

LAW INSTITUTE OF VICTORIA
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Relationships Act (Vic) 2008

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INTRODUCTION

The *Relationships Act* (Vic) 2008 (“the Act”) took effect in Victoria on 1 December 2008.

The purpose of this paper is to provide a summary of the salient provisions of the Act, in particular its purpose, the introduction of “Relationship Agreements” within Victoria, its impact upon claims for the adjustment of property interests previously dealt with under the *Property Law Act* (Vic) 1958 (“PLA”) and to discuss some practical aspects involving maintenance applications under the Act. This paper also touches briefly on some relevant provisions of the *Relationships Amendment (Caring Relationships)* Bill 2008.

Finally we will consider briefly some recent authorities delivered with respect to the old Act, namely *Giller v. Procopets* [2008] VSCA 236 and *Kenyon v. Akeroyd* [2008] VSCA 277 which may be of some assistance in considering claims under the Act.

PURPOSE OF THE RELATIONSHIPS ACT

Section 1 of the Act provides that the purpose of the Act is:

- (a) to establish a ***Relationships Register*** in Victoria for the registration of domestic relationships;
- (b) to provide for ***Relationship Agreements***;
- (c) to provide for ***adjustment of property interests*** between domestic partners and the rights of domestic partners to ***maintenance***; and
- (d) to repeal Part IX of the ***Property Law Act*** 1958 and to make consequential amendments to other Acts.

REGISTRATION OF DOMESTIC RELATIONSHIPS

Section 6 of the Act provides that persons who are in a “***registrable relationship***” may apply for registration of their relationship.

What is a Registrable Relationship?

A relationship that is:

- between two adult persons, who are not married to each other, but are a couple;

- where one or each of the persons in the relationship provides “personal or financial commitment” and support of a domestic nature for the material benefit of the other irrespective of gender, and irrespective of whether the couple live under the same roof.

Registration is **not** available to persons in relationships in which a person provides domestic support and personal care to the other person “for fee or reward” or on behalf of another person or organisation (including Government and non-Government bodies and agencies or charities).

Residential Requirements

Each person seeking registration of their relationship must be:

- (a) domiciled or ordinarily resident in Victoria; and
- (b) not married or already in a registered relationship; and
- (c) not in another registrable relationship.

Formal Requirements

An application for registration of a relationship must include or be accompanied by:

- (a) a Statutory Declaration from each of the applicants indicating:
 - (i) their consent to the registration;
 - (ii) the fact that they are not married or in a registered relationship; and
 - (iii) they are not in another registrable relationship.
- (b) evidence of identity and age of each applicant;
- (c) the prescribed fee [currently \$180];
- (d) any other document or information that the Registrar requires for the purposes of determining the application.

The pro forma Statutory Declaration provided by the Registry of Births Deaths and Marriages to applicants (and available on the Registry website) is attached.

Pursuant to Section 8 of the Act the Registrar may require applicants for registration to provide “any further information that the Registrar requires.”

Withdrawal of Applications for registration of Relationships

Section 9 effectively provides a “cooling off” period and gives each applicant for registration of their relationship the right to withdraw the application (unilaterally) within 28 days of the date of lodgement of the application.

Assuming no application for withdrawal of the application is made, and all necessary further information is provided to the Registrar, the Registrar must “within a reasonable time” either 28 days after the date of lodgement of the application or after the provision of further information to the Registrar, either register the relationship in the **Relationships Register** or, refuse to register the relationship [Section 10(3)(a)-(b)].

Revocation of Registration

Registration of a registered relationship is revoked by:

- (a) the **death** of **either** person in the relationship [Section 11(1)];
- (b) the **marriage** of either person in the relationship (whether to each other or another person) [Section 11(b)];
- (c) upon an **application for revocation** by either or both persons in the relationship [Section 11(2)].

Application for Revocation of Registration

Pursuant to Section 12 (1) of the Act either or both persons in the relationship may apply to the Registrar for the **revocation** of registration of the relationship.

If the application is made unilaterally (that is, by one spouse only), the person applying for revocation must serve the other spouse with a copy of the revocation application [Section 12(2)]. Service must be effected personally or by registered post [Section 13(1)].

An application for revocation of registration of the relationship will not be considered without proof of service of the application on the other spouse [Section 12(4)]. The Act provides for dispensation of this requirement where service cannot be effected [see Section 12(5) and (6)]. An application for revocation of registration of the Agreement may be withdrawn within 90 days of lodgement with the Registrar [Section 14]. Such applications must however be signed by both persons in the registered relationship [Section 14(2)(c)].

In the absence of an application for withdrawal of a revocation application the Registrar **must** revoke the registration of a registered relationship after the expiry of 90 days from the date of lodgement of a revocation application unless a Court or Tribunal otherwise directs [Section 15].

Section 16 of the Act provides that a Court may also order the revocation of the registration of a registered relationship, either on application made by an “interested person” or on its own motion [see Section 16(a) and (b)].

The Relationships Register

Section 17 of the Act provides that the Registrar of Births Deaths and Marriage must maintain a Register of registered relationships to be known as the “Relationships Register”.

The Relationships Register must contain:

- (a) particulars of each registered relationship; and
- (b) further information where the inclusion of that information is considered appropriate by the Registrar [Section 17(2)].

Section 18 confers upon the Registrar the power to conduct an inquiry to find out or to verify information given for, or in connection with an application for registration of a relationship or revocation of registration or whether particulars of a registered relationship have been correctly recorded in the Relationships Register.

Section 18(2) of the Act gives the Registrar power to issue notices to any person who may be able to provide information relevant to an inquiry, requiring that person to answer specified questions or to provide other information. The person served

with such a notice must not without reasonable excuse fail to comply with the Registrar's Notice for Information, under threat of a \$1,000 fine [Section 18 (3)].

The Relationships Register is to maintain the privacy of the persons named on it [Section 20].

Applications may be made for a search of the Register by persons with sufficient interest and "an adequate reason" for "wanting" the information which is the subject of the search.

In considering whether to accede to an application for a search of the Register, the Registrar must have regard to:

- (a) the relationship between the applicant [for the search] and the persons to whom the information relates; and
- (b) the age and contents of the entry and any other relevant factors [Section 21(4)].

Similarly, Section 24 of the Act allows the Registrar, on appropriate conditions to:

- (a) allow "a person or organisation" that has "an adequate reason for wanting access" to the Relationships Register, such access; or
- (b) to provide a person or organisation that has an adequate reason for wanting information, with information extracted from the Register.

In determining such applications the Registrar must have regard to:

- (a) the nature of the applicant's interest; and
- (b) the sensitivity of the information; and
- (c) the use to be made of the information; and
- (d) "other relevant factors".

It is envisaged that organisations such as superannuation funds and life insurance companies may be given such access (for example in determining death benefit claims and/or claims for the payment of life insurance or trauma and accident insurance) where, for example, a dispute exists as to the existence of a domestic relationship between a spouse and a deceased, or injured, spouse/claimant.

Nevertheless the Registrar remains compelled to as far as practicable protect the privacy of the persons to whom the interest in the Register relate and to prevent an unreasonable intrusion on their privacy [Section 24(3)].

Collection by the Registrar of "Other Information"

Section 26 of the Act provides that the Registrar may maintain records of information "other than registrable information" relating to registered relationships.

Such information must be kept separately from the Relationships Register.

Such information may be included at the request "of a person interested in the registered relationship to which it relates" or on the Registrar's own motion. One can only speculate about what sort of information would be collected and maintained by the Registrar pursuant to this section.

Powers of Review by VCAT

Section 28 of the Act provides that a person whose interests are affected by a decision of the Registrar under the Act may apply to VCAT for review of the decision. The application for review must be made within 28 days after the later of:

- (a) the day on which the decision is made; or
- (b) the day on which a Statement of Reasons is given pursuant to the *VCAT Act* 1998.

CHAPTER 3 – RELATIONSHIP AGREEMENTS, PROPERTY AND MAINTENANCE

Relationship Agreements

Part 3.2 of the Act makes reference to the existence of “Relationship Agreements” which are defined at Section 35(1) as follows:

“relationship agreement” means an agreement, or a variation of an agreement, between two persons, whether or not there are other parties to the agreement-

- (a) that is made before, on or after the commencement of this Act –
 - (i) in contemplation of their **entering into** a domestic relationship; or
 - (ii) **during** the existence of their domestic relationship; or
 - (iii) in contemplation of the **termination** of their domestic relationship; or
 - (iv) **after the termination** of their domestic relationship; and
- (b) that provides for financial matters, whether or not it provides for other matters.

“Domestic Relationship” is also defined in Section 35(1) as meaning:

- (a) A registered relationship; or
- (b) A relationship between two persons who are not married to each other but who are living together as a couple on a genuine domestic basis (irrespective of gender); or
- (c) A relationship between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person for a reward or through the auspices of a government or non government body or agency.

If there is any doubt about whether a domestic relationship exists, guidance can be obtained from Section 35(2) of the Act which sets out some of the matters that may be relevant in determining whether a domestic relationship exists, or has existed, namely:

- (a) The degree of mutual commitment to shared life;
- (b) The duration of the relationship;
- (c) The nature and extent of common residence;
- (d) Whether or not a sexual relationship exists;
- (e) The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (f) The ownership, use and acquisition of property;
- (g) The care and support of children;
- (h) The reputation and public aspects of the relationship.

The Significance of Relationship Agreements

Curiously the significance of Relationship Agreements is dealt with in the context of section 59 of the Act (contained in Part 3.3, Division 5) rather than in the earlier Part 3.2.

Part 3.3 of the Act contains those provisions similar to the now repealed Part IX of the PLA, and , in short, confers upon a domestic partner the right to apply to court for an adjustment of interests in property, and/or maintenance.

Section 59(1) of the Act provides that a court must not make an order, or do any other thing that is inconsistent with the terms of a relationship agreement between the domestic partners who are parties to the proceeding, if the court is satisfied that:

- (a) The Agreement is **in writing**; and
- (b) The Agreement is **signed** by the partner against whom it is sought to be enforced;
- (c) Each partner was given a **legal practitioner's certificate** before the time at which the partner signed the agreement; and
- (d) Each legal practitioner's certificate is **endorsed on, annexed to or otherwise accompanies** the agreement.

Legal Practitioner's Certificate

Section 59(2) sets out the formal requirements of the legal practitioners certificate which in short:

- (a) Must be signed by the legal practitioner giving it;
- (b) Must state that the legal practitioner provided legal advice to the party to whom the certificate was given, independently of the party to the domestic relationship, as to the following matters:
 - (i) the effect of the agreement on the powers of a court **under this Part**;
 - (ii) The advantages and disadvantages, at the time that the advice was provided, to the party making the agreement.

It is submitted that the inclusion of the words "under this Part" in Section 59(2)(b)(i) is a reference to Part 3.3 of the Act, rather than Part 3.2. The distinction is a fine but important one, and having regard to the decided authorities in various cases

involving binding financial agreements under the *Family Law Act* (see, for example, **Black v Black**), particular care should be taken to ensure that the legal practitioner's certificate strictly complies with Section 59(2).

This is particularly so given that section 59(3) provides that if the court is satisfied that there is a Relationship Agreement, but it is **not** satisfied as to any of the matters set out in section 59(1)(a)-(d) [inclusive], the court may make any order or do any other thing it could have made or done as if there was no relationship agreement between the parties. In other words, the relationship agreement will effectively be ignored. To comply with section 59 of the Act is therefore critical.

Notwithstanding this, section 59(4) of the Act enables a court to have regard to the terms of the relationship agreement, in making an order or doing anything referred to in section 59(3).

Section 59(5) is somewhat unusual in that it also enables a court to depart from the provisions of a relationship agreement (even if there has been strict compliance with section 59(1) if the court is of the opinion that:

- (a) The partners have, by their words or conduct, revoked or consented to revocation of the Agreement;
- (b) The Agreement has "otherwise ceased to have effect";

The parties to relationship agreements will therefore need to be careful to ensure "by their words or conduct" they have not revoked or consented to revocation of the agreement, should they be keen to avoid such an outcome.

One can therefore imagine that the principles relating to estoppel, promissory estoppel and acquiescence may assume considerable importance.

Varying or Setting Aside Relationship Agreements

Relationship Agreements are subject to, and enforceable in accordance with, the law of contract [section 36].

Section 37 of the Act gives the Court the power to vary or set aside a relationship agreement, or any term of a relationship agreement, on the following grounds:

- (a) The circumstances of the partners have so changed since the agreement was entered into that it would lead to "serious injustice" if the agreement or term (as the case requires) were enforced [section 37(1)];
- (b) If the court is of the opinion that the agreement was entered into under duress or by fraud [section 37(2)(a)];
- (c) On any other ground that would allow a contract to be varied or set aside [section 37(2) (b)].

It is not possible for the parties to contract out of these provisions [section 37(3)].

APPLICATIONS FOR MAINTENANCE UNDER THE RELATIONSHIPS ACT

Section 41 provides that a domestic partner may apply to a Court for either or both of:

- (a) an order for the adjustment of interests with respect to the property of one or both of the domestic partners;
- (b) an order for the granting of maintenance.

Prerequisites for an Application for Maintenance

Section 42 provides that if the domestic relationship is not a “registered relationship” a Court can only make an application for maintenance if it is satisfied:

- (a) one/both of the domestic partners lived in Victoria on the day on which the application was made; and
- (b) both partners have lived together in Victoria for at least one third of the period of their relationship; or
- (c) substantial contributions (of the financial/non-financial kind and homemaker and parent kind) have been made in Victoria by the partner making the application; and
- (d) the domestic partners have lived together in the relationship for a period of at least two years.

The requirement for the relationship to endure for two years is subject to Section 42(3) which gives the Court the power to make an order if satisfied that there is a child of the domestic partners or *accepted* by the domestic partners as one of the family (whether or not the child is a child of one or both of the partners); or failure to make an order would result in serious injustice to the applicant and the applicant has made substantial contributions of a financial/non-financial kind and/or homemaker and parent kind for which the applicant partner would otherwise not be adequately compensated.

Time Limits

An application to a Court for orders for the adjustment of property interests or orders for maintenance must be made within two years after the day on which the relationship ended. [Section 43(1)].

The Court has the power to grant leave to a domestic partner to apply out of time if the Court is satisfied that greater hardship would be caused to the partner applying for leave, if that leave were not granted, than would be caused to the other partner if that leave were granted [Section 43(2)].

What Sort of Maintenance Order Can be made?

The Court is given broad powers to make orders for maintenance in Division 4 [see Sections 51-58].

Significantly, Section 51(1) of the Act provides that a Court may make an order for maintenance if satisfied that the applicant is unable to support himself/herself adequately because his/her earning **capacity “has been adversely affected by the circumstances of the domestic relationship”**, or because of any other reason arising in whole or part from the circumstances of the domestic relationship.

Arguably this goes further than the spousal maintenance provisions of the Family Law Act and may result in a consideration of “opportunity cost” principles where decisions have been made for one spouse or the other to take on particular roles within the marriage at the expense, for example, of one spouse’s career and employment prospects.

Section 51(2) sets out the matters the Court must have regard to in considering whether to make a maintenance order and the amount of such order.

They include:

- (a) that income, property and financial resources of each domestic partner and the physical and mental capacity of each partner for appropriate gainful employment;
- (b) the financial needs and obligations of each domestic partner;
- (c) the responsibilities of either domestic partner to support any other person;
- (d) the terms of any property order to be made or proposed to be made under Section 45 of the Act;
- (e) any child maintenance payments of the child of the domestic partners;
- (f) the standard of living that is reasonable for each domestic partner in all the circumstances;
- (g) the extent to which the payment of maintenance would assist in enabling the applicant to undertake a course of education or training, or to establish a business, or otherwise to obtain adequate income;
- (h) the extent to which the applicant has contributed to the income, earning capacity, property and financial resources of the other partner;
- (i) the age and state of health of each domestic partner;
- (j) the length of the domestic relationship;
- (k) the extent to which the domestic relationship has effected the earning capacity of the domestic partner whose maintenance is under consideration;
- (l) any other facts or circumstances the Court considers relevant.

These same matters are to be taken into account pursuant to Section 45(1)(d) when the Court considers whether to make an order for the adjustment of interests in property by application of what has become the “third limb” of s79(4) cases, namely the consideration of the so-called “future needs” factors. Most of the factors set out in s51 are identical to those factors set out in Section 75(2) of the *Family Law Act*.

Applications for Interim Maintenance

Section 52 of the Act gives the Court the power to order the payment of maintenance on an interim basis where it appears to the Court that the applicant is “in immediate need of financial assistance” and it is not practicable in the circumstances to determine the application for maintenance immediately.

It is expected that in the consideration of such applications the Court will apply similar principles to those of the Family Court with respect to applications for urgent spousal maintenance under Section 77 of the Family Law Act.

Section 53 of the Act provides that once the domestic relationship ceases, an application cannot be made for a person who has entered into a domestic relationship with another person, or married or remarried.

When will an entitlement to maintenance cease?

Where there is an obligation to pay periodic maintenance set out in a Relationship Agreement, that obligation will be unenforceable against the payer, on the death of the payer unless the agreement provides otherwise, and upon the death of the payee, irrespective of the provisions of the Agreement [section 38(1)]. Nevertheless any arrears of periodic maintenance due to the payee spouse are recoverable and payable under a Relationship Agreement at the date of death of either partner.

The terms of an Agreement relating to property and lump sum maintenance payments set out in a Relationship Agreement are on the death of either partner enforceable on behalf of, or against, the Estate of the deceased partner [Section 38(3)].

Section 54 of the Act provides that an *order* for maintenance ceases to have effect:

- (a) on the death of the domestic partner in whose favour the order was made;
- (b) on the death of the domestic partner against whom the orders was made;
- (c) on the marriage or remarriage of the domestic partner in whose favour the order was made;
- (d) on the registration of a registrable relationship of the domestic partner in whose favour the order was made.

Housekeeping Arrangements

Adjournment of Property Proceedings when Family Court Proceedings on Foot

Section 47(1) provides that where a proceeding in relation to a property of one or both domestic partners is commenced in the Family Court at any time before a court has made a final order (under the *Relationships Act*) to adjust interests with respect to the property, the court *may* adjourn its hearing of the matter, subject to there being no delay in the Family Court proceeding [section 47(2)].

Note that the section is specifically confined to Family Court – not Federal Magistrates Court – proceedings and contemplates the adjournment of property, but not maintenance claims, before the lower court.

Further, whether an adjournment is to be granted is a matter entirely left to the discretion of the court [section 47(3)].

County Court of Victoria

The County Court of Victoria Family Property Division (a Division of the Commercial List) has published two helpful practice notes with respect to operation and management of the Family Property Division and the Act.

Copies of those practice notes are contained in your papers.

Your attention is drawn to procedures set out in paragraphs 10-12 of practice note PNC1 8-2008 dated 15 December 2008 regarding the bringing of an application for maintenance in the County Court and the matters to be deposed to in an Affidavit sworn by the Plaintiff/Applicant.

On 4 December 2008 the *Relationships Amendment (Caring Relationships) Bill 2008* was passed by the Victorian Parliament.

The purpose of the Caring Relationships Act is set out at paragraph 1(a) in particular, to amend the *Relationships Act* 2008 (described as the Principal Act) to provide for:

- (a) the registration of “caring relationships” in Victoria;
- (c) the adjustment of property interests between caring partners who are in, or have been in, a registered caring relationship; and
- (d) to provide for the rights to maintenance of caring partners who are in, or have been in, a registered caring relationship.

The provisions of the Act will come into effect no later than 1 December 2009.

“Registrable Caring Relationship”

Section 8(a) provides that a registrable caring relationship means a relationship (other than a registered relationship) between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, whether or not they are living under the same roof, but does not include a relationship in which domestic support and personal care is provided for fee or reward, or on behalf of another person, organisation or agency.

“Caring Partner”

The Caring Relationships Act provides for Section 35 of the Relationships Act to be amended by insertion of the following definition of “caring partner”:

- (a) a person with whom the person is, or has been, in a registered caring relationship;
- (b) a person with whom the person is contemplating entering into a registered caring relationship;

The Caring Relationships act provides for caring partners to enter into Relationship Agreements after the commencement of Section 16 of the Act. Such Agreements can be entered into in contemplation of the entering into a registered caring relationship, *during* the existence of a registered caring relationship, in contemplation of the *termination* of a registered caring relationship or *after* the termination of a registered caring relationship.

RECENT DECIDED CASES – PROPERTY LAW ACT 1958

1. *Giller v. Procopets* [2008] VSCA 236
2. *Kenyon v. Akeroyd* [2008] VSCA 277

CONCLUSION

The *Relationships Act* 2008 undoubtedly represents a socially progressive piece of legislation and the State Government is to be commended for at last enacting law that sees unmarried and same sex couples placed on an equal footing to their married counterparts, insofar as the right to an adjustment of property interests, and maintenance, is concerned. It is unfortunate in some respects that it will soon be largely, if not completely, superseded by the reforms to the Family Law Act at Commonwealth level.

Nevertheless the introduction of the “relationships register” and the ability of unmarried heterosexual, and same sex, spouses to have their relationships recognised by their registration is an important reform that will remain available, notwithstanding the reforms to the Commonwealth family law property and maintenance regime.

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