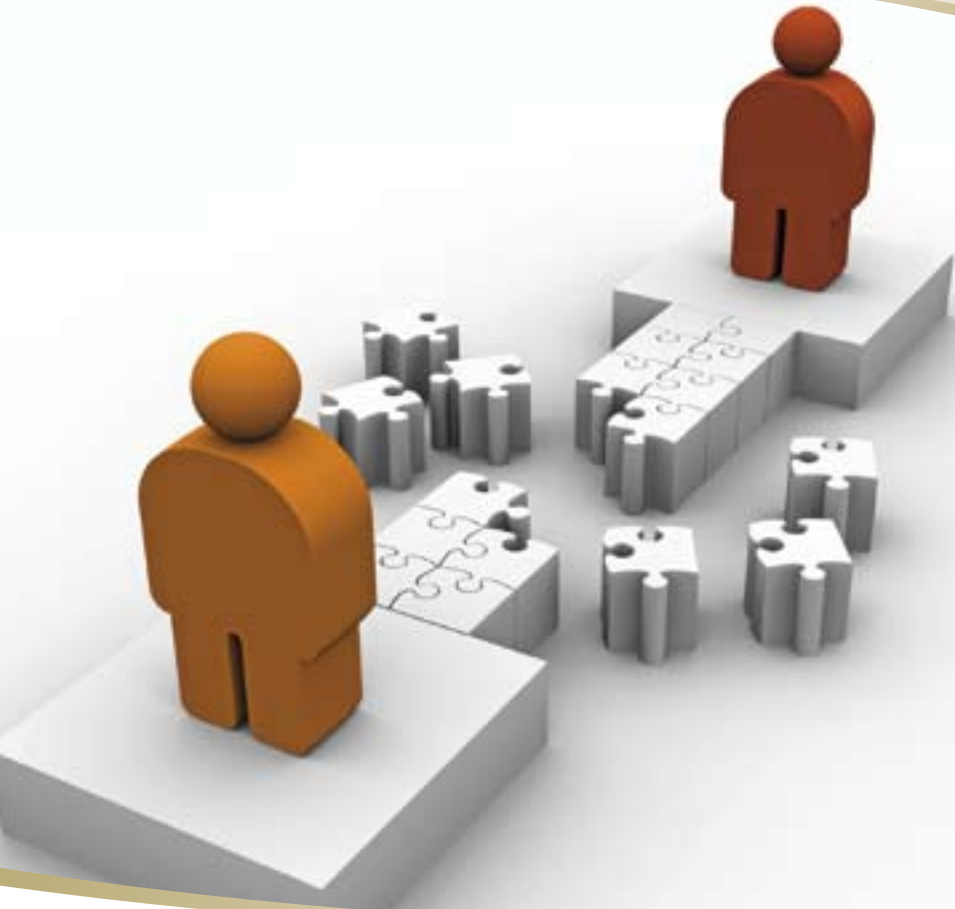




All domestic partners (same-sex or heterosexual) need to know about Victoria's new scheme for division of property and payment of maintenance



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Overview

Chapter 3 of the *Relationships Act 2008* (Vic) provides for relationship agreements between domestic partners. It also allows for property to be divided and for maintenance to be paid if the domestic relationship breaks down.¹ The scheme established by the Act goes some way to place heterosexual and same-sex couples living in a domestic relationship on equal footing with married couples in terms of the law's approach to division of property and payment of maintenance upon relationship breakdown.

When does this scheme commence?

This scheme will be operational no later than 1 December 2008.

To whom does this scheme apply?

This scheme applies to two people aged 18 or over who are (or were) in a 'domestic relationship' and are dealing with the breakdown of this relationship.

What is a domestic relationship?

A domestic relationship is:

- a registered relationship²; or
- a relationship between two unmarried persons (same-sex or heterosexual) who are genuinely living together as a domestic couple.³

If you support or care for someone for a fee or reward or on behalf of another person or organisation – that doesn't count!

If the relationship is **not** registered all of the circumstances of the relationship will be taken into account to decide whether a domestic relationship exists or existed. The legislation lists a number of circumstances that may be relevant, including:⁴

- the degree of mutual commitment to a shared life (for example, one partner taking on the other's surname);
- the length of the relationship;
- whether a sexual relationship exists;
- whether the parties own property together;
- whether the parties care for and support children (for example, if the couple adopts children together);
- the reputation and public aspect of the relationship (for example, whether the couple go out to public functions together);
- the financial arrangements between the parties (for example, whether the couple have a joint bank account).

¹ *Relationships Act 2008* (Vic) s 34.

² For an explanation of what is a registered relationship and what is the process for registering a relationship see the companion booklet entitled 'All You Need to Know about Victoria's New Relationships Register'.

³ In the context of a relationship agreement the definition is wider and includes a relationship between two unmarried adults (same-sex or heterosexual) who are not living together where one person provides personal or financial commitment and support (of a domestic nature) to the other: *Relationships Act 2008* (Vic) s 35(1).

⁴ *Relationships Act 2008* (Vic) s 35(2).

Relationship agreements

What is a relationship agreement?

A relationship agreement is an agreement between two persons who were (or are) in a 'domestic relationship'. An agreement may be made:

- before parties enter into a domestic relationship; or
- when parties are already in a domestic relationship; or
- when parties are contemplating relationship breakdown; or
- when the relationship has come to an end.

A relationship agreement deals primarily with maintenance and property matters between the parties. It states how property will be divided and sets out future financial arrangements between the parties in the event of relationship breakdown.⁵

For example, the agreement may specify who gets to keep the house or how the superannuation will be divided.

What is the effect of a relationship agreement?

A relationship agreement enables the parties to 'contract out' of the legislative scheme for payment of maintenance and division of property on relationship breakdown. In other words, if you are in a domestic relationship and that relationship comes to an end, you will be bound by the division of property and payment of maintenance scheme set out in this Act UNLESS you and your partner entered into a relationship agreement.⁶

If you and your partner entered into a relationship agreement, a court may NOT make an order that is inconsistent with that agreement IF:

- the agreement is in writing and signed by the partner against whom it is to be enforced (for example, the party who is to pay maintenance).
- each partner obtained independent legal advice about:
 - the effect of the agreement on the court's powers; and
 - at the time when the agreement was entered into, the advantages and disadvantages of making the agreement.
- the agreement is accompanied by a certificate that each party obtained such independent legal advice before signing.⁷

If the court finds that these requirements have NOT been met, the court is not bound by the agreement but it may still take the agreement into account when making an order.

Can you change your mind or is the relationship agreement binding forever?

You can change your mind! If the court finds that parties have expressly or impliedly cancelled the agreement then the agreement will not be binding.

A court may also vary or set aside a relationship agreement and apply the provisions of the Act relating to division of property and payment of maintenance instead.⁸ A court may set aside the agreement if it believes that the parties' circumstances have changed to such an extent since they signed the agreement that it would be unfair to hold them to that agreement

for example, if a house is specified in the agreement and it has since been sold

OR the facts give rise to any ground which would ordinarily allow a judge to set aside a contract.⁹

So, if you get your partner drunk and then make him/her sign an agreement, a court will not enforce this agreement!

Property and Maintenance

Who can apply for an order for division of property and payment of maintenance?

If you have **not** registered your relationship and you want to apply for payment of maintenance, or to have your property divided after your relationship has ended, you will have to satisfy the court that:

- you or your former partner lived in Victoria on the day that the application was made; and
- you both lived in Victoria for at least one third of the relationship OR the applicant has made substantial contributions in Victoria; and
- you have been living together in a domestic relationship for at least 2 years.¹⁰

If these conditions are not satisfied, a court can still make an order IF it is satisfied that:

- you are raising a child together OR
- it would be unjust not to make an order AND the applicant has made substantial contributions to the relationship.

! If you and your former partner registered your relationship, there is no need for you to prove any of the above.

⁵ For the definition of 'relationship agreement' see: *Relationships Act 2008* (Vic) s 35(1).

⁶ *Relationships Act 2008* (Vic) s 59.

⁷ *Relationships Act 2008* (Vic) s 59.

⁸ *Relationships Act 2008* (Vic) s 37(1).

⁹ *Relationships Act 2008* (Vic) s 37(2).

¹⁰ *Relationships Act 2008* (Vic) s 42.

What is the deadline for making an application for property division or payment of maintenance?

If you want the court to make an order dividing property between you and your former partner, or to make an order that your former partner pay you maintenance, you must apply to the court within **2 years after the day that the relationship ended**.¹¹

So... what is the scheme for division of property and payment of maintenance?

Property

In the context of adjustment/division of property, property could include personal property (like a car, or jewellery), land (like a house), money (or shares) or other goods. Debts may also be divided. The court also takes into account the parties' financial resources which may include superannuation benefits.

How does the court determine the division of property between the parties?

The court will make what it regards as a 'just and equitable' (or fair) order, taking into account:

- contributions (financial and non-financial) which both you and your former partner made (or contributions made on either of your behalf) to
 - buying, conserving or improving property belonging to either or both of you (for example, if your brother paints your house) OR

- financial resources (for example, superannuation benefits) of either or both of you.
- contributions which both you and your former partner made as homemaker and parent to the welfare of the other person and of your family as a unit.
- the nature and duration of the relationship
 - how long has the relationship existed and what sort of a relationship was it?¹²

When determining division of property the Court must also have regard to ALL the relevant matters that it takes into account when determining whether maintenance is payable.¹³ (See below under 'maintenance')

Maintenance

When the court orders one party to continue to provide financial support to the other party (either temporarily or indefinitely) after the breakdown of the domestic relationship, this is known as an order for maintenance. An application for maintenance can be made independently or at the same time as an application for division of property.

When will the court make an order for maintenance?

The court will order a party to pay maintenance where the person applying for maintenance ('the payee') is unable to support himself or herself adequately because his or her earning capacity has been detrimentally affected by the circumstances of the domestic relationship.

An order for maintenance will NOT be made if the payee is in a domestic relationship with, or has married, another person.¹⁴

Note: certain other circumstances will give rise to a maintenance order being varied or coming to an end. For example, if either the payer or payee dies maintenance payments will cease.¹⁵

How does the court determine whether to make an order for payment of maintenance?

When determining BOTH division of property and payment of maintenance, the court must have regard to:

- the income, property and financial resources of each party;
- the capacity of each party for appropriate gainful employment;
- the financial needs and obligations of each party;
- the responsibilities of each party to support another person;
- the terms of any order made for the division of property;
- any payments provided for the maintenance of a child;
- what is a reasonable standard of living;
- the extent to which payment of maintenance would increase the payee's earning capacity eg by enabling the payee to take a course or set up a business;
- the extent to which the party who will receive maintenance contributed to the income, earning capacity, property and financial resources of the other party;

- the age and state of health of each party;
- the length of the domestic relationship;
- the extent to which the relationship between the parties has affected the earning capacity of the party who will receive the maintenance.¹⁶

In addition to the factors listed above which the court must consider, the court also has wide discretion to take into account any other facts or circumstances which it considers to be relevant to an application for division of property or payment of maintenance.

A word of future caution...

The federal government has introduced legislation extending the financial provisions in the *Family Law Act 1975* (Cth) to parties in a de facto relationship (same-sex or heterosexual). If the new federal Act becomes operative, claims relating to financial agreements, property division and payment of maintenance between parties in a domestic relationship will be decided under the *Family Law Act 1975* (Cth) in the family courts, rather than the State legislation in State courts.¹⁷ However, until this legislation comes into operation the **Victorian legislation as described in this booklet is operative.**

The information provided in this booklet is a general guide only. You should obtain advice from a solicitor or a community legal centre to be sure of your rights and responsibilities.

¹¹ *Relationships Act 2008* (Vic) s 43.

¹² *Relationships Act 2008* (Vic) s 45.

¹³ *Relationships Act 2008* (Vic) ss 45(1)(d) and 51.

¹⁴ *Relationships Act 2008* (Vic) s 53.

¹⁵ *Relationships Act 2008* (Vic) s 54.

¹⁶ *Relationships Act 2008* (Vic) ss 45 (1)(d) and 51.

¹⁷ Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth).

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Authored by Dr Adiva Sifris and Ms Ronli Sifris

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