

The Court will consider the following:

- The likely earning capacity of each party
- The responsibilities of each party for the ongoing care of children.

It is therefore possible, that if one person is unable to work due to their responsibilities during the relationship and after, to care for the children, the Court may order compensation.

7 Recording the division of property

For an agreement to be legally binding it must be recorded in one of two ways, either:

- i. Family Court orders; or
- ii. A written agreement which complies with the requirements of the Act.

A written agreement is usually a faster and less expensive way of dividing the property than making an application to the Family Court and obtaining Family Court orders. The agreement has the added advantage of allowing the parties themselves to decide how the property shall be divided rather than a Judge making the decision. If dividing relationship property by an agreement, each party must have independent legal advice as to the effects and implications of signing the agreement before it is signed.

8 The Family Court

If spouses/partners cannot agree upon the division of property, then one or other spouse/partner can make an application to the Family Court for the division of property. Once an application has been filed in the Family Court, and the other spouse/partner (the Respondent) has filed a defence, the parties are generally referred to a settlement conference to see if they are able to reach agreement.

The settlement conference takes place in front of a Judge

with the parties and their lawyers present. The Judge has no power to make a decision but can record any agreement as binding Court Orders.

If no agreement is reached at the settlement conference then the matter will go to a hearing. At the hearing the parties and any witnesses will give evidence, be cross-examined and a Judge will make a decision based on the evidence they have heard.

9 Other matters to consider

Upon separation besides from the division of property, other matters need to be considered such as:

- i. The care arrangements for any children; and
- ii. Reviewing your Will.

Inder Lynch has prepared brochures on the above, including: "Wills Estates and Enduring Powers of Attorney" and "Family Law".

10 Avoiding application of the Act and protecting your assets

The Act allows spouses/partners to record their own agreement of how their property will be divided in the event of a separation. Such agreements are generally entered into at the commencement of the relationship but can be drawn up at any time.

To be legally binding, each spouse/partner must receive independent legal advice as the effects and implications of signing the agreement, prior to its signing. Such agreements are particularly useful where one or both parties already has substantial assets that they wish to protect.

Consideration can also be given to establishing a Family Trust. A Trust may give protection to assets which, but for the Trust, would otherwise be treated as relationship property and subject to the equal sharing provisions of the Act. We refer you to our brochure "Family Trusts".

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621 Great South Road
(cnr Cavendish Drive & Great South Road)
MANUKAU CITY
Telephone 09 266 6185



52 Wood Street
(cnr East & Wood Streets)
PAPAKURA
Telephone 09 299 8550



Level 1, 1 Hall Street
(cnr King & Hall Streets)
PUKEKOHE
Telephone 09 238 4166

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Relationship Property



LAWYERS



Important facts about Relationship Property

1 What is the Property (Relationships) Act 1976 and who does it apply to?

The Act has two main functions:

- i. It describes how the property of married, civil union and de facto couples is to be divided upon separation, or when one of them dies.
- ii. To allow parties entering into a de facto relationship, civil union and/or marriage to contract out of the Act and make their own arrangements for the division of property if they should separate.

The Act applies to all marriages and civil unions although special rules apply to marriages of less than three years. In the case of de facto relationships, the Act usually applies only when the de facto partners have lived together for at least three years but the Act can apply to de facto relationships of less than three years duration in certain circumstances.

2 Ending a relationship

Married couples or civil union partners can apply to the Family Court for a separation order recording their separation. The separation can also be formally recorded by a written agreement between the parties. However, for practical purposes, all that is required is that the parties cease to live together. After two years of separation an application can be made to the Family Court for a dissolution of marriage or civil union (previously known as divorce).

When ending (or entering) a relationship, it is important to consider the provisions of your Will and decide whether a new Will should be drafted to reflect the change in your living arrangements.

3 What is a de facto relationship?

The Act defines a de facto relationship as a relationship between two people who live together as a couple, who are both aged 18 years or older and who are not married to one another. On deciding whether two people “live together” the Court will consider the following:

- How long the relationship has lasted
- Whether the couple share a home
- Whether there is a sexual relationship
- Financial and property arrangements
- The care and support of children
- The degree of mutual commitment to a shared life.

4 What is relationship property?

Relationship property generally consists of the following:

- The family home and chattels whenever acquired
- Property acquired after the marriage, civil union or relationship began
- All property owned jointly by both parties
- Property owned by either party before the relationship began if it was acquired in contemplation of that relationship and intended for the common use of both parties
- The proportions of any life insurance policy or superannuation scheme that is attributable to the relationship

Even if one party owns the family home or chattels before the relationship commenced, and the relationship lasts for more than three years, the Court is likely to find that the

home and chattels are relationship property to be divided equally between the parties upon separation.

5 What is separate property?

Separate property is defined as property that is not relationship property. Generally, separate property includes:

- i. Property acquired by either party when they were not living together (although this property may become relationship property)
- ii. Property acquired from a third person by succession, survivorship, gift or as a beneficiary under a Trust.

Separate property may become relationship property if it is intermingled with relationship property or if it is used for the common use and benefit of both parties. An increase in the value of separate property can become relationship property if it is at least partly caused by the efforts of the other party, or the application of relationship property.

The most effective way to ensure that particular assets remain the separate property of one party is to sign a “contracting out” agreement. This is discussed further below.

6 The presumption of equal sharing and exceptions to it

When a relationship has lasted for three or more years, there is a presumption that both parties will share equally in all relationship property. There are exceptions to this rule:

(i) Relationships of short duration

If the marriage or civil union has ended within three years of its commencement (taking into account any preceding

de facto relationship) there is no presumption of equal sharing. Instead the Court will look at what each party has contributed to the relationship. The Court has the power to consider not only financial contributions but also non financial contributions such as performance of household duties and child care.

The Act does not apply to de facto Relationships of less than three years duration. However the Court has a discretion to apply the Act if:

- a. There is a child of the de facto relationship, including a child of both partners or any other child who was a member of the family; or
- b. The applicant has made a substantial contribution to the de facto relationship.

(ii) Repugnant to Justice

Even if a relationship has lasted for three or more years, the Court can order unequal sharing if it considers that there are “extraordinary circumstances” that would make equal sharing of the relationship property “repugnant to justice”. “Repugnant to justice” circumstances are very difficult to prove and the Court is unlikely to find such circumstances in most cases.

(iii) Economic Disparity

The Family Court may also order an unequal division of property, or payment of lump sum compensation, if it finds that there is “economic disparity” between the parties at the end of the relationship. The Court must be satisfied that after the relationship ends, the income and living standards of one of the partners is likely to be significantly higher than the other because of the effects of the division of functions within the relationship.