

relationships but that such relationships should not be treated automatically as if they were legal marriages. The Commission recommended that recognition should be based on proof of dependency and that, in general, it should be granted to a de facto spouse to prove dependence only where the parties have cohabitated for a period of 12 months immediately prior to the cessation of the dependency by death or the happening of the event on which the claim is based. It is provided that the court, if satisfied that the dependency exists, should have a discretion to allow a claim on proof of "special circumstances" even though the parties have not cohabitated continuously for the 12 month period. The Commission further recommended that amendments, in line with the above principles, be made to legislation dealing with estate duty assessment, fatal accidents, motor accidents, testators family maintenance and workers compensation.

The Commission did not attempt to define either "dependence" or the "special circumstances" that would justify a claim before expiration of the qualifying period for cohabitation. These matters are to be determined by the court according to the circumstances of each case. The Commission did not consider the application of the general principles which it had enunciated to property disputes between de facto spouses although such principles would appear to be equally appropriate in such cases. The Commission's approach maintains a clear distinction between the legal effect of marriage and that of a de facto relationship. The former confer entitlements by virtue of the status of the partners. De facto partners, by contrast, receive entitlements only on proof of dependence and, save in special circumstances, proof of cohabitation for at least 12 months. The Commission's proposal would not permit a non-financially dependent de facto spouse to claim benefits even in circumstances where these are available to a married person without proof of dependence.

It may be argued that a test of financial dependence takes an insufficient account of the interdependence of parties in a relationship regardless of their financial arrangements. Relationships may involve not merely economic but emotional interdependence and mutual support concerning such matters as the rearing of children, management of the household and discharge of family and social responsibilities. The interdependence of parties to a relationship may, therefore, be an important consideration in formulating an approach to the law to the recognition of the rights and duties of de facto spouses.

Committee's View

This approach would give de facto partners rights and obligations in certain areas, but only on proof of dependence. We reject this option because dependence does not take into account the interdependence which may exist regardless of the partners' financial arrangements. It may lead to arbitrary results in cases where both partners contribute to the family's resources, so that it is difficult to draw the line between independence and partial dependence.

This option is unlikely to provide a remedy in the vast majority of relationships, and where it does apply, it is likely to disadvantage the male partner.

(d) Leave to the Common Law

Courts are developing the law in the area of de facto relationships. Until recently it was generally assumed that cohabitation agreements were void as being contrary to public policy. The NSW Court of Appeal has recently given qualified approval to such agreements in Seidler's Case. But in other areas there are still problems (see Part 7). It is clear that many rights, enjoyed by people by virtue of their marital status, are only conferred by statute. It is not possible for the common law to develop in the area of statutory rights or benefits.

Committee's View

The Committee considers that the development of the common law is not an appropriate policy option. It cannot be said with any certainty how the law will develop in such areas as property or financial adjustment at the end of a de facto relationship. Further, it is not possible for the common law to alter statutory rights.

(e) Recognition of De Facto Relationships to deal with Specific Injustices

It can be argued that, even if legislative reform is desirable, no attempt should be made to adopt a uniform definition of a de facto relationships designed to confer on de facto spouses the same entitlements as lawful spouses in a variety of fields. Rather, the question of reform should be approached by examining each area of the law in which legislative recognition of de facto relationships is an issue. A judgment should then be made as to whether such relationships should be regulated further and, if so, what form the recognitions should take. The legislation of the Commonwealth, the Territory and the States has tended to develop in this way with the exception of South Australia. Traditionally, de facto relationships have been regulated or acknowledged by legislation in limited areas but not on any systematic basis.

If this approach is to be followed, it will be necessary to examine separately each important area of law in which recognition of de facto relationships is an issue. A decision will be required as to the nature of the change, if any, needed in that area. If further legislative recognition of de facto relationships is warranted, a definition will have to be formulated, although it may not be identical to the definition adopted for other purposes.

Committee's View

This approach has been supported by the large majority of submissions received by the NSW Law Reform Commission and all the submissions received by the NTLRC. It can be applied

without detracting from the special significance of marriage. Equally, it does not penalise de facto partners by forcing them to either accept the full rights and duties of marriage or face various legal injustices or anomalies. In some cases, the Committee has concluded, it is appropriate for the law to distinguish between the two relationships. Conflicting claims against a person may be made by de facto partner and spouse. There is no uniform answer to this kind of problem. It can only be solved on a case by case basis.

Accordingly, we consider this the appropriate policy option.

NATURE OF LEGAL PROBLEMS AND RECOMMENDATIONS FOR REFORM

The legal difficulties most commonly experienced by de facto partners concern -

- (a) agreements concerning the financial aspects of the parties' continuing relationship, generally called "cohabitation agreements" or "separation agreements";
- (b) claims to property and financial adjustment on separation, or on the death of one party; and
- (c) protection from domestic violence.

(a) Cohabitation and separation agreements

Submissions from the YWCA, the Uniting Church and the Office of Womens Affairs expressed the view that de facto partners should be able to regulate their own financial affairs by a cohabitation agreement, that is, an agreement between a man and woman made before or after the de facto relationship has begun which makes provision with respect to financial or property aspects of the relationship. Similarly, a separation agreement should be available to the parties.

Co-habitation contracts have, until recently, been considered void at common law, because they were against public policy. In Seidler's Case (1982) the Court of Appeal gave qualified approval to such agreements.

Recommendation

We agree with the view expressed in the submissions, because cohabitation and separation agreements are a means by which de facto partners can regulate their own affairs and avoid both an imposed regime or unnecessary litigation to resolve the issue. Accordingly, we recommend that the law should be clarified to ensure that cohabitation and separation agreements should be enforceable under the general law as an ordinary contract (see clauses 40 to 48 of the Draft Bill).

We consider that the entering into of a cohabitation or separation agreement should be available with certain specified requirements designed to ensure that the partners have received appropriate advice and are aware of the consequences of the agreement. The safeguards should include requirements that the agreement be in writing and that each partner receive independent legal advice before entering the agreement (clause 43). Where the requirements have been satisfied, the agreement should not, in general, be capable of being varied or overturned by a court.

To avoid creating undue injustice, we consider that there should be one exception to this general rule. In proceedings for financial adjustment, the court should have power to override a cohabitation agreement where the parties' circumstances have so changed since the date of the agreement that enforcement of its terms would lead to serious injustice (clause 45(3)).

The power to vary a separation agreement should be limited, as such agreements are more likely to be conducted with both partners being aware of their legal position. In such a case, the agreement may be varied only if it is obtained by fraud, is void or unenforceable at common law or in special circumstances, occurring since the agreement, make it impracticable to carry the agreement out (clause 45)

(b) Property adjustment

Property disputes between de facto partners represent the most common cause of litigation between de facto partners. The existing common law relating to property and trusts is clearly inadequate. Submissions to the Committee recommend that reform of the law should deal with this area.

The Property Law (Amendment) Act 1988 (Vic) deals only with this aspect of de facto law reform.

Recommendation

In order to overcome this injustice we recommend that, disputes between de facto partners relating to property, the law should be changed to give the court power to determine the respective interests of parties according to what is just and equitable. Accordingly, the court should be entitled to take into account the financial and non-financial contributions, by either partner, to the acquisition, conservation or improvement of property and to the welfare of the other partner or the family generally.

We think it is important to prevent claims being brought by people whose de facto relationships have lasted for only a relatively short time. It is also inappropriate to create rights and obligations in relation to property interests in financial matters that apply to people as soon as they enter into a de facto relationship. Accordingly, we recommend that, in general, an applicant should be able to institute proceedings for property adjustment (or financial adjustment which is dealt with later) only where the parties have lived together in a de facto relationship for at least 2 years.

To avoid creating new injustices, we consider that the court should be permitted to hear claims for adjustment in these special cases, where the de facto relationship is less than 2 years. These cases are where :-

- (i) the partners themselves have had a child,
- (ii) the claimant has made substantial contributions to the relationship which would not otherwise be recognised,
- (iii) the claimant has the care and control of the other partner's child.

In the cases (ii) and (iii) the Committee recommends that the court hear the application only if satisfied that failure to do so may lead to serious injustice.

Claims for adjustment of property or financial interests should be brought shortly after a relationship ends. While noting that Canadian legislation favours a period of 1 year for financial adjustment, we recommend 2 years, which is the same as the period in NSW legislation. The court should make orders in such a way that the financial relationship between the partners is settled once and for all. The latter is the "clean break" principle recognised under the Family Law Act. As the property interests of partners may not be static, we consider it appropriate that the court determining property interests have specific power to adjourn a proceeding, should there be a likelihood of a significant change in the financial circumstances of one or both partners.

We consider that, on the death of a party to an application for property adjustment, the application should continue against the estate of the deceased. If a partner dies before the survivor has instituted proceedings for the adjustment of property interests, we consider that the survivor should be confined to existing remedies available to him or her under the Family Provision Act (see part 8).

Suggested legislative provisions giving effect to this recommendation are contained in clauses 12 to 22 of the Draft Bill. These recommendations will not affect property disputes involving only a de facto partner and a third party. The common law will still apply.

(c) Financial adjustment

A de facto partner is under no legal obligation to support his or her partner, either during the relationship or after it has ended. The law does not allow a needy partner to claim support, regardless of the resources available to the other partner.

We consider that the law can cause injustice by failing to alleviate financial hardship where it arises because of the relationship.

A number of submissions to the NSW LRC pointed to the hardship involved in denying a claim to maintenance by a de facto partner, where there had been a prior period of dependence and special needs arise out of the relationship. The New South Wales Catholic Social Welfare Committee supported

"the right of a de facto spouse to seek maintenance from the other in cases where the party has been disadvantaged or made dependent because of the nature of the relationship ... Legislation should be specific in its terms and clearly define the circumstances in which such a claim can be made." (NSW LRC Report, page 156).

The Submissions to the Committee from the Office of Women's Affairs and the Uniting Church also supported the conferral of some form of maintenance right on a de facto partner.

Recommendations

We consider that it is not appropriate to alleviate injustice by giving courts the same power to award maintenance as they have in relation to married couples. A court may require a married person to support his or her spouse where the spouse's needs are created by circumstances not related to the marriage, e.g. illness or accident.

We suggest that, in general, the parties to a de facto relationship should be required to support themselves, and the law should provide for maintenance in cases of hardship. These are :-

- (i) where one party has the care and control of a child in the de facto relationship and is unable to support himself or herself by reason of child care responsibilities,
- (ii) where a person's earning capacity has been adversely affected by the de facto relationship (for example because domestic responsibilities have precluded the person acquiring skills needed for employment), and additional training or retraining is required to enable the person to undertake gainful employment.

We consider that orders on the first ground should continue beyond the date on which a child in the applicant's care attains the age of 18. Orders on the second ground should have a maximum life of 3 years from the date of the order, or 4 years from the end of the relationship, whichever is shorter.

We consider that a de facto partner who has since married, or entered into another de facto relationship, should not be able to bring an action for maintenance. It would clearly be inappropriate in these circumstances.

We consider that an application for maintenance against a de facto partner should cease on that partner's death. The survivor's remedy should be confined to existing remedies available to him or her under the Family Provision Act (see Part 8).

We consider that, in accordance with general principles, a court should be empowered to vary a maintenance order, if the circumstances of either party has changed, or the cost of living has changed to such an extent as to justify making a variation. No variation should be capable of extending the period of the order beyond the maximum life we have recommended earlier.

Suggested legislative provisions giving effect to the above recommendation are contained in clauses 12 to 16, 23 to 31 of the Draft Bill.

(d) Domestic Violence

Domestic violence has been examined in the last decade both overseas and in Australia. Most States have reformed their laws: NSW - Crimes (Domestic Violence) Amendment Act 1982, Periodic Detention of Prisoners (Domestic Violence) Amendment Act 1982, De Facto Relationships Act 1984 Part V: Tas. - Justices Amendment Act 1985: South Australia - Justices Act Amendment Act (No. 2) 1982: Queensland - Peace and Good Behaviour Act 1982: W.A. - Justices Amendment Act (No. 2) 1982.

In March 1984, the Northern Territory Government authorised the release of the d'Abbs report, Domestic Violence Between Adults in the Northern Territory: A Review of Existing Services and Strategy for the Future, and established an interdepartmental committee to prepare proposals for consideration by the Government on the issue. The Office of Women's Affairs co-ordinated a Working Group with representatives from Departments of Health and Community Services, Law and Northern Territory Police to prepare a Submission to Government, having considered the recommendations of the d'Abbs Report.

The Working Group, after consulting with community groups involved in assisting victims of domestic violence, recommended that reform in this area cover three areas:

- amendment to the existing law,
- a public education campaign,
- post crisis counselling.

These recommendations were accepted by the Government in February 1988.

A set of legislative reforms are contained in the Justices Amendment Bill (No. 2) 1988 and associated legislation tabled (see Appendix C) in May 1988 and are similar to legislation enacted in three Australian jurisdictions.

WA: Justices Act 1902, ss 172-174 (added 1982)

SA: Justices Act 1921, ss 99 (added 1982)

Tas: Justices Act 1959, ss 106A-F (added 1985)

The legislation -

- empowers police to enter premises where there is a belief on "reasonable grounds" that a person "is suffering or is in imminent danger of suffering personal injury at the hands of another person",
- permits the Court of Summary Jurisdiction to make an order imposing restraints on a person, including limiting the person's access to any premises,
- provides for making the order on the application of a victim of domestic violence or harassment, or a police officer. Domestic violence includes actual "personal injury or damage to property", threats of such violence,

and "provocative or offensive behaviour ... likely to lead to a breach of the peace",

- makes a breach of an order an offence and, consequently, the offender liable to arrest without warrant.

Recommendation

We consider that the general thrust of reforms contained in the Justices Amendment Bill 1988, and related legislation, are sufficiently comprehensive to deal with the legal aspects of the problem of domestic violence and are generally in accord with reforms the Committee was considering recommending. We agree that such reforms should not be limited to the De Facto Relationships Act, but in legislation which may also be utilised by married people, children, neighbours and other

PRESENT NORTHERN TERRITORY LEGISLATION AND RECOMMENDATIONS FOR REFORM

In many cases, specific injustices have been dealt with by Territory legislation (see Table 2). The most important example, addressed in most common law jurisdictions (i.e. jurisdictions whose laws derive from English law), is the case of a dependent de facto partner with children whose partner is killed. Under the Compensation (Fatal Injuries) Act a de facto partner is entitled to share in damages awarded to the partner's dependants - the "de facto widow" as this person is normally called.

(a) Adoption

The New South Wales Adoption of Children (Amendment) Act 1987 provides that adoption orders may be made generally in favour of de facto couples of at least 3 years cohabitation in respect of a child they have jointly brought up and maintained for at least 2 years (s.19(1A)(a)), with power to make adoption orders where either or both minimum periods are not satisfied if the welfare and interests of the child require it.

The Adoption of Children Act s.12 (see Table 1) does not permit de facto partners jointly to adopt a child. We recommend that the policy be changed to permit de facto partners, who have lived together for at least three years, to apply jointly to adopt a child.

Under the Act, an adoption order can only be made if the Supreme Court is satisfied that the applicants meet specified criteria, the primary concern being the welfare and interests of the child (s.10).

The Committee considers that, as the Act permits a single person to adopt a child, it would serve no purpose to restrict the ability of a de facto couple to adopt a child, beyond that imposed on married couples, as any restriction could be lawfully avoided by one partner choosing to adopt the child in that partner's name.

This recommendation was supported by the Office of Women's Affairs in its Submission to the Committee.

(b) Damages

Where a de facto partner suffers nervous shock as a result of the death or injury of his or her partner, he or she cannot bring an action for damages under section 23 of the Law Reform (Miscellaneous Provisions) Act (see Table 1). We recommend that such an action should be possible. This places a de facto partner in the same position as a parent, husband or wife who suffers nervous shock as the result of death or injury of a child or spouse. We see no need for a minimum period of cohabitation to apply in this case.

(c) Succession

The property of a deceased person may be distributed in the following ways:

- . Pursuant to the terms of a will, or
- . If the deceased dies without leaving a valid will, or dies intestate, then it goes to the surviving family members according to "rules of intestacy" in the Administration and Probate Act (see Table 1), or
- . The terms of a will or the effect of the rules of intestacy may be altered by a court under the Family Provision Act (see Table 2) in favour of certain dependants where the will or the rules of intestacy do not make adequate provision for their "maintenance, education or advancement in life" (s.8).

Under N.T. law a surviving de facto partner of a person who dies intestate is not entitled to a share in the estate. (This is also the case in all Australian jurisdictions except NSW and South Australia.) However, the survivor is eligible to apply to the Supreme Court under the Family Provision Act for provision out of the estate. We do not consider that this provision adequately deals with all the problems of a person whose de facto partner dies intestate. Court proceedings may be time consuming and expensive, and may not be worthwhile where the estate is small.

The NSW Law Reform Commission stated the purposes of the rules of intestacy, which may be summarised as follows:

- . They have the virtue of certainty and thereby avoid disputes and delays in distribution,
- . They ensure that immediate relatives benefit from the estate in preference to more distant relatives,
- . They reflect community views on the way in which a spouse's estate should be distributed,
- . They reflect the deceased's assumed wishes.

These are, of course, general assumptions and may prove to be arbitrary in individual instances.

The Commission recommended -

- (i) Where a person dies intestate and is survived by both a spouse and a de facto partner, the de facto partner should be entitled to the spouse's share of the estate under the rules of intestacy to the exclusion of the spouse if the de facto partner lived with the deceased for a period of at least 2 years before his or her death. However, even where this condition is fulfilled, the de facto partner should not be entitled to the spouse's share if the court is satisfied

the deceased lived with his or her spouse during any part of that 2 year period.

- (ii) Where the deceased is survived by a de facto partner and children of another relationship the de facto partner should be entitled to the spouse's share on intestacy if she or he had lived with the deceased for a period of at least 2 years before the death.
- (iii) Where a person dies intestate leaving a de facto partner but neither a spouse or children of another relationship the de facto partner of the deceased, if living with the deceased at the time of his death, should be entitled to take the spouse's share on intestacy.

These recommendations have been enacted by the Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984.

In the event that a person is survived by both a de facto partner and a husband or a wife, three options are possible:

- (a) The de facto partner of
 - (i) 2 or more years standing, or
 - (ii) no specified standing period
 takes the entire estate,
- (b) The de facto partner of
 - (i) 2 or more years standing, or
 - (ii) no specified standing period
 takes 50% of a spouse's share,
- (c) The de facto partner takes nothing.

New South Wales adopts option (a)(i), South Australia adopts option (b) in the case of a putative spouse (ie, a partner of 5 years standing or a partner with dependent children who has obtained a court declaration of his or her status). The Victorian De Facto Relationships Bill proposed option (c).

The Committee has concluded that

- (a) in the event that a person is survived by de facto partner but no spouse, the partner should take the share that would have gone to a spouse, if living with the deceased at the time of his or her death, and
- (b) in the event that a person is survived by both a de facto partner of 2 years standing and a spouse, the partner should take the share that would have gone to a spouse if living with the deceased at the time of his or her death.

The Committee considers that this recommendation is more likely to reflect the intention of the deceased than either option (b) or (c).

(d) Accident Compensation

The Work Health Act s.49 provides that a worker's dependent may claim compensation in respect of loss caused by work-related injury to the worker. Dependant includes de facto partner. There is no period specified for co-habitation.

The Committee considers the definition of de facto spouse in this Act should be made consistent with that provided in the draft De Facto Relationships Bill.

(e) Ancillary next of kin benefits/obligations

Under the Administrators Pension Act and Supreme Court (Judges Pensions) Act, de facto partners and their dependent children are not entitled to share in pension benefits. Under the Supreme Court (Judges Long Leave Payments) Act a widow (i.e. spouse) only is entitled to share in long leave benefits.

We recommend that, where there is a de facto partner, living with the Administrator at the time of his retirement, or the Judge at the time of his demise, that partner should receive the share that would have gone to a spouse.

Only, a "spouse" may object to cremation (Cemeteries Act); is covered by an Aboriginal land permit (Aboriginal Lands Act); is liable to pay dependant's medical bills (Medical Services Act); is classed as sharing in the land held by his spouse under the provisions of the Crown Lands Act limiting the area of land that may be held by a person; is protected from seizure of household furniture under a bill of sale under the Instruments Act she/he has not endorsed; may be a shareholder (other than as a partner) in an incorporated legal practice (Legal Practitioners (Incorporation) Act).

Under the Public Trustee Act, only a spouse or "dependent" can benefit from estate maintenance orders.

We recommend that all these benefits or obligations be extended to de facto partners, with no minimum qualifying cohabitation period, where there is no spouse.

(f) Exercise of incapacitated spouse's rights

Under the Aged and Infirm Persons Property Act only a spouse and children may apply for a protection order. Only a spouse may consent to emergency operations (Emergency Medical Operations Act).

We recommend that all these benefits or obligations be extended to de facto partners with no minimum cohabitation period.

(g) Marital Privileges

Under the Evidence Act, one spouse is not a competent and compellable prosecution witness against the other for certain

offences. This privilege, derived from the common law, has been much criticised and many recommendations for reform made.

The Committee considers it inappropriate to automatically extend this privilege to de facto spouses. The policy basis for the privilege has been criticised and the appropriate place to consider whether it should be abolished, modified or even extended (to such people as children or parents of the accused) is when the privilege is reviewed.

The Real Property Act contains provisions dealing with dealings by married women. These provisions are primarily directed at removing disabilities imposed by the common law on married women but, to some extent, preserve them. By s.69, a wife's title to land where the husband is wrongly registered as co-proprietor, is given priority against all persons except bona fide purchasers for value.

The Committee considers it inappropriate to automatically extend this corresponding privilege to de facto spouses because the lack of formal and public declaration of marital status makes such a provision extremely difficult to apply to de facto relationships. Further, existing common law and statutory provisions enable rectification of the title in such cases or permit a claim for compensation to be made.

The Wills Act provides that a will is revoked by marriage unless it is expressed to be in contemplation of marriage. The practical effect of this is that, until a new will is made, a spouse would inherit the entire estate of the deceased (in the absence of children) under the laws of intestacy.

The Committee considers it inappropriate to automatically extend this provision to de facto spouses for two reasons. The primary reason is that, as a matter of principle, it cannot be assumed that a person entering into a de facto relationship intends to make the same kind of commitment to his or her partner that is made in the ceremony of marriage. In Australia, most married couples execute mutual wills as part of, or immediately after, the marriage ceremony. The rule of law is well-known. By entering into a de facto relationship, it cannot be said that the partner's minds have turned to this question. In addition to rejecting an extension of the provision as a matter of principle, the Committee recognises substantial practical problems of proof of "the commencement" of the relationship, the consequent problem of status of the will if the de facto relationship ends (given that approximately 40% of de facto relationships last less than 2 years), and the varying state of mind of the partners. At some stage of the relationship a partner may intend to alter his or her will, but it is difficult to provide a rule of when the law presumes this to occur.

The Wills Act s.17 provides that a gift to the spouse of an attesting witness is void. The Committee recommended repeal of s.17 in its Report Relating to the Attestation of Wills by Interested Witnesses and the Due Execution of Wills

(Report No. 2, 1979). Whatever the continued rationale for this rule, the Committee considers no purpose would be served by extending such a rule to de facto partners.

However, the Committee considers that it may be appropriate to extend the above benefits or entitlements (or benefits or entitlements the Committee has not identified), available to married persons, to de facto spouses, where failure to do so would result in substantial injustice to a de facto partner.

Such extension should be available on application by the de facto partner to the Supreme Court, on reasonable notice to any person likely to be affected by an order of the Court.

CONCORDANCE OF LEGISLATION

<u>NSW</u>	<u>NT</u>	<u>VIC</u>	<u>NSW</u>	<u>NT</u>	<u>VIC</u>
	1		26	23	
	2		27	24	
	3		28	25	
	-		29	26	
	-		30	30	
	4		31	27	
	5	277	32	28	
	6	278	33	29	
			34	33	
	8	297	35	31	
	9		36	-	
	10	299	37	32	
	11	300	38	34	291
			39	35	292
	12	279	40	36	293
	13	280	41	37	294
	-	283	42	38	295
	14	281	43	39	296
	15	282			
	16	284	44	3	
			45	40	
	17	285	46	42	
	18	286	47	43	
	19	287	48	44	
	20	288	49	45	
	21	289	50	46	
	22	290	51	47	
			52	48	
			*		
			56	7	

NSW: De Facto Relationships Act 1984
 N.T.: De Facto Relationships Bill 1988
 Vic.: Property Law (Amendment) Act 1988

SELECT BIBLIOGRAPHY1. Law reform papers and reports

Law Reform Commission (Tasmania), Report on Obligations Arising from De Facto Relationships (1977).

New South Wales Law Reform Commission, De Facto Relationships: Issues Paper (1981).

New South Wales Law Reform Commission, Report on De Facto Relationships (1983).

Institute of Law Research and Reform (Edmonton, Alberta), Towards Reform of the Law Relating to Cohabitation Outside Marriage, Issues Paper No. 2 (1987), "Davies".

2. Text Books

Christine Davies, Family Law In Canada (1984, Carswell).

A. Dickey, Family Law (1985, Law Book), 181-196.

W.H. Holland, Unmarried Couples: Legal Aspects of Cohabitation (1982, Carswell).

3. Articles

Finlay, H.A. "Defining the Informal Marriage" (1980) UNSWLJ 279.

APPENDIX A

- TABLE 1: Legislation which confers a benefit or obligation only on a spouse, wife etc.
- TABLE 2: Legislation which confers a benefit on a de facto partner
- TABLE 3: Legislation which removes a disability that only applies to a married woman.

TABLE 1: LEGISLATION WHICH CONFERS A BENEFIT OR OBLIGATION ONLY ON A SPOUSE, WIFE ETC.

ACT	S.	BENEFIT
Aboriginal Lands	6A	"Spouse" is covered by Aboriginal land permit
Administration and Probate	22	Administration may be granted to husband/wife unless the Court is of opinion that they are not to be trusted with it
	64	Presumption of survivorship applies to intestate and "spouse"
	66	"Spouse" is entitled to distribution of intestate estate (see Schedule 6)
	67	"Spouse" entitled to take absolute intestate's personal chattels
	73	"Spouse" may have intestate interest in the matrimonial home appropriated under s.81 to satisfy legacy, interest etc. of deceased
	77	Personal representative may dispose of intestate's interest in matrimonial home without spouse's consent
	78	Rule that trustee may not acquire trust property is abrogated where trustee is spouse and trust property is matrimonial home

ACT	S.	BENEFIT
Administrators Pensions	5	Pension payable to surviving spouse of Administrator
Adoption of Children	12	Adoption order may only be made in favour of husband and wife (unless circumstances make it desirable to make the order in favour of one person)
	19	Adoption list maintained for benefit of married couples who wish to adopt
Aged & Infirm Persons' Property	7	Spouse and other relations may apply for a protection order.
	17	Manager may apply money to maintenance or advancement of spouse and children.
Crown Lands	38A	(10A) Married persons holding beneficial interests in pastoral lands are deemed to hold the beneficial interests in all lands held by each of them (10B) Same provision for shares in incorporated companies
Emergency Medical Operations	2(1)	"next of kin" for the purpose of consent to emergency operations may be a spouse
Evidence	7, 9 26K	Spouse not compellable witness against husband for certain offences.
Instruments	12	Bills of Sale made by married persons which comprise household furniture are not enforceable by seizure or sale unless endorsed by spouse in the manner prescribed in Schedule 1

ACT	S.	BENEFIT
Law Reform (Misc. Provisions)	23	Husband or wife included in definition of "member of the family"; and can therefore sue nervous shock.
Legal Practitioners (Incorporation) Act	7	Spouse of a director may shares in a practising compa
Maintenance	12A	A husband whose conduct justifi wife living separately from deemed to have deserted her.
	12C	Husband or wife may rebut presumption of condonation.
	13	Wife may obtain maintenance/separation orders specified grounds.
	15	Husband may obtain maintenance order.
	30	An offer to provide a home by person whose conduct justifi spouse is living separately isn't sufficient answer to an application for a maintenance order.
	30A-B	Separation order relieves wife obligation to live with husband wife may enforce.
Medical Services	5	Spouse may be a "dependant" for purposes of the Act.
	13	Where a dependant receives medical services, the person on whom he dependent is liable to pay charges.

ACT	S.	BENEFIT
Public Trustee	60	Public Trustee empowered to apply property, money etc. for benefit of wife, husband, children or any other dependant (could catch some de facto partners).
Real Property	28	Married woman not to make application to bring land under provisions of Act without her husband's consent; unless the land is her separate property.
	69	VII where husband is wrongly registered as co-proprietor of land belonging to wife, title of wife prevails except as against a bona fide purchase for value.
	189	Where a female registered proprietor becomes married, the details of her marriage must be entered on the Register.
	190	Husband of female registered proprietor is entitled to be registered as co-proprietor unless the land is her separate property.
	255	Married women making applications to bring land under Act to which they're not separately entitled, or married women registered as co-proprietor of land with husband, entering into dealings which may alienate or diminish their interest, must be separately examined and declare that they know what they're doing.
	257	A married woman registered as separately entitled to land is treated as a <u>feme sole</u> for purposes of the Act, unless restraints have been placed on her ability to alienate.

ACT	S.	BENEFIT
Status of Children	5(1)	Where a woman gives birth during or within 10 months before termination of, her marriage, child is deemed to be a child of marriage.
Supreme Court (Judges Long Leave Payments)	5	Long leave payment can be made widow of Supreme Court Judge.
Supreme Court (Judges Pensions)	5	Pension payable to widow of Supreme Court Judge, or widow's child.
Wills	17	Gifts to the wife or husband of attesting witness are void.
	18	A creditor whose wife or husband attests a will which charges estate with the debt will still be admitted as a witness to prove validity of the will.
	20	Will is revoked by marriage unless expressed to have been made in contemplation of marriage.

TABLE 2: LEGISLATION WHICH CONFERS A BENEFIT ON A DE FACTO PARTNER

ACT	S.	BENEFIT
Compensation (Fatal Injuries)	4(3)	De facto partner is treated as a family member for the purposes of the Act.
	S.8	Action for damages may be brought for benefit of family members of deceased.
Coroners	4	"Spouse" includes de facto spouse for the purposes of the Act.
	23	Spouse entitled to a copy of Post-Mortem Report.
	48A	Spouse may apply for exhumation and removal of remains.
Crimes Compensation	4	De facto widow/widower is a "relative" of the deceased for the purposes of the Act.
	5	Compensation Certificate may be obtained for benefit of dependant relatives.
	9	Pecuniary loss to dependent relatives is relevant to the assessment of compensation.
Family Provision	7	De facto widow/widower may apply to Court for provision from deceased's estate.
Home Loan Scheme Regulations Housing Concessional Loans Regulations		Person ineligible for certain benefits if spouse (includes de facto spouse) owns certain property.

ACT	S.	BENEFIT
Human Tissue Transplant	17	De facto partner is taken to a spouse for the purposes of Act.
	18	Spouse may approve or object to use of deceased's tissue at death.
Lands Acquisition	Sched 2, Rules 9, 11, 1	Disadvantages to de facto spouse can be considered in assessing compensation or granting leave
Legislative Assembly Members Superannuation	18	"Spouse" includes certain de facto partners (note: some limitations eg minimum 3-year length relationship)
	24	Pensions and benefits paid widows/widowers.
Maintenance	16	Orders may be made that the father of a child must pay preliminary expenses of pregnancy.
	19	Orders may be made that the father of a child must pay funeral expenses of a mother who dies in childbirth.
Mental Health	34	A spouse is a "prescribed person" who may apply for review of an order - <u>Note</u> , however, the Supreme Court may also allow an application for "any other person who ... has, by reason of ties of blood or friendship or for any other reason, a bona fide interest in the welfare of the person who is the subject of the order" - would cover de facto partners.

ACT	S.	BENEFIT
Motor Accidents Compensation	4	"Spouse" includes certain de facto partners (some limits - eg minimum length of 3 years etc)
	7	Benefits in respect of injuries where injured has died are payable to his spouse.
	22	Death benefits payable to spouses.
Status of Children	5(3)	Where a woman gives birth to a child and within 44-20 weeks before the birth she cohabited with a man, the child is presumed to be theirs.
	5A	"Husband or wife" includes de facto partner for purposes of AID program.
	5D	Husband of a woman who has an AID child is deemed to be its father.
Work Health	49	Dependants entitled to compensation. "Dependant" includes person "ordinarily" living with the worker as husband or wife immediately preceding the accident.

TABLE 3: LEGISLATION WHICH REMOVES A DISABILITY THAT ONLY APPLIES TO MARRIED WOMEN

ACT	S.	DISABILITY
Domicile	5	Married woman taken to have domicile of her husband.
Guardianship of Infants	22	A married woman is capable of acting as next friend and of being appointed guardian <u>ad litem</u> on behalf of her own, or any of her children
Law Reform (Misc. Provisions)	10	Husband's liability for his wife's torts and ante-nuptial obligations.
Married Women's Property	1	Married women unable to deal with their separate property, enter into contracts, sue and be sued etc. as if single woman.
	3	Wife unable to prove loans made by husband in his bankruptcy.
	2	Women married after commencement of Act are entitled to hold as separate property everything belonging to them at time of marriage or acquired by them after marriage.
	5	Property acquired by married woman after commencement of Act to be treated by her as separate property.
	6-9	Shares, stocks etc. in the name of a married woman deemed to be separate property [doesn't apply against creditors of husband in situations of fraud etc. s.10]
12	Married woman to have same civil and criminal remedies and redress as <u>feme sole</u> .	

ACT	S.	DISABILITY
Trustee	16	Married woman in whom a freehold hereditament is vested as a bare trustee may not convey/surrender it as if she were a <u>feme sole</u> .
	69(1)	Married woman unable to fully and effectually dispose of future/reversionary interests, and possibilities of interests in personality, without consent of husband.
	69(2)	Married women unable to fully and effectually release powers/rights or equities to settlement in personal estate without consent of husband.
Married Persons (Torts) Act	4	Persons who were a party to a dissolved or annulled marriage have rights of action in tort against each other as though they had never been married.

APPENDIX B

DRAFT DE FACTO RELATIONSHIPS BILL

(DRAFT No. 1)
NORTHERN TERRITORY OF AUSTRALIA
DE FACTO RELATIONSHIPS BILL 1988

TABLE OF PROVISIONS

PART I - PRELIMINARY

1. Short title
2. Commencement
3. Interpretation -
 - "applicant";
 - "child";
 - "cohabitation agreement";
 - "de facto partner";
 - "financial matters";
 - "financial resources";
 - "periodic maintenance";
 - "property";
 - "separation agreement";
 - "Supreme Court";
4. Application
5. Other Rights of De Facto Partners not affected by this Act
6. Declaration of Interests in Property
7. Declaration as to Existence of De Facto Relationship

PART II - JURISDICTION

8. Courts with Jurisdiction under this Act
9. Limit of Jurisdiction of Local Court
10. Suspension and transfer of proceedings
11. Courts to act in aid of each other

PART III - PROCEEDINGS FOR FINANCIAL ADJUSTMENT

Division 1 - Preliminary

12. Applications for orders
13. Conditions for making order - living within Territory, &c.
14. Conditions for making order - length of relationship, &c.
15. Time limit for applications
16. Duty of court to end financial relationships

Division 2 - Adjustment of interests in property

17. Order for adjustment
18. Adjournment of application - likelihood of significant change in circumstances
19. Adjournment of application - proceedings in Family Court
20. Deferment of order

- 21. Effect of death of parties on application
- 22. Effect of death of party on order

Division 3 - Maintenance

- 23. No general right of de facto partner to maintenance
- 24. Order for maintenance
- 25. Interim maintenance
- 26. Effect of subsequent relationship or marriage
- 27. Applicant cannot continue after death of partner
- 28. Cessation of order - generally
- 29. Cessation of order - child care responsibilities
- 30. Duration of orders for periodic maintenance
- 31. Variation, &c., of orders for periodic maintenance
- 32. Extension of orders for periodic maintenance
- 33. Recovery of arrears

Division 4 - General

- 34. Powers of court
- 35. Execution of instruments by order of court
- 36. Orders and injunctions in the absence of a party
- 37. Variation and setting aside of orders
- 38. Transactions to defeat claims

"disposition"

- 39. Interests of other parties

PART IV - COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS

- 40. Entering into agreements
- 41. Separation agreement where relationship continues
- 42. Agreements subject to law of contract
- 43. Effect of agreements in certain proceedings
- 44. Effect of certain exclusion provisions in agreements
- 45. Variation of terms of cohabitation agreements and separation agreements

"cohabitation agreement"

"separation agreement"

- 46. Effect of cancellation, &c., of agreements
- 47. Effect of death of de facto partner - periodic maintenance
- 48. Effect of death of de facto partner - transfer of property and lump sum payments

PART V - MISCELLANEOUS

- 49. Enforceability of Orders
- 50. Regulations

DRAFT No. 1

to make provision for the resolution of disputes
between de facto partners

PART I - PRELIMINARY

1. SHORT TITLE

This Act may be cited as the *De Facto Relationships Act 1988*.

2. COMMENCEMENT

This Act shall commence on a date to be fixed by the Administrator by notice in the *Gazette*.

3. INTERPRETATION

In this Act, unless the context otherwise indicates or requires -

"applicant" includes a cross-applicant;

"child", in relation to de facto partners (whether the partners are referred to as the parties to an application or otherwise) means -

- (a) a child born as a result of sexual relations between the partners;
- (b) a child of the woman whose de facto partner is presumed to be the father of the child under section 5D of the *Status of Children Act*; or
- (c) a child adopted by the partners;

De Facto Relationships

"cohabitation agreement" means an agreement between a man and a woman, whether or not there are other parties to the agreement -

- (a) made (whether before or after the commencement of this Act) -
 - (i) in contemplation of their entering into a de facto relationship; or
 - (ii) during a de facto relationship between them; and
- (b) which makes provision at least with respect to financial matters.

"de facto partner" means -

- (a) in relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and
- (b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her;

"de facto relationship" means the relationship between de facto partners, namely the relationship of living together as husband and wife on a bona fide domestic basis although not married to each other;

"financial matters" means matters with respect to any one or more of the following:

- (a) the maintenance of one or both of the de facto partners;
- (b) the property of one or both of those partners;
- (c) the financial resources of one 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;

De Facto Relationships

- (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;

"periodic maintenance" means maintenance by means of a weekly, fortnightly, monthly, yearly or other periodic sum;

"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 between a man and a woman, whether or not there are other parties to the agreement -

- (a) made (whether before or after the commencement of this Act) in contemplation of terminating a de facto relationship between them or after terminating it; and
- (b) which makes provision at least with respect to financial matters;

4. APPLICATION

This Act applies to a person who has been a de facto partner, whether before or after the commencement of this Act, but does not apply to a person who was a partner in a de facto relationship which ended before the commencement of this Act.

5. OTHER RIGHTS OF DE FACTO PARTNERS NOT AFFECTED BY THIS ACT

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.

6. DECLARATION OF INTERESTS IN PROPERTY

(1) Without limiting the generality of section 5, in proceedings between de facto partners with respect to existing rights in real or personal property, a court may declare any rights that a de facto partner has in respect of the property.

(2) If a court makes a declaration under subsection (1) it may make consequential orders to give effect to the declaration, including -

(a) orders as to possession; and

(b) in the case of a Local Court, orders of the kind which may be made under section 33(1)(b), (c), (i) and (j).

(3) An order under this section is binding on the de facto partners but not on any other person.

7. DECLARATION AS TO EXISTENCE OF DE FACTO RELATIONSHIP

(1) A person who alleges that a de facto relationship exists or has existed -

(a) between himself or herself and another named person; or

(b) between 2 named persons,

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

(2) If the court is satisfied that a de facto relationship exists or has existed, the court 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.

(3) The court shall state in its declaration that the de facto relationship existed -

(a) at a date specified in the declaration; or

(b) between dates specified in the declaration, or both.

(4) 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.

De Facto Relationships

(5) If any person whose interests, in the opinion of the court, would be affected by a declaration is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application the court may, if it thinks that a person ought to be present or represented at the hearing, adjourn the hearing to enable that person to be given that opportunity.

(6) While a declaration remains in force the persons named in the declaration are presumed conclusively for all purposes to have had a de facto relationship at the date specified in the declaration or between the dates specified, or both.

(7) The court may make an order annulling a declaration, on the application of a person who applied or could have applied for the making of the declaration, or who is affected by it, if the court finds that new facts or circumstances have arisen that have not been, and could not reasonably have been, previously disclosed to the court.

(8) The declaration ceases to have effect on the order of annulment but the order does not affect anything done in reliance on the declaration before the making of the order.

(9) If any person whose interests, in the opinion of the Court, would be affected by an order of annulment is not present or represented and has not been given an opportunity to be present or represented at the hearing of the application for the order the court may, if it thinks that the person ought to be present or represented at the hearing, adjourn the hearing to enable that person to be given that opportunity.

(10) If the court makes an order annulling a declaration, it may, if it thinks that it would be just and equitable to do so, make any ancillary orders (including orders varying rights with respect to property or financial resources) that may be necessary to preserve, as far as practicable, the rights or interests of any person affected by the annulment.

PART II - JURISDICTION

8. COURTS WITH JURISDICTION UNDER THIS ACT

A person may apply to the Supreme Court or a Local Court for an order or relief under this Act.

9. LIMIT OF JURISDICTION OF LOCAL COURT

(1) A Local Court -

(a) shall not have jurisdiction under this Act to hear or determine proceedings seeking an order -

De Facto Relationships

- (i) in relation to property, to declare or adjust any estate or interest; or
- (ii) for maintenance,

of a value or amount in excess of the jurisdictional limit order the *Local Courts Act*;

- (b) shall transfer such proceedings to the Supreme Court unless the parties consent to the Local Court hearing and determining the proceedings.

(2) The Local Court may transfer proceedings referred to in subsection (1) of its own motion, even if the parties would be willing for the Local Court to hear and determine the proceedings, but the Local Court may first make such orders as it considers necessary pending the disposal of the proceedings by the Supreme Court.

(3) If proceedings are transferred from the Local Court to the Supreme Court, the Supreme Court shall, subject to the rules of court, proceed as if the proceedings had been originally instituted in that Court.

(4) Without affecting the duty of a Local Court to comply with this section, failure by the Local Court to comply does not invalidate any order of the Court in the proceedings.

10. SUSPENSION AND TRANSFER OF PROCEEDINGS

(1) A court may suspend or dismiss proceedings that have been instituted under this Act by or in relation to a person if it appears to the court that other proceedings have been instituted under this Act by or in relation to the same person in another court.

(2) A court may transfer pending proceedings instituted under this Act to another court with jurisdiction under this Act if it appears to the court that it is in the interests of justice that the proceedings be dealt with by that other court.

11. COURTS TO ACT IN AID OF EACH OTHER

All courts having jurisdiction under this Act shall act in aid of and be auxiliary to each other in all matters under this Act.

PART III - PROCEEDINGS FOR FINANCIAL ADJUSTMENT

Division 1 - Preliminary

12. APPLICATIONS FOR ORDERS UNDER THIS PART

A de facto partner may apply to a court (whether or not any other application for any remedy or relief is of

De Facto Relationships

may be made under this Act or any other Act or any other law) for an order under this Part -

- (a) for the adjustment of interests with respect to the property of the de facto partners or either of them; or
- (b) for the granting of maintenance,

or both.

13. CONDITIONS FOR MAKING OF ORDER - LIVING WITHIN TERRITORY, &c.

(1) A court shall not make an order under this Part unless it is satisfied that the parties to the application or either of them resided in the Territory on the day of the application and that -

- (a) both parties resided in the Territory for at least one-third of their de facto relationship; or
- (b) substantial contributions of the kind referred to in section 17(1)(a) or (b) have been made in the Territory by the applicant.

(2) If a court is satisfied about the matters specified in subsection (1) it may make or refuse to make an order because of facts and circumstances, including facts and circumstances that took place before the commencement of this Act or outside the Territory.

14. CONDITIONS FOR MAKING ORDER - LENGTH OF RELATIONSHIP, &c.

A court shall not make an order under this Part unless it is satisfied that the parties to the application have lived together in a de facto relationship for a continuous period of not less than 2 years, but irrespective of that circumstance, the court may make an order if it is satisfied that there is a child of the parties to the application, or that the applicant -

- (a) has made substantial contributions of the kind referred to in section 17(1)(a) or (b) for which the applicant would otherwise not be adequately compensated if the order were not made; or
- (b) has the care and control of a child of the respondent,

and if satisfied that the failure to make the order would result in serious injustice to the applicant.

De Facto Relationships

15. TIME LIMIT FOR APPLICATIONS.

If de facto partners have ended their de facto relationship an application to a court for an order under this Part shall be made before the expiration of the period of 2 years after the day on which the relationship ended.

However, a court may grant leave to a de facto partner to apply to the court at any time after that period for an order under this Part (other than an order under section 24(1)(b)) if the court is satisfied that greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if that leave were granted.

16. DUTY OF COURT TO END FINANCIAL RELATIONSHIPS

In proceedings for an order under this Part, 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.

Division 2 - Adjustment of Interests in Property

17. ORDER FOR ADJUSTMENT

(1) A court may make an order adjusting the interests of the partners in the property of one or both of them that it considers just and equitable having regard to -

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto 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 de facto 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.

(2) A court may make the 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.

De Facto Relationships

18. ADJOURNMENT OF APPLICATION - LIKELIHOOD OF SIGNIFICANT CHANGE IN CIRCUMSTANCES

(1) A court may adjourn an application by a de facto partner for an order to adjust interests with respect to the property of one or both of the de facto partners, if the court is of the opinion that -

- (a) 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) 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 any time, before the end of a period specified by the court, that 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 being 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 any 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.

De Facto Relationships

19. ADJOURNMENT OF APPLICATION - PROCEEDINGS IN FAMILY COURT

(1) If proceedings in relation to the property of one or both of the de facto partners are commenced in the Family Court of Australia at any time before a court has made a final order to adjust interests with respect to the property of one or both of the partners the court may adjourn its hearing.

(2) If the hearing of the application has been adjourned, the applicant for the order 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.

20. DEFERMENT OF ORDER

If 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 section 17 the court may defer the operation of the order until the date or the occurrence of the event specified in the order.

21. EFFECT OF DEATH OF PARTIES ON APPLICATION

(1) If either party to an application for an order under section 17 dies before it 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 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) The order 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.

22. EFFECT OF DEATH OF PARTY ON ORDER

If a party to an application under section 17 dies after an order is made against the party, the order may be enforced against the estate of the deceased party.

De Facto Relationships

Division 3 - Maintenance

23. NO GENERAL RIGHT OF DE FACTO PARTNER TO MAINTENANCE

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.

24. ORDER FOR MAINTENANCE

(1) A court may make an order for periodic or other maintenance if the court 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 is under 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 that 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 programme 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 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) the responsibilities of either de facto partner to support any other person;

(e) the terms of any order made or proposed to be made under section 17 with respect to the property of the de facto partners; and

De Facto Relationships

(f) any payments made for the maintenance of child or children in the care and control of the partner applying for the order.

(3) In making an order, a court shall disregard an entitlement of the child, or partner applying for the order, to an income tested pension, allowance or benefit.

25. INTERIM MAINTENANCE

If it appears to a court that the partner applying for the order for maintenance 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 any periodic sum or other sums that the court considers reasonable until the application is determined.

26. EFFECT OF SUBSEQUENT MARRIAGE

If 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 for maintenance against the previous de facto partner.

27. APPLICATION CANNOT CONTINUE AFTER DEATH OF PARTIES

An application under section 24 cannot be continued if either party to the application dies before the application is determined.

28. CESSATION OF ORDER - GENERALLY

(1) An order for maintenance 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) If a de facto partner in whose favour an order for maintenance is made marries the partner must notify the de facto partner against whom the order was made of the date of the marriage without delay.

(3) A de facto partner who paid any money under an order for periodic maintenance after a marriage referred to in subsection (1)(b) takes place may recover the money as a debt in a court of competent jurisdiction.

29. CESSATION OF ORDER - CHILD CARE RESPONSIBILITIES

An order for period maintenance under section 24(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.

De Facto Relationships

30. DURATION OF ORDERS FOR PERIODIC MAINTENANCE

(1) An order for periodic maintenance under section 24(1)(a) applies for any period which the court may decide, not exceeding the period ending when the child to whom section 24(1)(a) applies, or the younger or youngest child, attains the age of 18 years.

(2) An order for periodic maintenance under section 24(1)(b) applies for any period that the court may decide not exceeding -

(a) 3 years after the day on which the order is made; and

(b) 4 years after the day on which the de facto partners last ceased to live together,

whichever is the shorter.

(3) An order for periodic maintenance under section 24(1)(a) and (b) applies for any period decided by the court, not exceeding the period permissible under subsection (1) or (2), whichever is the longer.

(4) Nothing in this section or in an order under this Part for periodic maintenance prevents the order from ceasing to have effect under section 28 or 29.

31. VARIATION, &c., OF ORDERS FOR PERIODIC MAINTENANCE

(1) On application by a de facto partner in respect of whom an order has been made for periodic maintenance, a court may -

(a) discharge the order;

(b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some 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 any amount directed to be paid by the order or in any other manner.

(2) A court shall not make an order discharging, increasing or decreasing any amount directed to be paid by an order 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 -

De Facto Relationships

as to justify making the order.

(3) In satisfying itself for the purposes of subsection (2)(b), a court shall have regard to 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, and 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 at least 12 months have passed 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 sum payable under an order.

(6) For the purposes of this section, a court must have regard to sections 23 and 24.

32. EXTENSION OF ORDERS FOR PERIODIC MAINTENANCE

(1) Where a court has made an order for periodic maintenance for a period which is less than the maximum period permissible under section 30, 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 30.

(4) For the purposes of this section, a court must have regard to sections 23 and 24.

33. RECOVERY OF ARREARS

Nothing in section 28 or 29 affects the recovery of arrears due under an order for maintenance at the time when the order ceased to have effect.

Division 4 - General

34. POWERS OF COURT

(1) A court, in exercising its powers under this Part, may do any one or more of the following:

De Facto Relationships

- (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 deed or instrument be executed and that documents of title be produced or other things be done that 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 sum;
 - (f) order that 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,
or both;
 - (j) impose terms and conditions;
 - (k) make an order by consent or in the absence of a party;
 - (m) make any other order or grant any other injunction to do justice.
- (2) A court may, in relation to an application under this Part -
- (a) make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law; and
 - (b) make any order or grant any remedy or relief under this Part in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.

De Facto Relationships

(3) This section does not take away any other power of the court under this or any other Act or law.

35. EXECUTION OF INSTRUMENTS BY ORDER OF COURT

(1) If -

(a) a person has refused or neglected to comply with an order to execute a deed or instrument or

(b) for any other reason, a court thinks it necessary,

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do everything necessary to make the deed or instrument valid and operative.

(2) The execution of the deed or 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 deed or instrument.

36. ORDERS AND INJUNCTIONS IN THE ABSENCE OF A PARTY

(1) In the case of urgency, a court in the absence of a party may make or grant any one or more of the following:

(a) an order under section 25;

(b) an order or injunction for either or both of the purposes specified in section 34(1)(h).

(2) An application 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 shall be expressed to operate or apply only until a specified time or the further order of the court.

De Facto Relationships

- (6) The court may give directions with respect to -
 - (a) the service of the order or injunction and any other documents it thinks fit; and
 - (b) the hearing of an application for a further order.

37. VARIATION AND SETTING ASIDE OF ORDERS

(1) If a court is satisfied, on the application of a person in respect of whom an order referred to in section 17 or 24 has been made -

- (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 this Part.

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

38. TRANSACTIONS TO DEFEAT CLAIMS

(1) In this section "disposition" includes a sale and a gift.

(2) The court may set aside, or restrain the making of, any instrument or disposition which is intended to or (irrespective of intention) likely to defeat any order applied for under this Part.

(3) The court may (without limiting section 35) order that -

- (a) any property dealt with by such an instrument or disposition be used to satisfy, or be charged with the payment of, any sums payable under an order under section 17 or this Part, or costs; or
- (b) that the proceeds of a sale be paid into court until it has made an order.

De Facto Relationships

(4) The court may order a party or a person acting in collusion with a party to pay the costs -

(a) payable or paid by any other party; or

(b) incurred by a purchaser in good faith or other interested person,

for and incidental to the making of the instrument or disposition, or setting it aside or restraining it.

39. INTERESTS OF OTHER PARTIES

(1) In the exercise of its powers under this Part a court shall have regard to the interests of, and must 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 this Part.

PART IV - COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS

40. ENTERING INTO AGREEMENTS

(1) Notwithstanding any rule of public policy to the contrary, a man and a woman who are not married to each other may enter into a cohabitation agreement or separation agreement.

(2) Nothing in a cohabitation agreement or separation agreement affects the power of a court to make an order with respect to the right to custody of, maintenance of, access to or any other matter relating to the children of the parties to the agreement.

41. SEPARATION AGREEMENT WHERE RELATIONSHIP CONTINUES

If a separation agreement is made in contemplation of terminating a de facto relationship and the relationship is not terminated within 3 months after the day on which the agreement was made, the agreement is to be treated as a cohabitation agreement.

42. AGREEMENTS SUBJECT TO LAW OF CONTRACT

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.

43. EFFECT OF AGREEMENTS IN CERTAIN PROCEEDINGS

(1) If a court is satisfied, on an application by a de facto partner for an order under Part III -

De Facto Relationships

- (a) that there is a cohabitation agreement or separation agreement between the de facto partners;
- (b) that the agreement is in writing;
- (c) that the agreement is signed by the partner against whom it is sought to be enforced;
- (d) that before the time the parties signed the agreement a solicitor had advised each partner independently of the other about -
 - (i) the effect of the agreement on the rights of the partners to apply for an order under Part III;
 - (ii) whether or not, at that time, it was prudent for that partner to enter into the agreement;
 - (iii) whether or not the provisions of the agreement were fair and reasonable at that time and in the light of the circumstances which were then reasonably foreseeable; and
 - (iv) whether or not, at that time, it was to the advantage, financially or otherwise, of that partner to enter into the agreement -

and had given each partner a certificate in the prescribed form stating that the advice had been given; and

- (e) that copies of the certificate are endorsed on, attached to or accompany the agreement -

the court shall not make an order under Part III which is inconsistent with the terms of the agreement, except as provided by sections 45 and 46.

However, if the court is not satisfied about any of the matters referred to in paragraph (b), (c), (d) or (e), the court may make any order that it could have made if there were no cohabitation or separation agreement between the partners.

(2) In making an order under subsection (1) the court may have regard to the terms of the cohabitation agreement or separation agreement in addition to the matters which it is required to consider under Part III.

(3) A court may make an order under subsection (1) even if the cohabitation agreement claims to exclude the jurisdiction of the court to make that order.

De Facto Relationships

44. EFFECT OF CERTAIN EXCLUSION PROVISIONS IN AGREEMENTS

If a cohabitation agreement or separation agreement does not satisfy any one or more of the matters referred to in section 43(1)(b), (c), (d) or (e), the provisions of the agreement may be enforced in proceedings other than an application for an order under Part III even though the agreement claims to exclude the jurisdiction of a court to make an order under Part III.

45. VARIATION OF TERMS OF COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS

(1) In this section only -

"cohabitation agreement" means a cohabitation agreement made between de facto partners which satisfies the matters referred to in section 43(1)(b), (c), (d) and (e);

"separation agreement" means a separation agreement made between de facto partners which satisfies the matters referred to in section 43(1)(b), (c), (d) and (e).

(2) A court may vary or set aside any or all of the provisions of a cohabitation agreement or a separation agreement on an application by a de facto partner for an order under Part III.

(3) The court may exercise its powers under subsection (2) in respect of a cohabitation agreement if, in the opinion of the court, the circumstances of the partners have changed since the agreement was entered into and that it would lead to serious injustice if any or all of the provisions of the agreement were enforced whether on the application for the order under Part III or on any other application for any remedy or relief under any other Act or any other law.

(4) The court may exercise its powers under subsection (2) in respect of a separation agreement only if in the opinion of the court -

- (a) the agreement was obtained by fraud;
- (b) the agreement is void, voidable or unenforceable; or
- (c) in the circumstances since the agreement was made it is impracticable for the agreement or any provision of it to be carried out.

(5) A court may exercise its powers under subsection (2) despite any provision of the agreement to the contrary.

De Facto Relationships

46. EFFECT OF CANCELLATION, ETC., OF AGREEMENTS

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

- (a) the de facto partners have cancelled or consented to the cancellation of the agreement by their words or conduct; or
- (b) the agreement has ceased to have effect for some other reason.

47. EFFECT OF DEATH OF DE FACTO PARTNER-PERIODIC MAINTENANCE

(1) On the death of a de facto partner the provisions of any cohabitation agreement or separation agreement requiring that a de facto partner to pay periodic maintenance to other de facto partner shall be unenforceable against that partner's estate except in so far as the cohabitation agreement or separation agreement provides to the contrary.

(2) The provisions of a cohabitation agreement or separation agreement requiring a de facto partner to pay periodic maintenance to the other de facto partner will, on the death of the second-mentioned partner, be unenforceable by his or her estate.

(3) Subsections (1) and (2) do not affect the right to recover arrears of periodic maintenance due and payable under a cohabitation agreement or separation agreement at the death of the partner.

48. EFFECT OF DEATH OF DE FACTO PARTNER-TRANSFER OF PROPERTY AND LUMP SUM PAYMENTS

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 against, the estate of the deceased partner, except in so far as the agreement provides to the contrary.

PART V - MISCELLANEOUS

50. ENFORCEABILITY OF ORDERS

An order under this Act made -

- (a) by a Local Court is enforceable as if it were an order made by the Court on a claim under the *Local Courts Act*, or any other Act or law; and

De Facto Relationships

- (b) by the Supreme Court is enforceable as if it were an order made by the Court on a proceeding under the *Supreme Court Act* or any other Act or law.

51. 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.
-
-