

# Legal Torque

## HOW IMPORTANT IS SEX?

**-Cathy Bormans-**

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One of the more significant features of the changes to the relationship property regime in 2002 was the extension of the law to apply to couples in a de facto relationship as well as to married couples. This extension of the law was clearly a reflection of the sheer number of couples these days in de facto relationships choosing not to get married.

The question that then arises is what constitutes a de facto relationship? The Act says that in considering whether a couple are living in de facto relationship the Court is required to look at the circumstances of the relationship including:

- How long they have lived together
- Whether they live in the same house all or part of the time
- Whether they have a sexual relationship
- Whether they mingle their finances
- Whether one of them supports the other financially
- Who owns the property, how they use it and how they got it
- Whether they are both committed to a shared life
- Whether they have children and who looks after them
- Who does the housework
- Whether other people see them as being in a relationship

Those are not the only factors the Court can take into account but they are some of the relevant factors.

Whether or not a de facto relationship exists is a question of fact and depends on the circumstances of each individual case. It can be a very difficult decision for the Court to make. Sometimes the move towards a de facto relationship is incremental and it is not clear exactly when the de facto relationship began as opposed to a marriage situation where there is a very definitive date on which the marriage commenced.

The Courts have had to grapple with some interesting scenarios, such as:

- the Court considered a relationship between a Chinese migrant student and a man many years older than her. The parties were affectionate and mutually supportive, shared certain domestic duties and had a sexual relationship. The Court decided that despite those factors their relationship had not developed to the extent that it could be said that they had a mutual commitment to a shared life together. They were no more than "friends with benefits".



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- In one case the parties, due to their religious beliefs, neither shared a common residence nor engaged in a sexual relationship. However, the parties were emotionally dependent on one another and spent a large amount of time at his place whilst she cooked and performed household duties. They were regarded by themselves and others as a close and devoted couple and they had accumulated a large investment portfolio together over their 22 year relationship. The Court found that despite not having a common residence or a sexual relationship they nevertheless were in a de facto relationship.
- When looking at whether the parties have a mutual commitment to a shared life together, the Court can have regard to such things as whether the parties shared holidays together, attended family functions together, went to office functions together and so on. In one case the fact that the parties had attended a fancy dress party together in matching costumes was seen as relevant.
- The Courts have determined that it is possible to have a de facto relationship where the parties do not have sex. In particular elderly couples may have some characteristics of a de facto relationship including mingled finances, a house jointly owned and they may go out in public together but their relationship may not include sex. They are nevertheless, to be regarded as being in a de facto relationship.

There is an array of different relationships that people can have and Judges are now having to delve into a very detailed enquiry as to the nature of particular relationships.

If a court finds that a couple are de facto then the relationship property regime will apply to them as if they were a married couple, which means assets that may have been considered to be separate property may in fact be relationship (joint) property.

If you have any questions regarding your status or relationship property matters generally, please contact Cathy Bormans on (0) 915-2412.

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