



Defining a de facto relationship

Not that straightforward when it comes to property

You may have heard that 'Marriage is betting someone half your stuff that you'll love them forever'. But what happens about the 'stuff' you own before you formally say "I do"?

The law providing equal sharing of relationship property automatically begins after three years in a de facto relationship. However, what a de facto relationship looks like, and when it starts, isn't always obvious and is often the subject of a dispute.

We take a closer look at de facto relationships as defined in the Property (Relationships) Act 1976 (PRA for short). This is key if you and your partner separate and have a dispute over property.

Harry and Kahurangi

If Harry and Kahurangi had been dating casually for a while before moving in together, we'd all agree their relationship evolved into a de facto relationship when they set up home as a couple. But what if Harry and Kahurangi were flatmates first? Would we assume they were in a de facto relationship from their first kiss?

The landscape changes again if Harry and Kahurangi each own their own home and want to keep their independence, or if Harry lives in Auckland away from Kahurangi in Tauranga? Does it matter that Harry hasn't told Kahurangi about his significant credit card debt? Or that Kahurangi's children think Harry is a 'friend'?

A de facto relationship is a romantic relationship between two adults, who are not married or in a civil union, who live together as a couple.

Partners in relationships come with their unique experiences and backgrounds, forming bonds in any number of ways. Determining when a relationship becomes de facto requires an analysis of many factors.

The easy parts

A de facto relationship is a romantic relationship between two adults, who are not married or in a civil union, who live together as a couple. Many de facto relationships start when couples begin living together, as the legal term suggests. However, when couples

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M A C T O D D
L A W Y E R S

have other commitments such as children or jobs in different cities requiring them to live apart, the science of determining when two people start living together as a couple becomes harder.

Living together as a couple

The PRA sets out nine factors to consider when determining whether two people are living together as a couple. The simplest factors are whether the couple lives together, the duration of the relationship and if a sexual relationship exists. Exclusivity is not a requirement of a de facto relationship: partners may be in more than one relationship or be having a sexual relationship with other people.

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The nature and extent of the relationship must be taken into account. You should think about whether you would rely on your partner in an emergency and the level of dependency you have on your partner. A couple may date for many months or years before considering themselves to be serious or update their social media relationship status. It is also relevant whether the relationship is public or known to family and social circles of the couple when looking at whether a de facto relationship exists.

There are practical considerations: do the partners care for and support their partner's family or children? Do they look after their partner's home, including performing household chores and cooking? Entering a relationship with children from a previous relationship provides layers of complexity – deciding when to introduce partners to children, and navigating living arrangements, further complicates things.

The analysis of whether a de facto relationship exists also looks at whether there are financial commitments together such as owning joint property or bank accounts, and any support provided from one partner to the other. Some de facto partners retain separate accounts for their independence or security, but this alone will not stop a relationship from becoming de facto.

Ultimately, it is the degree of commitment and investment that each partner has to their shared life that is the tipping point of whether they are living together as a couple. They do not need to own property together and, on the other side of the coin, they can live in the same property without living together as a couple.

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Why the fuss?

Many couples do not consider it relevant to define their relationship; and for many this is perfectly fine.

If, however, a couple is living in a property that was owned by one partner before the relationship began it will be classified as relationship property after the couple reaches its three-year anniversary, or earlier in some situations. If they separate, the property will be divided equally, rather than remaining the property of the original owner.

Protecting personal assets from a relationship property division is best done before reaching the three-year threshold, but can be done at any time. This is called 'contracting out'. Independent legal advice for both parties is essential and should be obtained before entering into any formal agreement.



Conclusion

It is never too late to define your relationship with your partner. Whether you are introducing your partner to your family or buying some furniture together (or a house!), take a moment to consider whether you think you may have crossed into de facto, and potentially equal sharing, territory.

Whatever the stage of your relationship, it is wise to think about the longer-term impact this could have for both your futures.

NB: The Property (Relationships) Act 1976 has been reviewed by the Law Commission which recommended significant changes to this piece of legislation. However, in late November 2019, the government responded by stating it would not implement nearly all of those recommendations until the Commission has carried out a review of succession law. +

Lockdown rent relief – are there remedies?

For many of us the recent lockdown brought a sense of déjà vu. Once again, a number of us were back juggling Zoom calls while supervising school work from the confines of our own homes. The landlords and tenants amongst us were again grappling with the issue of how the lockdown affects lease obligations.

Businesses which were not deemed 'essential' were prohibited from accessing their premises during Alert Level 4, and for some of you this meant your business could not earn any income during that period or revenue was severely reduced.



At the other end of the scale, cafés and restaurants will not be able to operate at all. Also in the mix are professional services businesses such as law and accounting firms where staff may be able to continue to work from home but have access to the server situated on the premises. Many businesses will have important items stored at their premises so will continue to gain some benefit from the premises during their lockdown. The proportion of the rent reduction is likely to be affected by the benefit the business gains from the premises.

Is rent relief available?

The first place to look for rent relief options is in your lease itself. The most common form of commercial lease is the Auckland District Law Society (ADLS) lease. If you've entered into an ADLS lease in or after 2012 it is likely to contain clause 27.5 which deals with situations where tenants are unable to gain access due to an 'emergency'.

Although this clause was originally introduced as a result of the Christchurch earthquakes and tenants being unable to enter undamaged premises which were in the locked down 'red zone', the term 'emergency' includes epidemics such as Covid. Clause 27.5 states that if a tenant is unable to gain access to their premises in an emergency 'to fully conduct the tenant's business' due to a restriction on occupation by a competent authority then a 'fair proportion' of the rent and outgoings shall cease to be payable' during the period they are unable to access their premises.

What is a 'fair proportion'?

Eighteen months after the first Covid lockdown, there is still no guidance from the courts as to what a 'fair proportion' is as disputes between landlords and tenants have either been resolved through agreement or by arbitration. While fairness is ultimately in the eye of the beholder, the following factors should be considered:

- + Fairness to both parties: Both the landlord's and tenant's situations should be taken into account in determining the extent to which a reduction is 'fair'. While the income of most tenants will be impacted by a lockdown, many landlords will also have mortgages and other outgoings and rely on the rent to meet those obligations.
- + Nature of a tenant's business: Businesses will be affected differently by the lockdown. At one end of the scale there are 'essential businesses' such as supermarkets which may continue to fully operate from their premises.

Rent relief period?

Clause 27.5 applies to situations where a tenant is not allowed to access their premises due to an emergency 'to fully conduct the tenant's business'. If a tenant can access the premises, but still can't fully operate, they may claim an abatement of a 'fair proportion' of the rent and outgoings for as long as they cannot access the premises to fully conduct their business due to the emergency.

The clause is not intended to deal with situations where a tenant's turnover has been affected by a market downturn which is not related to access to premises.

Resolving rental issues

We recommend that landlords and tenants attempt to negotiate an acceptable outcome for both parties in good faith. If an agreement cannot be reached it is likely that the lease will require the dispute to be resolved by mediation, and then arbitration if mediation is not successful.

It is in the interests of both parties that tenants survive this difficult period and that they maintain a good relationship.

Lease does not provide for rent relief?

An early November 2021 amendment to the Property Law Act 2007 effectively inserts a new clause similar to clause 27.5 into those commercial leases which do not currently have a rent relief clause. The deemed clause took effect (retrospectively) from 28 September 2021 and only applies in relation to epidemics. The new law does not define 'fair proportion', so there will still be a need for negotiation, then possibly arbitration.

The legal doctrine of 'frustration' also provides a potential legal argument in favour of tenants.

It is important that any agreement on rent relief is properly documented. We will be happy to assist you with this, and help you with any negotiations with either your landlord or tenant during these Covid times. +

Working from home

Tax status of allowances

Most, if not all, employers and employees will now be familiar with the once illusive and distant concept of working from home (WFH). Since Covid reached our shores, flexible working practices have evolved with more employees now preferring to work remotely in any alert level, either on a full-time or part-time basis.

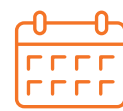
WFH brings unique challenges that are otherwise not encountered in an office environment. One commonly-faced situation by both employers and employees is the blurred line around work and home life. This is more than just a decrease in the ability to switch off from work; it also relates to work use of a household's power, internet and phone.

Both employers and employees should be aware of the tax implications of such costs of WFH. Employees cannot personally claim a tax deduction for costs incurred in carrying out their employment duties, such as WFH costs. If employers wish to contribute to their employee's WFH expenses and compensate them accordingly, in some circumstances that compensation will be taxable income for the employee; in some circumstances, it will be tax-exempt. Inland Revenue has provided a simplified way for employers to determine whether, and to what extent, such a payment is taxable or not; it recently extended this method for the period from 1 October 2021 to 31 March 2023.



Inland Revenue has a great deal of information about WFH (go to www.ird.govt.nz and search for working from home).

If you have specific enquiries about WFH tax obligations, do contact your accountant. Employers may also want to draft a WFH policy that outlines their expectations about this new way of working; we can help you with that. +



Digital Boost – a tool for small business



Since the launch of government-funded Digital Boost in late 2020, more than 40,000 small businesses have signed up. Digital Boost is a joint initiative between the Ministry of Business, Innovation and Employment (MBIE) and the private sector. Its purpose is to get small businesses to not only acknowledge, but also to use, the benefits that come from digital tools and technologies.

Adding to its existing toolbox, Digital Boost recently launched a new Digital Boost Live app. MBIE says that it wanted to make Digital Boost content more accessible to people who work more from their mobile phones and to give businesses up-to-date digital information “in the palms of their hands”.

Features include:

- + More than 500 short three-to-five minute learning videos including how to use digital marketing to increase sales
- + Podcasts with business owners
- + Hundreds of downloadable learning summaries
- + Case studies featuring Kiwi small business owners, and
- + Live Q&A sessions.

Digital Boost Live is available free at the App Store or Google Play. For more about Digital Boost go here: www.digitalboost.co.nz +



Waikato DHB cyber-attack

Business owners must stay vigilant

On 19 May, a cyber-attack on the Waikato District Health Board brought down all hospital computer systems and phone lines. On 25 May, an unidentified group claimed responsibility for the attack and demanded payment from the DHB, threatening to release sensitive data about patients, staff and finances. The DHB and the government both refused to pay the ransom. Subsequently, a substantial amount of private information was posted on the dark web including staff data, payroll information, patient records and photographs.

This cyber-attack serves as another reminder for business owners to have effective cyber security protocols in place. Cyber-attacks are becoming more frequent and their disruption can cause significant cost to businesses.

It took the Waikato DHB over a month to restore its IT services, and it had to employ hundreds of additional IT experts to rebuild its systems. Health authorities had to inform more than 4,000 people that their personal information was breached and shared on the dark web after this damaging cyber-attack.

Following the Waikato DHB cyber-attack, the Chief Operating Officer at cyber security company, Safestack, Erica Anderson, was interviewed on RNZ. She explained that ransomware is “basically bad software [and] once it lands onto your computer it tries to do three things:

1. Lock down access to that computer
2. Spread to as many other computers as it can reach, and
3. Give you a popup telling you that you need to pay money to unlock your access.”

She recommended that businesses invest time now to protect themselves rather than being in a situation where there is no access to systems combined with pressure to pay a ransom. She also highlighted the importance of regular backups.

“If you get infected [by ransomware], backups are a way for your business to fall back to a point in time where you weren’t infected so that you can restore and get back to normal a lot faster.”

... all boards and senior management need to take more responsibility to stay vigilant.

With the increasing number of cyber-attacks worldwide, all boards and senior management need to take more responsibility to stay vigilant. Your business needs to be prepared.

For a DIY-level understanding of cyber-security, the Autumn 2021 edition of *Fineprint* has an article, ‘Cyber security 101 for business’ with a list of basic prevention measures.

If you have not done so already, we recommend hiring an IT advisor so that your business can have effective cyber security protocols in place. +

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Postscript

Looking after your wellbeing

In this very hard year, it's important that we all look after our mental health. The New Zealand Economics Foundation's (NEF) Foresight Project on Mental Capital and Wellbeing research report has created Five Ways to Wellbeing. NEF found that building five actions in to your day-to-day life is important for the wellbeing of individuals, families, communities and organisations.

- + Connect
- + Keep learning
- + Give
- + Be active, and
- + Take notice

To find out more, go to www.mentalhealth.org.nz/five-ways-to-wellbeing

Put Matariki 2022 into your calendar

Aotearoa/New Zealand's first Matariki holiday will take place on Friday, 24 June 2022.

The actual day will differ each year depending on the appearance of Pleiades in the sky, although it has been decided Matariki will be celebrated on a Friday to make a long weekend for New Zealanders. In 2023, Matariki will be celebrated on Friday, 14 July.

The Pleiades are a cluster of stars that rise in midwinter and mark the start of the Māori New Year. Some iwi name this time of the year *Puanga*, after a bright star that is above and to the right of the Matariki constellation. +

Stay safe this summer

After another torrid Covid year, we are all looking forward to a sunny (and healthy) summer break.

Remember, if you're boating, driving, bush walking, swimming or enjoying your backyard this summer, please stay safe, look out for others and enjoy relaxing in our beautiful country. +

Merry Christmas and a Happy New Year

We wish you all a very Merry Christmas and a happy, safe and healthy 2022.

Meri Kirihimete me te Hape Nū Ia. +



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