financial circumstances of either or both of the de facto spouses and it is reasonable to adjourn the application having regard to the time when the change is likely to happen; and

- (b) an order the court could make about the property if the change happens is more likely to do justice between the parties than an order the court could make immediately.

‘Matters for consideration by court

‘**311.** In considering whether there is likely to be a significant change in the financial circumstances of either of the de facto spouses, the matters a court may consider include any change in the financial circumstances of the de facto spouse that may happen because of—

- (a) the vesting of a financial resource in the de facto spouse; or
- (b) the use or application of a financial resource for the de facto spouse’s benefit.

‘Orders may be made before adjournment

‘**312.** Before a court adjourns an application to adjust interests in property, it may make any order it considers appropriate about the property.

‘Adjournments on other grounds not affected

‘**313.** Section 310¹⁰ does not limit the power of the court to adjourn a proceeding before it.

‘Subsubdivision 6—Change in circumstances

‘Delayed operation of order

‘**314.** If the court considers a de facto spouse is likely, within a short time, to become entitled to property that may be applied in satisfaction of a property adjustment order, the court may delay the operation of the order until a day, or the happening of an event, stated in the order.

¹⁰ Section 310 (Likelihood of significant change in financial circumstances)

‘Effect on proceeding of death of party

‘**315.** If a party to a proceeding for a property adjustment order dies before a final order has been made, a court may make an order if it considers—

- (a) it would have adjusted interests in property if the deceased party had not died; and
- (b) it is still appropriate to adjust the interests despite the death of the deceased party.¹¹

‘Division 5—Existence of a de facto relationship***‘Subdivision 1—Declaration about existence of relationship*****‘Purpose of div 5**

‘**316.(1)** The purpose of this division is to avoid the duplication of proceedings where the existence or non-existence of a de facto relationship is relevant in 2 or more proceedings.

‘**(2)** This purpose is achieved by allowing applications to a court for a declaration about the existence or non-existence of a de facto relationship.

Example—

A de facto spouse is killed in an accident at work. Whether or not the deceased’s de facto spouse is eligible for compensation under the *WorkCover Queensland Act 1996* or may claim family provision under the *Succession Act 1981* will depend on whether the de facto spouses were living in a de facto relationship at the time of death. It will avoid duplication of proceedings if this matter were litigated once only.

Note, however, that even when the existence or non-existence of a de facto relationship is declared, additional requirements may apply for particular purposes. Sometimes, a de facto relationship must exist for a minimum period, which may or may not be shortened if there is a child of the relationship. Sometimes, the relationship must exist at a particular time, for example, when a de facto spouse in the relationship dies.

¹¹ See also the *Succession Act 1981*, section 66 (Survival of actions), ‘...on the death of any person ... all causes of action subsisting against or vested in the person shall survive against, or, ...for the benefit of, the person’s estate.’

‘Application

‘317. A person may apply to the Supreme Court or the District Court for a declaration that—

- (a) there is, or has been, a de facto relationship between the person and another named person or between 2 named persons at a particular time or for a particular period; or
- (b) there is not, or was not, a de facto relationship between the person and another named person or between 2 named persons at a particular time or for a particular period.

‘Court may adjourn hearing if other affected person

‘318.(1) This section applies if, on an application under this subdivision, a court considers—

- (a) a person whose interests would be affected by the making of a declaration—
 - (i) is not present or represented at the hearing of the application; or
 - (ii) has not been given the opportunity to be present or represented at the hearing of the application; and
- (b) the person ought to be present or represented at the hearing.

‘(2) The court may adjourn the hearing to enable the person to be given an opportunity to be present or represented.

‘Court may make declaration about existence of relationship

‘319. If, on an application under this subdivision, the court is satisfied there is, or was, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.

‘Court may make declaration about non-existence of relationship

‘320. If, on an application under this subdivision, the court is satisfied there is not, or was not, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.

‘Declaration to include date

‘321. A declaration must include either or both of the following—

- (a) the date at which there was, or was not, a de facto relationship;
- (b) the dates between which there was, or was not, a de facto relationship.

‘Death of de facto spouses irrelevant

‘322. A declaration may be made whether or not the person or either of the persons named by the applicant as a de facto spouse or de facto spouses in the de facto relationship is alive.

‘Effect of declaration

‘323.(1) A declaration made by a court has effect as a judgment of the court.

‘(2) The persons named in the declaration are taken, as stated in the declaration, to have had or not to have had a de facto relationship at the date stated in the declaration, between the dates stated in the declaration or both.

‘(3) Subsection (2) applies for all purposes.

‘Subdivision 2—Revocation of declaration**‘Party or affected person may apply**

‘324. If a declaration has been made under subdivision 1¹²—

¹² Subdivision 1 (Declaration about existence of relationship)

- (a) a person who applied, or could have applied, for the declaration;
or
- (b) a person who is affected by the declaration;

may apply to the court that made the declaration for a revocation of the declaration.

‘Court may adjourn hearing if other affected person

‘325.(1) This section applies if, on an application under this subdivision, a court considers—

- (a) a person whose interests would be affected by the making of a declaration—
 - (i) is not present or represented at the hearing of the application;
or
 - (ii) has not been given the opportunity to be present or represented at the hearing of the application; and
- (b) the person ought to be present or represented at the hearing.

‘(2) The court may adjourn the hearing to enable the person to be given an opportunity to be present or represented.

‘Court may revoke declaration

‘326. On an application under this subdivision, the court may make an order revoking the declaration if satisfied—

- (a) a new fact or circumstance has arisen that has not previously been disclosed to the court; and
- (b) if the applicant was a party to the application for the declaration, the fact or circumstance was not within the applicant’s knowledge when the declaration was made.

‘Court may make ancillary orders

‘327.(1) If a court makes an order revoking a declaration, the court may, if it considers it would be just and equitable to do so, make any ancillary order necessary to place a person affected by the revocation of the

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

‘(2) Without limiting subsection (1), the court may make an order varying rights in property or the financial resources of de facto spouses or another person.

‘Effect of revocation

‘328.(1) If the court makes an order revoking a declaration, the declaration ceases to have effect.

‘(2) The revocation of the declaration does not affect anything done in reliance on the declaration before the order revoking the declaration was made.

‘Division 6—Courts

‘Subdivision 1—Jurisdiction

‘Courts having jurisdiction under pt 19

‘329.(1) The Supreme Court and the District Court have jurisdiction under division 5¹³ to make or revoke a declaration.

‘(2) The Supreme Court and, subject to subsection (4), the District Court and the Magistrates Courts each have jurisdiction to hear and decide all other matters under this part.

‘(3) The *Uniform Civil Procedure Rules 1999*, rule 35¹⁴ does not apply to a proceeding under this part.

‘(4) In a proceeding, the District Court or a Magistrates Court may make an order or declaration concerning an interest in property if the value of the interest is more than the court’s monetary limit only if—

¹³ Division 5 (Existence of a de facto relationship)

¹⁴ *Uniform Civil Procedure Rules 1999*, rule 35 (General rule) provides that a person must start a proceeding before a court in 1 of the districts mentioned.

- (a) for the District Court—a document has been filed under the *District Court Act 1967*, section 72;¹⁵ or
- (b) for a Magistrates Court—a document has been filed under the *Magistrates Courts Act 1921*, section 4A.¹⁶

‘Stay or dismissal of proceeding in relation to same person

‘330.(1) If there is a proceeding under this part started by or in relation to the same person pending in more than 1 court, a court in which a proceeding is pending may—

- (a) stay the proceeding pending before it for the time it considers appropriate; or
- (b) dismiss the proceeding.

‘(2) Before staying or dismissing a proceeding, a court may make any orders and give any directions it considers appropriate.

‘Transfer of proceeding to more appropriate court

‘331.(1) A court may transfer a pending proceeding to another court having jurisdiction under this part if the first court considers it is more appropriate for the proceeding to be dealt with in the other court.

‘(2) Before transferring a proceeding, a court may make any orders and give any directions it considers appropriate pending the disposal of the proceeding by the court to which the proceeding is transferred.

‘Subdivision 2—Powers

‘Purpose of sdiv 2

‘332. The purpose of this subdivision is to ensure the courts having jurisdiction under this part have adequate powers to make appropriate orders.

¹⁵ *District Court Act 1967*, section 72 (Consent jurisdiction)

¹⁶ *Magistrates Courts Act 1921*, section 4A (Consent jurisdiction)

‘Court’s powers

‘333.(1) In exercising its powers under this part, a court may do any 1 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 the court considers appropriate;
- (c) order that a document be executed, that a document of title be produced or that anything else be done to enable an order to be carried out effectively or to provide security for the performance of an order;
- (d) order payment of a lump sum, whether in a single amount or by instalments;
- (e) order that payment of an amount ordered to be paid be wholly or partly secured in a way the court directs;
- (f) appoint or remove a receiver or trustees;
- (g) make an order or grant an injunction—
 - (i) for the protection of, or otherwise relating to, the property or financial resources of a party to an application; or
 - (ii) to aid enforcement of another order made in relation to an application;
- (h) make an order or grant an injunction about the use or occupancy of the de facto spouses’ home;
- (i) if a de facto spouse is the lessee of the home in which the de facto spouses have lived and on separation the other de facto spouse wishes to remain in the home, the court may, with the consent of the lessor, order that the lease be assigned from the lessee to the other de facto spouse;
- (j) order that payments be made direct to a de facto spouse, to a trustee or into court for the benefit of a de facto spouse;
- (k) make a final order or grant a final injunction;
- (l) make an order or grant an injunction—
 - (i) pending the disposal of the proceeding; or

- (ii) for a fixed term or for life or during joint lives; or
- (iii) until the happening of a particular event, including, for example, a further order;
- (m) impose conditions;
- (n) make an order by consent;
- (o) make any other order or grant any other injunction it considers necessary to do justice.

‘(2) This section does not affect any other power of the court under this part or another law.

‘(3) This section applies for a Magistrates Court despite the *Magistrates Courts Act 1921*, section 7.¹⁷

‘(4) In this section—

“**law**” includes a law of the Commonwealth or a State.

‘Variation and setting aside of orders

‘334.(1) On the application of a person in relation to whom an order has been made under this part, a court may vary the order if satisfied—

- (a) there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence, failing to disclose matters as required by this part or another circumstance; or
- (b) because of 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) a person has defaulted in carrying out an obligation imposed on the person by the order and, because of circumstances that have arisen because of the default, it is just and equitable to vary the order; or

¹⁷ *Magistrates Courts Act 1921*, section 7 (Title to land etc.)

- (d) a child of the de facto spouses (or the applicant if the applicant has the care of a child of the de facto spouses) will suffer hardship if the court does not vary the order because of circumstances of an exceptional nature relating to the welfare of the child that have arisen since the order was made.¹⁸

‘(2) In this section—

“vary” includes—

- (a) set aside; and
- (b) set aside and substitute another.

‘Transactions to defeat claims

‘335.(1) If a court is satisfied an existing or anticipated order in a proceeding under this part is likely to be defeated by the making of a document or disposition by a party to the proceeding, the court may set aside or restrain the making of the document or disposition.

‘(2) If a court is satisfied an order in a proceeding under this part was defeated by the making of a document or disposition by a party to the proceeding, the court may order that—

- (a) any property dealt with by the document or disposition be applied towards, or charged with, payment of—
 - (i) an amount payable under a property adjustment order; or
 - (ii) costs; or
- (b) the proceeds of a sale of the property be paid into court to await its order.

‘(3) A court may order a party, or person acting in collusion with a party, to pay the costs of—

- (a) another party; or
- (b) a purchaser in good faith; or
- (c) another interested person.

¹⁸ See also *Uniform Civil Procedure Rules 1999*, rule 667 (Setting aside).

‘(4) The costs mentioned in subsection (3) are the costs of and incidental to—

- (a) the document or disposition; or
- (b) the setting aside or restraining of the document or disposition.

‘(5) For this section, something is made by a person if the thing is made by or on behalf of, or by direction or in the interests of, the person.

‘(6) For this section, it does not matter whether the document or disposition is or was intended to defeat the order it is likely to defeat or has defeated.

‘Interests of other parties

‘**336.(1)** In the exercise of its powers under this part, a court must have regard to the interest in the property of, and must make any order proper for the protection of, a purchaser in good faith and other interested persons.

‘(2) A court may order that a person be given notice of a proceeding or be made a party to the proceeding on the application of the person or if it appears to the court the person may be affected by an order under this part.

‘Duty of court to end financial relationship

‘**337.** In a proceeding under division 4, subdivision 2,¹⁹ a court must make orders that, as far as practicable, will end the financial relationship between the de facto spouses.

¹⁹ Division 4 (Resolution of financial matters by court), subdivision 2 (Adjustment of property interests)

‘Subdivision 3—Miscellaneous matters concerning proceedings***‘Subsubdivision 1—Intervention*****‘Application for leave**

‘338. A person may apply for leave to intervene in a proceeding under this part.

‘Leave to intervene

‘339.(1) A court may give a person leave to intervene in a proceeding before the court.

‘(2) The court may give leave subject to any conditions it considers appropriate.

‘Intervener’s rights

‘340. A person who intervenes in a proceeding by leave of the court is a party to the proceeding with all the rights, duties and liabilities of a party unless the court orders otherwise.

‘Subsubdivision 2—Costs**‘Party bears own costs**

‘341.(1) A party to a proceeding under this part bears the party’s own costs.

‘(2) However, if the court is satisfied there are circumstances justifying it making an order, it may make any order for costs or security for costs it considers appropriate.

‘(3) The court may make an order at any stage of the proceeding or after the proceeding ends.

‘(4) In considering whether there are circumstances justifying it making an order, the court must consider the following matters—

- (a) the income, property and financial resources of each of the parties;
- (b) whether any party has legal aid and the terms of the legal aid;
- (c) the conduct of each of the parties in relation to the proceeding, including, for example, conduct about pleadings, particulars, disclosure, inspection, interrogatories, admissions of facts and production of documents;
- (d) whether the proceeding results from a party's failure to comply with a previous order made under this part;
- (e) whether any party has been wholly unsuccessful in the proceeding;
- (f) whether any party made an offer to settle under the *Uniform Civil Procedure Rules 1999*²⁰ and the terms of the offer;
- (g) any fact or circumstance the court considers the justice of the case requires to be taken into account.

‘Subsubdivision 3—Publication of proceedings

‘Specifically authorised publication

‘342.(1) A person may publish an account of a de facto proceeding in the following ways—

- (a) by communicating, to a person involved in another proceeding in any court, a court document from the de facto proceeding for use in the other proceeding;
- (b) by communicating a court document from the de facto proceeding to—
 - (i) a body responsible for disciplining members of the legal profession; or
 - (ii) a person involved in a disciplinary proceeding against a member of the legal profession;

²⁰ See *Uniform Civil Procedure Rules 1999*, Chapter 9 (Ending proceedings early), part 5 (Offer to settle).

- (c) by communicating, to a body that grants legal aid, a court document from the de facto proceeding for use in deciding whether legal aid should be provided or continued in a particular case;
- (d) by publishing a notice or report about the de facto proceeding by direction of a court;
- (e) by publishing an account of the de facto proceeding in a publication that is—
 - (i) genuinely intended primarily for use by the members of a profession; and
 - (ii) a separate volume or part of a series of law reports or another publication of a technical character;
- (f) by publishing an account of the de facto proceeding to—
 - (i) a member of a profession in relation to the member's practice of the profession; or
 - (ii) a student in relation to the student's studies.

‘(2) In this section—

“**court**” means a court or tribunal established under a law of the Commonwealth or a State.

‘No identification in general publication

‘**343.(1)** A person may publish an account of a de facto proceeding only if the publication does not identify—

- (a) a party to the proceeding; or
- (b) a witness in the proceeding; or
- (c) another person who is, or is alleged to be, involved in a matter relevant to the proceeding; or
- (d) a person related to, or associated with, a person mentioned in paragraph (a), (b) or (c).

‘(2) A publication identifies a person if it is sufficient to identify the person to—

- (a) a member of the public; or
- (b) a member of the section of the public to whom the publication was made.

‘(3) Subsection (1) does not apply to a publication under section 342.

‘Offence

‘**344.(1)** A person must not publish an account of a de facto proceeding other than under section 342 or 343.

Maximum penalty—40 penalty units.

‘(2) A proceeding for an offence against this section may be started only with the written consent of the director of public prosecutions.

‘(3) A document purporting to be a consent mentioned in subsection (2) is taken to be the consent, and to have been properly given, unless the contrary is established.’.

PART 3—CONSEQUENTIAL AMENDMENTS

Acts amended in schedule

- 8.** The schedule amends the Acts it mentions.

SCHEDULE

ACTS AMENDED

section 8

MAGISTRATES COURTS ACT 1921

1. Section 45(1)—

insert—

‘(d) in a proceeding under the *Property Law Act 1974*, part 19, division 4, subdivision 1;²¹’.

STAMP ACT 1894

1. After section 72—

insert—

‘De facto relationship instruments exempt from duty

‘72A.(1) A de facto relationship instrument is exempt from stamp duty.

‘(2) In this section—

“**de facto relationship instrument**” means an instrument, to the extent the instrument is, or is made under, an order of a court under the *Property Law Act 1974*, part 19.²²’.

²¹ *Property Law Act 1974*, part 19 (Property (De facto Relationships)), division 4 (Resolution of financial matters by court), subdivision 1 (Declaration of property interests)

²² *Property Law Act 1974*, part 19 (Property (De Facto Relationships))

SCHEDULE (continued)

2. Schedule 1, under the heading ‘Application for registration or application for transfer of registration of a motor vehicle’, exemption 5A, after ‘spouse,’—

insert—

‘de facto spouse,’.

3. Schedule 1, under the heading ‘Conveyance or transfer’, paragraph (4), proviso (xvi), after ‘subsisting marriage’—

insert—

‘or a subsisting de facto relationship’.

4. Schedule 1, under the heading ‘Conveyance or transfer’, paragraph (4), proviso (xvi), after ‘the marriage’—

insert—

‘or the relationship’.

5. Schedule 2—

insert—

‘**“de facto relationship”** means the relationship between de facto spouses.

“de facto spouse”—

1. A “de facto spouse” is either 1 of 2 persons, whether of the same or the opposite sex, who are living or have lived together as a couple for at least 2 years.
2. For subsection (1)—
 - (a) 2 persons are a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other; and
 - (b) 2 persons are not a couple only because they are cotenants.’.

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