



# SAME SEX RELATIONSHIPS AND THE LAW

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## **SAME –SEX RELATIONSHIPS**

South Australian law recognises same-sex relationships in a variety of situations. When it does so, the relationship is called a 'domestic partnership'. In some situations, there is no set time that you must live with someone before your relationship is recognised, for example when getting a restraining order against a violent partner, applying to the Family Law Courts about children, or applying for legal aid. In other situations, partners may not be entitled to certain rights unless they have lived together for three years, or for periods totalling three years over four years. For most legal purposes, partners do not have to take any formal steps to have the relationship recognised.

If the relationship was for less than three years, either of the former partners may seek a declaration from the Court that they were domestic partners on a given date, on the basis that they were living together in a close personal relationship and that the interests of justice require that a declaration be made.

The law recognises same-sex relationships in the same way as opposite-sex (de facto) relationships in many situations, for example when:

- one partner dies without a will
- one partner leaves another out of their will
- superannuation is being claimed after the death of a partner
- there are compensation claims arising from the death or injury of a partner
- a partner is ill and needs someone to make medical decisions for them
- organ donation is being considered
- getting a restraining order against a violent partner
- settling property disputes after separation
- assessing stamp duty payable on certain transfers of property between former domestic partners.



South Australian law does not recognise same-sex relationships in relation to adoption of children nor access to reproductive technology. Domestic partnerships do not include situations where care is provided by one person to the other for fee or reward. In areas of life governed by Commonwealth legislation, there is no general recognition of same-sex relationships. Any Commonwealth Act that does cover same-sex relationships will set out the circumstances where such relationships are recognised.

## **PROPERTY**

Property matters between domestic partners are governed by the *Domestic Partners Property Act 1996* (SA). The Act does not apply to same-sex relationships that ended before 1 June 2007.

***domestic partnership agreements***

A couple living or intending to live together can draw up an agreement saying how property will be divided should the relationship end. The agreement can deal with any other matter (financial or otherwise) concerning the relationship. It should include a list of the property owned by each partner and how items will be divided if they separate. To be enforceable, agreements must be in writing and signed by both partners. It is wise to get legal advice before signing an agreement. An agreement can be changed at any time, either in writing or verbally, if you both agree.

A domestic partnership agreement can be 'certified', which can give it more weight in any future dispute. In a certified agreement, each partner must state that they have declared all their assets. In addition, each partner must get independent legal advice, with each lawyer signing the agreement, and each party signing it in the presence of their own lawyer without the other party present. A certified agreement can only be changed by another certified agreement.

***property disputes***

Applications to court about division of property when a relationship ends can only be made if the relationship existed for at least three years, one of the partners is resident in the State when the application is made, and the partners were resident in the State for the whole or a substantial part of the relationship. Same sex partners who do not meet these criteria should seek legal advice about disputed property. Applications for property settlement must be made within 12 months after the relationship ends, unless there are special reasons to allow an extension of time. Cases are heard in the South Australian courts (not the Family Law Courts).

If you live with someone in a domestic relationship they are not automatically entitled to half of everything you own. The court considers what property is available for distribution and the contributions of each partner to the relationship. 'Property' includes superannuation. 'Contributions' can include money, property, work around the home, or caring for children. The court will also consider what any domestic partnership agreement says. Even if the shared home is in one partner's name only, the other partner may still be entitled to a share of the house if they can show that they have made some contribution to the house or to other property or child care.

A court may set aside or vary any agreement if satisfied that enforcement of the agreement would result in serious injustice, unless the agreement is certified and specifically excludes the court's power to do so. If the certified agreement specifically excludes the court's power to set it aside or vary it, generally a court cannot overrule it, even if it is unfair. However, if there has not been full disclosure, or there has been fraud or duress, it may be possible for a court to overrule the agreement.

**SUPERANNUATION (STATE)**

Superannuation schemes for South Australian State employees give same-sex partners access to death benefits, if the partners have been together for at least three years, or periods totalling three years out of the last four.

If you purchase major appliances, keep a record of the contract of sale. If you are both to own it, have the contract made out in both names. Mediation services can assist in resolving same-sex partner property disputes. There is usually a fee for these services.

## **SUPERANNUATION (COMMONWEALTH)**

Most superannuation comes under Commonwealth law. Same-sex partners have the right to receive superannuation payouts as death benefits if:

- the surviving partner was financially dependent on the other partner at the time of their death OR
- the surviving partner has been nominated as the preferred beneficiary and the nomination is binding OR
- the surviving partner inherits through the other partner's will OR
- they are in an 'interdependency relationship' and the fund's rules allow payment of death benefits to an interdependent partner (Commonwealth public sector schemes do not provide for this).

An interdependency relationship includes a close personal relationship between two people who live together, where one or both provides for the financial and domestic support or personal care of the other. The requirement to live together does not need to apply if one or both parties has a physical, intellectual or psychiatric disability.

## **TAXATION**

Same-sex relationships are not recognised under taxation law.

Any deductions and rebates, including any Medicare levy, apply as if same-sex partners were single.

## **CHILDREN**

If a child has been present during a relationship, both partners may wish to continue to spend time with, communicate with or care for the child. If agreement cannot be reached, an application for a parenting order can be made to the Family Law Courts. An applicant must be able to show they are concerned with the care, welfare and development of the child. In determining whether to grant a parenting order, the court must put the interests of the child first. It will consider a variety of issues, including maintaining any established arrangements, the relationship between the applicant and the child, the wishes of the child and the child's safety.

## **CHILD SUPPORT FROM THE BIOLOGICAL PARENTS OF A CHILD**

A carer of a child can apply to the Child Support Agency for an assessment of child support payable by a parent of the child, providing the applicant is not living with that parent. The biological father can be liable to pay child support under the *Child Support (Assessment) Act, 1975* unless the child was conceived by an informal artificial conception procedure. Even if there is an agreement between the parties that the father will not have financial responsibility for the child, as a biological parent he can be liable to pay child support if the child was conceived by an act of sexual intercourse.

If a mother were to bear a child for a male homosexual couple, she could also be assessed to pay child support to the homosexual co-parent if the child was conceived by an act of sexual intercourse, rather than artificial insemination. Centrelink requires parents to take reasonable maintenance action in order to maintain their full entitlement to Family Tax Benefit. Centrelink can require a parent to seek child support from the biological parent of a child in their care. If that biological parent is registered on the child's birth certificate (a mother will always be registered) there is a presumption of parentage. Otherwise, an application can be made for a court order as to parentage. The donor parent may need to defend such an application by giving evidence as to the circumstances surrounding conception of the child.

## **CHILD SUPPORT FROM THE CO- PARENT**

If same-sex co-parents separate, it may be possible for the co-parent who has the principal care of the child to seek a financial contribution from the other co-parent. The law is not clear on this issue, but a recent case in New South Wales suggests that a court can make an order for financial support in specific circumstances. A co-parent should seek legal advice before considering such a claim.

## **MARRIAGE**

It is not possible for same-sex couples to be legally married in Australia. Nor can an Australian court make a declaration of validity in relation to a same-sex marriage entered into overseas. Social Security Any benefits paid to couples under social security law are not available to same-sex couples. Any person in a same-sex relationship may claim benefits as if they were single.

## **IMMIGRATION**

Same-sex partners of Australian citizens, Australian permanent residents and eligible New Zealand citizens may be able to migrate to Australia as an interdependent partner. An interdependent relationship is a relationship where there is a mutual commitment to a shared life in a genuine, continuing relationship that is exclusive of any other spouse or interdependent relationship.

Same-sex partners are not recognised as 'members of the family unit' under immigration law. This means that same-sex partners who want to migrate to Australia together will both need to meet the criteria for a visa in their own right. If only one person qualifies for a visa, it may be possible to travel to Australia alone and later sponsor his/her partner for an interdependency visa.



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