

Married v De Facto: The fundamental differences at law

23 November 2017

7 min. read

[relationship law](#) / [family law](#) / [family and relationship law](#) / [separation](#) / [relationships](#) / [de facto](#)

Let's assume that no further politicking will take place and that the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 will be passed imminently.

Once we've redefined marriage as a union of two people and introduce non-gendered language into our relevant legislation to move equality forward in Australia, what difference will this legislative change make for same sex couples (from a legal point of view) who now wish to marry formally in Australia or have their wedding held in a foreign country recognised in Australia?

We've prepared a comparison table below to explain the current fundamental differences at law between a marriage and a genuine de facto relationship.

	Married	De facto relationship*
Proof of relationship	A marriage certificate is evidence of marriage.	If the existence of a de facto relationship is challenged by one party in a dispute, a de facto relationship must be proven based on the facts of the case.
Date of cohabitation	The existence of a de facto relationship prior to marriage can still be challenged by one spouse in a dispute and may still need to be proven, although the marriage certificate remains proof of the marriage.	If the existence of a de facto relationship is challenged by one party in a dispute, a de facto relationship must be proven based on the facts of the case.
Ending a relationship	A married couple must be separated one year before they apply for a divorce. If separation is challenged by one party in a dispute, separation must be proven based on the facts of the case. An \$865 fee applies for an application for divorce. A Divorce Order evidences the end of a marriage.	There is no application required to formalise the end of a de facto relationship (if it is not registered as a civil partnership under existing State laws). The end of a de facto relationship is the date of separation. If separation is challenged by one party in a dispute, separation must be proven based on the facts of the case.
Dividing property, finances or assets	At the end of a marriage, property and/or spousal maintenance proceedings must be filed within one year of a Divorce Order, but there is an option to agree to an extension of time in which to file.	At the end of a de facto relationship, property and/or maintenance proceedings must be filed within two years of separation and there is no option to agree to an extension of time in which to file - the Court must determine that issue.
Wills in Queensland	A marriage revokes an existing will, unless the will was made in contemplation of the marriage. A Divorce Order (not separation) has the effect of revoking any appointments or gifts made to the former spouse in a will, but does not revoke the existing will. The validity of an existing will is not affected when married parties separate, but do not divorce.	Entering a new de facto relationship does not revoke an existing will. In Australia, prior to the same-sex marriage vote, it is unlikely that same sex couples would have made wills in contemplation of marriage and therefore same sex couples who will be looking to get married once we have new laws need to consider the impact of that marriage on their existing estate planning. The validity of an existing will is not affected when de facto couples separate.
Death in Queensland	A death certificate will be issued that records all the marriages of the deceased. If a person dies intestate (that is without a valid Will) a surviving married spouse (even if they were separated but not divorced) will be entitled on intestacy. Regardless of whether the deceased had a will or not, their surviving 'spouse' is eligible to make a claim against the deceased estate. By definition, a spouse includes the deceased's husband or wife and dependant former husband or wife.	A death certificate will be issued but no record of any de-facto relationships will be recorded. If a person dies intestate (that is without a valid will) a surviving de facto spouse will be entitled on intestacy. However, the surviving de facto spouse will have to prove they were a de facto spouse at the time of death. Regardless of whether the deceased had a Will or not, their surviving 'spouse' is eligible to make a claim against the deceased estate. By definition, a spouse includes a de facto partner provided they had lived together on a genuine domestic basis for a period of at least two years ending on the deceased's death.

	Married	De facto relationship*
Statutory Health Attorneys in Queensland	If a person lacks capacity to make a decision for a health matter, the person's spouse (provided the spouse is close and continuing) will have highest priority to act and make a decision regarding a health matter on behalf of the incapable adult. To avoid the uncertainty of the Statutory Health Attorney provisions, every adult should have an enduring power of attorney.	It will be more difficult for a de facto spouse to prove that they are the close and continuing spouse of the incapable adult in order to be able to become a health attorney. To avoid the uncertainty of the Statutory Health Attorney provisions, every adult should have an enduring power of attorney.
Enduring Powers of Attorney in Queensland	If a person marries after making an enduring power of attorney, the enduring power of attorney is revoked to the extent it gives power to someone other than the person's husband or wife.	If a person divorces after making an enduring power of attorney, the enduring power of attorney is revoked to the extent it gives power to the divorced spouse.
Children	If a couple undergo IVF while married, both parties are presumed to be the legal parent of any child born.	If a de facto couple undergo IVF while in a relationship, the other intended parent may need to establish the existence of the de facto relationship at the time of conception to be presumed to be the legal parent of any child born.
Superannuation	If a member of a superannuation fund dies, their death benefits can be paid to their spouse. The definition includes a married spouse.	If a member of a superannuation fund dies, their death benefits can be paid to their spouse. The definition of spouse includes a de facto spouse, but it is having to prove the de facto relationship which can be difficult.

*A de facto relationship can be challenged by one spouse. If the existence of a de facto relationship is challenged, the other spouse party can be required to prove the existence of the de facto relationship as defined in the Act. When the court considers whether people live together on a genuine domestic basis, the court takes into consideration the circumstances of the relationship such as:

- its duration (being a minimum of two years concurrent or a total period of two years unless you have registered the relationship, have a child or have made significant contributions to the relationship);
- the nature and extent of the parties' common residence;
- whether a sexual relationship exists;
- degree of financial dependence or interdependence;
- degree of mutual commitment to a shared life; and
- whether there is a child of the relationship.

For more information or discussion, please contact HopgoodGanim Lawyers' [Family and Relationship law](#) or [Estates and Succession](#) teams.

23 November 2017

[relationship law](#) / [family law](#) / [family and relationship law](#) / [separation](#) / [relationships](#) / [de facto](#)
[Previous article](#) [Next article](#)