

FOLEY'S | LIST

Defacto Relationships

The Threshold Issues

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Defacto Relationships: The Threshold Issues

Foley's Breakfast Seminar

RACV Club

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DE FACTO RELATIONSHIPS – THRESHOLD ISSUES

THE DE FACTO JURISDICTION INTRODUCED

On 1 March 2009 the *Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008* (“the Act”) made significant changes to the *Family Law Act 1975* (Cth) (“the *Family Law Act*”) in relation to de facto couples. The Act introduced Part VIIIAB into the *Family Law Act* which gives a Court exercising jurisdiction under the Act power to deal with property and maintenance matters upon the breakdown of a de facto relationship.

Which states and territories does it apply to?

The Act gives jurisdiction in de facto property matters to the Family Court of Australia, the Federal Magistrates Court of Australia, the Supreme Court of the Northern Territory and Courts of Summary jurisdiction in referring jurisdictions.

The Act only applies to States of the Commonwealth of Australia who have referred to the Commonwealth Parliament financial matters relating to the parties de facto relationship arising out of the breakdown of de facto relationships. All of the States of the Commonwealth except for Western Australia and South Australia initially referred their powers to the Commonwealth Government in relation to de facto relationships. In those states the Act came into operation on 1 March 2009 and applies to de facto relationships that break down on or after that date. In 2010 the South Australian Parliament passed the *Commonwealth Powers (De facto Relationships) Act 2009* (SA) referring their power in relation to de facto relationships to the Commonwealth Government. This Act came into operation on 1 July 2010 and will apply to de facto relationships that break down on or after that date.

The State laws will continue to apply to all relationships which ended prior to the commencement of the new legislation, unless both parties consent to the application being heard under the *Family Law Act*.

Adjustment of property interests

The Act provides that in property proceedings after the breakdown of a de facto relationship a Court may

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make such orders as it considers appropriate in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them, altering the interests of the parties to the de facto relationship in property.¹ The provisions of the Act also give the Court power to deal with the issue of spousal maintenance.

The Act also contains provisions enabling de facto parties to enter into financial agreements. The provisions enable de facto couples to enter into financial agreements either before the commencement of a de facto relationship, during or after a de facto relationship has broken down.² The provisions relating to the formal requirements for entering into a financial agreement mirror the key sections of Part VIIIA.³

Declarations

The Act provides for a Court to have the power to declare whether a de facto relationship did or did not exist in situations where there is an application or an order for property or spousal maintenance by a party alleging a de facto relationship.⁴ A Court can declare the following matters with respect to whether there is a de facto relationship:

- The period, or periods, of the de facto relationship.
- Whether there is a child of the de facto relationship.
- Whether one of the parties to the de facto relationship made substantial contributions.
- When the de facto relationship ended.
- Where each of the parties to the de facto relationship was ordinarily resident during the de facto relationship.

THE LEGAL REQUIREMENTS FOR A DE FACTO RELATIONSHIP

A preliminary question to be determined is what constitutes a de facto relationship and what are the legal requirements for a de facto relationship under the Act.

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In 1995 when dealing with the issue of the commencement of a de facto relationship, Keane JA of the Supreme Court of Victoria Court of Appeal made the following preliminary comments in relation to a de facto relationship:

The commencement of the legal relationship of marriage is readily established by the solemnities and formalities by which the parties declare that relationship to each other and to the world. By contrast, questions as to whether and when a relationship has become a de facto relationship may be attended with considerable uncertainty.⁵

Meaning of de facto relationship

The *Family Law Act* contains a section setting the definition or meaning of a de facto relationship. The meaning of a de facto relationship is that a person is in a de facto relationship with another person if:

- a) The persons are not legally married to each other; and
- b) The persons are not related by family; and
- c) Having regard to all of the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.⁶

The Act provides that a de facto relationship can exist between two persons of different sexes and between two persons of the same sex so no longer is the Act limited to heterosexual couples.⁷ A de facto relationship can also exist under the Act even if one of the persons is legally married to someone else or in another de facto relationship.⁸

When does the Act apply to de facto relationships?

The Act does not apply to all de facto relationships. Once a de facto relationship has been established it is also necessary to establish one of the grounds in the Act which deals with when the Act applies to a de facto relationship.⁹ A Court can only make an order under the Act¹⁰ or a Court may only make a declaration¹¹ in relation to a de facto relationship only if the Court is satisfied:

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- a) That the period, or the total of the periods, of the de facto relationship is at least two years; or
- b) That there is a child of the de facto relationship; or
- c) That:
 - (i) The party to the de facto relationship who applies for the order or declaration made substantial contributions of the kind mentioned in para 90SM4(a), (b) or (c); and
 - (ii) A failure to make the order or declaration would result in serious injustice to the applicant; or
- d) That the relationship is or was registered under a prescribed law of a State or Territory.

Geographical requirement

The Act also provides a geographical requirement in relation to a de facto relationship. A Court can only make an order in relation to a de facto relationship if it is satisfied:

- That each or both of the parties were ordinarily resident in a participating jurisdiction when the application for the order was made; and
- That either both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
- The applicant for the order made substantial contributions in relation to the de facto relationship in one or more States or Territories that are participating jurisdictions at the application time.¹²

There is an alternative condition when the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.¹³

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There must be a breakdown of a de facto relationship

A Court exercising jurisdiction under the *Family Law Act* will only have the power to deal with property and/or maintenance matters in relation to a de facto matter after the breakdown of a de facto relationship. In proceedings under the *Family Law Act* between a married couple, it is not necessary for the marriage to have broken down for property and/or spousal maintenance orders to be made. There is a difference between Section 79 of the Act in relation to a marriage and Section 90SM in relation to a de facto relationship (the same difference applies in relation to spousal maintenance orders, compare Section 74 with Section 90SE). In relation to a marriage, a Court exercising jurisdiction under the Act can make orders for the adjustment of property interests between the parties and/or for spousal maintenance even if the parties are still married and the marriage has not broken down. With regard to de facto relationships, however, a Court only has jurisdiction after the breakdown of a de facto relationship. If the parties are still in a de facto relationship then the Court has no jurisdiction to make orders neither for an adjustment of property interests nor for spousal maintenance.

HOW A COURT DETERMINES WHETHER THERE IS A DE FACTO RELATIONSHIP

The definition of a de facto relationship in the Act sets out a number of circumstances to be taken into account in working out if persons have a relationship as a couple.¹⁴ Those circumstances may include all or any of the following:

- a) The duration of the relationship;
- b) The nature and extent of their common residence;
- c) Whether a sexual relationship exists;
- d) The degree of financial dependence or interdependence, and any arrangements for financial support between them;
- e) The ownership, use and acquisition of their property;

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- f) The degree of mutual commitment to a shared life;
- g) Whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- h) The care and support of children;
- i) The reputation and public aspects of the relationship.

The factors are very similar to the factors which were set out in most State legislation relating to de facto property rights. They are in fact originally derived from a judgment in a New South Wales case by the name of *Roy v Sturgeon*.¹⁵ They are predominantly the same except for some changes. In that judgment His Honour had also referred to circumstances including the procreation of children, the performance of household duties which is not included in the current definition. The current definition also includes paragraph (g) above as to whether relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship.¹⁶

The Act provides that no particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.¹⁷ A Court determining whether a de facto relationship exists is entitled to have regard to such matters and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.¹⁸

HOW TO DETERMINE WHEN A DE FACTO RELATIONSHIP BEGINS AND ENDS

CASES FROM STATE COURTS

The Act provides a number of circumstances that a Court can take into account in determining whether there in fact has been a de facto relationship between the parties. There have been a number of decisions of State Courts dealing with the circumstances relating to when a de facto relationship begins and ends. Most of these decisions have been from New South Wales and Queensland. I will examine some of these

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cases now in looking at the circumstances which constitute a de facto relationship.

*Roy v Sturgeon*¹⁹

In that case Powell J made the following comments when looking at the *De Facto Relationships Act 1984* (NSW)²⁰ which had similar provisions in relation to the definition of a de facto relationship (but not the same) as the *Family Law Act*:

With respect, it seems to me that to attempt to dissect the phrase "living together as husband and wife on a bona fide domestic basis" and to discreet "elements", and then to test the fact of a particular case by reference to a set of a priori rules in order to establish whether a particular "element" is, or is not present, is to ignore the fact that just as human personalities and needs vary markedly, so to will the various aspects of their relationship which lead one to hold that a man and a woman are living together as husband and wife on a bona fide domestic basis vary from case to case. As I said in *D v McA* (1986) DFC 95/030 it seems to me that each case will involve the court making a value judgment having regard to a variety of factors relating to the particular relationship.²¹

*Simonis v Perpetual Trustee Co Ltd*²²

In this case Kearny J supported the approach taken by Powell J in *Roy v Sturgeon* stating "I consider that the expression under consideration constitutes a single composite expression of a comprehensive notion or concept, and therefore has to be approached by considering the expression as a whole and not in several parts."²³

*Light v Anderson*²⁴

In this case the Supreme Court of New South Wales Court of Appeal was dealing with an issue as to whether a female housekeeper/companion was living with the deceased as his wife on a bona fide domestic basis. The Court was dealing with the *Family Provision Act 1982* (NSW)²⁵ and in that case Handley JA stated:

The legal principles which are to be applied in determining, for the purposes of the Family Provision Act, where the parties who are not married to each other were living together as a man and wife on a bona fide

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domestic basis were correctly stated by Kearney J in *Simonis v Perpetual Trustee Co Ltd* (1987)²⁶

In effect, the Court of Appeal in that case adopted the approaches of both Kearney J and also of Powell J in *Roy v Sturgeon*.

SEPARATION

*Hibberson v George*²⁷

This was a matter in which the appellant and the respondent had lived in a house owned by the respondent. They commenced living together in March 1976 and separated in 1985. There was an issue as to when the parties had separated. The appellant's evidence was that she had left the home with the children in May 1985. She claimed the relationship had not ended at that time as she only left to decide whether the relationship should end or continue. The decision to end the relationship did not occur until after 1 July 1985 and therefore the Applicant claimed that was when the relationship ended.. In dealing with the issue Mahoney JA made the following comments in relation to the definition contained in the Act:

What is involved is 'living...together as husband and wife on a bona fide domestic basis'. It is correct...that the relevant relationship may continue notwithstanding that the parties are apart, eg on holidays...there is, of course, more to a relevant relationship than living in the same house. But there is, I think, a significant distinction between the relationship of marriage and the instant relationship. The relationship of marriage, being based in law, continues notwithstanding that all of the things for which it was created have ceased. Parties will live in the relationship of marriage notwithstanding that they are separated, without children, and without the exchange of incidents, which the relationship normally involves. The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance; holidays and the like show this. But where one party determines not to 'live together' with the other and in that sense keeps apart, the relationship ceases, even though it be merely, as it was suggested in the present case, to enable the one party or the other to decide whether it should continue.²⁸

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*Lipman v Lipman*²⁹

This was a case decided by the Supreme Court of New South Wales. The parties commenced living in a de facto relationship in June 1973. There was a child of the relationship. The parties continued to live together until May 1982 when the defendant asked the plaintiff to leave the townhouse in which they were living in Willoughby. The plaintiff together with the parties' son moved to a unit in North Ryde. A Mrs C moved into the townhouse with the defendant. In October 1982 Mrs C moved out of the townhouse at Willoughby and into the home unit at North Ryde and the plaintiff and the child resumed cohabitation with the defendant in the townhouse. They remained together until they separated in January 1986. In that case the New South Wales Supreme Court found that this was a case of two discreet de facto relationships. Powell JA in his judgment said as follows:

Although I accept that the concept of a 'de facto relationship' does not involve the notion that parties to it must always be together under the same roof so that such a relationship may continue to subsist notwithstanding the absence of one party from the 'matrimonial home' and although I do not discount the possibility that 'a de facto relationship' may properly be regarded as continuing notwithstanding that the parties may have separated only temporarily while they attempted to work through some difficulty which they had encountered in the relationship, I am quite unable to see how such a relationship can be said to continue in a case, such as this, in which the 'de facto husband' requires the 'de facto wife' to leave the 'matrimonial home' and installs another in her place.³⁰

*Dridi v Filmore*³¹

This involved a same sex relationship between a plaintiff and a defendant. The plaintiff claimed that a domestic relationship existed between them from 1994 until November 1999. The defendant admitted there had been a relationship between the parties from July 1994 to March 1996 and again from June 1996 to November 1997, however he denied that it was a domestic relationship within the meaning of the Act though conceded there was a de facto relationship from August 1994 until March 1996. The parties however had continued to live in the same premises until November 1999 when the defendant moved out of the premises. The matter was heard by Master McCreadie of the Supreme Court of New South Wales. In that matter Master McCreadie looks at the law on termination of a relationship and says:

There is strong weight of authority which supports the view expressed by Mahoney JA in the Court of

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Appeal in *Hiberson v George* of particular note is his view that: '...where one party determines not to 'live together' with the other and in that sense keeps apart, the relationship ceases, even though it be merely to enable the one party or the other to decide whether it should continue.'³²

In that case the Court found that the relationship terminated on 22 March 1996. The significance in this case was that the period of the relationship was found to be from July 1994 to March 1996 and therefore it was less than the two years required by the Act.

CIRCUMSTANCES OF A DE FACTO RELATIONSHIP

*Devonshire v Hyde*³³

This was a New South Wales Supreme Court decision involving the application of a same sex de facto partner in proceedings against the executrix of the estate of the plaintiff's alleged de facto partner who was deceased. The plaintiff had met the deceased on 22 December 1996 and had a sexual encounter with him. At that stage the plaintiff was working as a male prostitute. In March 1997, the plaintiff commenced a sexual relationship with the deceased and on 10 April 1997 the plaintiff moved into the deceased's unit and commenced to live with him. In May 1998 the plaintiff and the deceased went through a ceremony of commitment where he and the deceased exchanged rings. The plaintiff's case was that he was the de facto partner of the deceased from 10 April 1997 until the death of the deceased 3 years later. The existence of a de facto relationship was a major issue in the case. There was contradictory evidence from the family of the deceased and many of his friends who gave evidence that they didn't know he lived with the deceased and that he appeared to be involved in heterosexual relationships.

Master McCreddie of the Supreme Court of New South Wales looked at the following circumstances of the de facto relationship:

Nature and extent of the common residence

Master McCreddie found that it was clear that once the relationship commenced the parties lived together in the deceased's residence. Another person had shared the residence at some time but this did not detract from the continuing residence.

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Existence of a sexual relationship

He found that the evidence of the Plaintiff was that a sexual relationship existed between himself and the deceased. It was exclusive to the extent that they lived together. He found that the plaintiff admitted that from time to time he and the deceased engaged in sex with another person as a threesome but that there was sufficient evidence from the photographs of them together to satisfy him that the plaintiff and the deceased had a sexual relationship whilst living together.

The degree of financial dependent or interdependence and financial support

Master McCreadie found that the unit in question was owned by the deceased but that the deceased and the plaintiff each contributed to some of the household expenses. Although they did not have joint bank accounts there was evidence of sharing housework and contributing to household expenses.

The ownership, use and acquisition of property

He found there was no ownership of property.

Degree of mutual commitment to a shared life

He found that this was evidenced by a marriage ceremony that they went through and a number of statements concerning the plaintiff which were made by the deceased which indicated such commitment.

Performance of household duties

He found that both the deceased and the plaintiff performed household duties together.

The reputation and public aspects of the relationship

He found on the evidence from a number of the plaintiff's friends that the deceased and the plaintiff publicly behaved as a couple.

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Master McCreadie found that there was a de facto relationship.

Common Residence

*S v B*³⁴

In this matter the Supreme Court of Queensland looked at whether a de facto relationship existed between two parties in relation to two different periods from 1993 to 1996 and then from 1996 to 2000.

First period 1993 – 1996

The plaintiff and the defendant had developed a close relationship in late 1992 which involved sexual contact. In February 1993 the plaintiff agreed to move into a unit that was owned by the defendant near the defendant's residence. The plaintiff wanted to commit to a permanent and exclusive relationship with the defendant but did not want to move into his house because her former de facto partner had lived next door. The plaintiff lived in the unit rent free. She contended that from the time she moved in she visited the defendant's house virtually everyday, performed the tasks of a partner including cleaning, laundry and cooking, provided the defendant with companionship and they shared an active sexual relationship. She would spend all day at the defendant's house after dropping her son off at school until she had to collect him. On the other hand the defendant, though conceding it was a relationship of intimacy and love, argued it was not a de facto relationship because they lived at different premises, lead separate and distinct existences, had separate bank accounts, did not share domestic duties and did not hold themselves out as being a de facto couple.

The trial Judge Philippides J found that for that period, he was not satisfied that a de facto relationship existed and said as follows:³⁵

I accept that during this period the parties shared a close and supportive relationship which extended to one of a sexual nature which appears to have been a mutually exclusive one. It was also apparent that the defendant assisted in the support of the plaintiff's child and the plaintiff assisted with the performance of household tasks for the defendant, however, I am not satisfied that the nature and extent of their common residence during this period was as claimed by the plaintiff. The parties' relationship during this period

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was marked by their maintaining separate residences and whilst it is clear that the plaintiff saw the defendant very regularly, I find that the contact was often of short duration and only extended to common habitation in one residence on an infrequent basis.

Period from 1996 to 2000

In 1996 the plaintiff and her son moved into a different house owned by the defendant. A month later the defendant also moved in. It was a custom built house with two separate but adjoining residences and a common living area. Again during this period there was no acquisition of property in any joint capacity nor any bank accounts. They each lived in their own residences and shared a common living area. In relation to that period of time His Honour found as follows:

I am satisfied that a de facto relationship commenced in February 1996 when the Plaintiff moved into the house...importantly the actions of the Plaintiff in moving into the residence and of the Defendant in providing the residence are significant indicators that the parties had undertaken a mutual commitment to a shared life on the basis of a shared common residence. Even though the relationship was an unusual one, in that the parties continued to reside primarily in their own part of the house, I am satisfied that they interacted on a frequent basis in a number of important respects, which demonstrated that they did indeed live together as a couple on a genuine domestic basis, whilst accommodating a degree of independence in their lifestyle. I am satisfied that the parties continued to enjoy an intimate relationship, which included a mutually exclusive sexual relationship...³⁶

SEPARATE RESIDENCES

*Greenwood v Merkel*³⁷

This is another Supreme Court of New South Wales decision. The parties met in or about 1991. From June 1992 the parties formed a relationship which involved Mrs Merkel spending a substantial number of nights of the week at Mr Greenwood's residence and him spending some nights at her residence at the various addresses in the Katoomba area in which each of them was residing from time to time. They each lived in separate residences for the period of the relationship except for a period of approximately seven months to January 1996 where Ms Merkel did not have separate accommodation of her own but lived at Mr Greenwood's house paying some rent because Mr Greenwood said it was only fair as his sister also

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had an interest in the house and should receive a return. She moved out however, in January 1996 because there were difficulties with two of her children who had gone to stay with them. The relationship continued with a few short interruptions until March 1998 when Mr Greenwood ended it because he had, a few months earlier, formed a new relationship with a Ms McGregor. There was a dispute between the parties as to whether there was a de facto relationship or not. Ms Merkel claimed that there was a de facto relationship from June 1992 until March 1998. Mr Greenwood gave the impression that the relationship was merely in the nature of repeated but intermittent casual indulgence in sexual intercourse unaccompanied by any mutual dependence which did not include other sexual partners. In this matter there was also an intermingling of funds in that Mrs Merkel contributed to the acquisition of Mr Greenwood's business. In this case, Burchett AJ after considering the evidence made the following comments:³⁸

For many reasons, I do not accept the view of the relationship between the parties put forward by Mr Greenwood. For one thing, I accept the evidence of Ms Merkel that the parties slept together much more frequently than Mr Greenwood conceded, that she was faithful to him and he claimed to her that he was also faithful, that she performed various domestic tasks on his behalf and that they professed and in different ways sustained the supportive relationship of a couple. They were involved with each other's families and relations to some extent, shared some family Christmases and she provided to him, and he accepted, much assistance, both in work and in money and in matters of business. They entered into a partnership in which it is plain that he relied on her to undertake a part involving a much greater burden than anyone would have been likely to accept in the absence of a relationship going well beyond the mere matter of business.

His Honour went on to say:³⁹

The particular arrangements pursued by husbands and wives may vary very greatly, and the same is true for de facto partners. Although the relationship between the parties in the present case did not pursue the course that the majority of marriages pursue, except perhaps for the period of 6 months I have mentioned...in my opinion they lived together as husband and wife on a bona fide domestic basis in the way that suited them and such breaks as there were, were too brief to destroy the continuity of their de facto relationship within the meaning of the Statute over the period between 1992 and 1998. Many a normal marriage may suffer the occasional disturbance of similar intermissions. They certainly lived together in a de facto relationship for a period of not less than two years...

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ON AND OFF RELATIONSHIP

*Milevsky v Carson*⁴⁰

This was a decision of the Supreme Court of New South Wales. There was a dispute as to when the relationship commenced or recommenced after a period of separation. It was common ground in the matter that between 1978 and 1983 the parties were in a relationship, and thereafter until May 1989 were in a de facto relationship. They then resumed the relationship either in late 1992 (according to the defendant) or in May 1993 (according to the plaintiff). The plaintiff had contended that prior to January 1983 the relationship was intermittent and that neither party considered it to be permanent. His evidence was that the parties cohabited for periods which varied from a night to a week and up to 2 or 3 months and they were separated for similar irregular periods. The defendant's evidence was that she and her children moved into the house upon completion in July 1979. That she and the plaintiff believed the relationship was permanent, although there were disputes concerning her children and a number of periods of separation. Nicholas J was not dissuaded that the evidence of either party was wholly reliable in the matter though he went on to say:⁴¹

Nevertheless there was much in common which pointed to the existence of a close domestic relationship and mutual commitment which developed from at least the time when the house was occupied. The conflict should be resolved with reference to other objective and independent evidence... Upon taking an overall view of the parties' association over the whole of the period from July 1979 to January 1983 and allowing for periods of separation, I find that there was in fact a de facto relationship for this period.

There was also a dispute as to the commencement for the second period of the de facto relationship whether it began in December 1992 or May 1993, though His Honour stated that, in his opinion "[t]he difference is of negligible significance having regard to the aggregate period of the relationship."⁴²

He found that May 1993 was probably the time of the commencement. He found that the de facto relationship is to be taken to have existed from July 1979 to May 1989 and from May 1993 until 19 November 2001. He said that:

For the purposes of the Section of the Act the court must take into account the aggregate of the periods

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during which the parties lived in such a relationship. Thus it is necessary for the contributions made by the de facto partner be assessed by reference to the entire period of the de facto relationship, irrespective of whether it is made up of a series of broken or intermittent periods or whether it is constituted by one continuous period of cohabitation.

COMMON RESIDENCE V OTHER RESIDENCES

*W v T*⁴³

This was another decision of the Supreme Court of Queensland. In that case the applicant and the respondent commenced a sexual relationship shortly after they met and the applicant soon moved in with the respondent. The respondent owned a caravan park with her ex husband. After a few years the respondent was employed to manage the business. It was necessary for the applicant to stay overnight at the caravan park to take care of late arrivals and therefore the applicant slept at a caravan park four nights a week. When he did not sleep at the caravan park he would sleep at the respondent's property. In effect, the relationship started in 1985 and ended in 2004. There was a common residence for the first four years and for the remainder of the next 16 years the applicant was managing the caravan park. The applicant claimed that he returned home each night to the respondent's property. In effect, there was a common residence for the first 4 years and for the remainder of the next 16 years the applicant was managing the caravan park and staying overnight at the park 4 nights a week and at the residence of the female partner on the other nights. In looking at the issue of the nature and extent of common residence the trial Judge Culinane J made the following comments:⁴⁴

As I have said, in my view, this issue is of critical importance in the present case. A consideration of the evidence as a whole satisfies me that the Applicant's account is correct and that he did in fact continue to reside at 3 Kay Crescent for some nights each week until his departure in March 2004. The evidence suggests that this was, in the latter part, limited to no more than 2 or 3 nights a week. However, I do not think that this effects the conclusion that the parties should be regarded as maintaining a common residence during that period. Rather, it goes to the nature and extent of the common residence. There are some important pieces of documentary evidence under the hand of the Respondent or for which she was responsible, which provide support for this conclusion.

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He went on to find that the relationship subsisted for almost 2 decades, there was a sexual relationship which existed, there was a degree of financial interdependence and support, there was no suggestion of acquisition of joint property but said:⁴⁵

The evidence supports a conclusion that they lived jointly from 1985 to 2004. The Respondent provided the meals for the Applicant and herself at 3 Kay Crescent and also made clothes for him. They would over more recent years have separate holidays but according to the Applicant whose evidence I accept, this was because it was necessary that one or the other be at the caravan park to attend to its affairs. Nonetheless, I am satisfied that they did occasionally go away on short trips together...

...[I]t is true that there are some unusual features in the relationship in this case, but I am satisfied from the evidence that the relationship which existed between them was one of the parties living together as a couple on a genuine domestic basis without being married to each other.

*PY v CY*⁴⁶

In this matter, which was a decision of the Queensland Court of Appeal, a de facto relationship had existed between the appellant and the respondent for a period of 9 years. They lived together until the respondent was forced to leave to take care of her elderly parents. When this happened the appellant attempted to sell his home and business so that he could be with the respondent. When he failed to sell the business he began to make fortnightly trips to spend time with the respondent. The relationship ended in 2000. The appellant claimed that the de facto relationship ended in March 1997 when the respondent moved away to take care of her parents and cohabitation ceased. The respondent claimed that the relationship continued until 2000. The Court of Appeal in that matter found that:

- The de facto relationship had continued until December 2000.
- Though "common residence" is one of the circumstances a Court may take into account, the Court of Appeal stated that when deciding whether two persons are living together as a couple on a "genuine domestic basis", any of their circumstances may be taken into account, including, for example; whether or not a sexual relationship existed and/or the reputation and public aspects of their relationship. A common residence was not of itself necessary for there to be a de facto

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relationship and would not without more give rise to such a relationship.

- Despite circumstances preventing them from sharing a common residence after March 1997 the parties had "substantial, regular, intimate and other contact...embracing their mutual interest in matters personal, property and financial"
- The fact that the parties' finances were not intermingled was of little importance considering that was the case for the preceding 9 years.
- The Appellant failed to furnish evidence of a "fundamental change" in circumstances after March 1997 beyond the cessation of cohabitation.
- Apart from the change in living arrangements there was nothing to indicate a change in the relationship after March 1997.⁴⁷

In the course of his judgment, Williams JA made the following comments:⁴⁸

In the course of argument counsel for the Appellant referred on a number of occasions to a passage in my judgment in *S v B* [2004] QCA 449. I there said that the de facto relationship in the parties in that case was not 'evidenced by a number of the more concrete indicia which are frequently seen as an integral part of such a relationship.' However, what will constitute a 'concrete indicia' will vary with the circumstances of each case. Often a somewhat intangible consideration, such as how the couple presents to the public, will be the most decisive consideration. In the present case counsel for the Appellant submitted that a common residence was the most telling 'concrete indicia' of such a relationship, and its absence strongly suggested that the parties were not 'living together as a couple on a genuine domestic basis.' But as Jerrard JA has pointed out in his reasons in this case, a couple may still be living together on a genuine domestic basis, although separated by considerable distance because of prevailing circumstances.

He went on to say:⁴⁹

In the present circumstances the most critical feature of the relationship between the parties was the personal one, that is, regarding themselves as a family unit and enjoying whenever possible the sexual relationship which is a normal attribute of family life. Apart from the fact that they were not living on a

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daily basis in the same residence there was nothing which occurred between 1997 and Christmas 2000 which indicated that there had been a termination of the de facto relationship which had existed since 1988. One would have expected that if the relationship had ceased in 1997 there would have been something more positive to indicate that. To the contrary, there was regular contact between the parties, when the opportunity arose they presented themselves to the public as a family, and the Appellant provided the Respondent with accommodation where they regularly met and continued their sexual relationship.

In looking at the common residence Jerrard JA made the following comments:⁵⁰

People who have lived together, perhaps for many years, can find themselves obliged to undergo a period of separation in which they live in separate cities or countries, that separation being caused by events the parties regard as beyond their control as, by definition, is the length of that separation. An example which readily springs to mind is when a quickly emerging situation resulted in an overseas posting for a member of the armed services for an indefinite period, hoped to be short, at the end of which both parties intended their cohabitation as a family in the one residence will be resumed. Another common enough example will be when prevailing family and economic circumstances, such as sudden illness, as has occurred in this case, force a physical separation.

COMMON RESIDENCE

*Horton v Russell*⁵¹

The parties variously lived in a de facto relationship in the 1970's and 2000's. Both parties in this matter agree that there were 6 separate periods of the relationship though they differed on the dates. The plaintiff submitted that the parties were in only one de facto relationship, that relationship being interrupted by periods while they were not living together. The defendant agreed that he and the plaintiff had lived in a

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de facto relationship for 6 separate periods and almost submitted that it was not necessary for the Court to make specific findings concerning the precise date of commencement and precise date of termination of the periods of the de facto relationship. In looking at the section of the *Property (Relationships) Act 1984* dealing with de facto relationships and the circumstances which constitute a de facto relationship McLaughlan AJ made the following comments:⁵²

It is apparent from the reference in Subsection 2 to a common residence, that it is not in every case essential to a finding that the parties were in a de facto relationship that they resided in a common residence. Nevertheless, it is essential to such a finding that they 'live[d] together as a couple'...Although during the periods whilst the parties to the present proceedings were not sharing a common residence they maintained contact and, at times participated in sexual activities, nevertheless I am not satisfied upon the evidence that the parties were in a de facto relationship other than during the periods whilst they were residing together. It follows that there were 6 separate de facto relationships between the parties, not as the Plaintiff contends, one single (but at times interrupted) de facto relationship.

PERIODS OF COHABITATION

*Delaney v Burgess*⁵³

This was a decision of the New South Wales Court of Appeal which dealt with the issue of whether a de facto relationship existed or whether the relationship was essentially of a business nature. There were 3 interrupted periods between 1996 and 2004 where the appellant resided at the property of the respondent. During the periods the appellant paid board at the same rate as previous boarders at the home, she had her own room to keep her belongings, however, she slept with the respondent in his room. There was relatively little comingling of financial affairs. In late 2001, the respondent's daughter came to live with him and the appellant made school lunches and dinners for them and generally assisted in their supervision. The parties broke up in early 2004. The appellant's case was that the de facto relationship extended beyond the periods of shared residence at the property and the respondent claimed that there was never a de facto relationship alternatively if there was its duration was less than the period asserted by the appellant. The trial Judge accepted the respondent's case that there was no de facto relationship between the parties and the relationship was essentially of a business nature. The Court of Appeal looked at whether the relationship was in fact a de facto relationship. The matters relied upon to establish or rebut

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a de facto relationship during the periods of shared residence of the property were summarised by Mason P of the Court of Appeal as follows:⁵⁴

Shared Lives

The couple had shared sexual intimacy, the Appellant slept in the Respondent's bedroom when she lived at the property and there was no secret about them being a generally supportive and affectionate couple. The Appellant became pregnant to the Respondent one time but the couple decided that the Appellant should have an abortion. The Appellant retained a bundle of affectionate cards from the Respondent including ones addressed to his "friend, lover, wife" and "soulmate".

The relationship was further manifested by sharing of meals, joint visits to friends, attendance at family occasions, holidays together, long telephone conversations during the period of absence...and the Appellant's assistance with the care of the Respondent's teenage daughters.

The Appellant said that she did most of the housework and sometimes mowed the lawns when she resided at the property.

During the generally good periods of the relationship the Respondent dealt with the Appellant in a way significantly different from his relationship with any of the other boarders.

Financial Dealings

There was relatively little comingling of financial affairs. The Appellant agreed in cross examination that the couple kept separate financial identities.

Bank accounts were kept separate. The Respondent arranged for the Appellant to have an account in her name with his staff credit union. She needed to be an immediate family member of his family for this to occur.

Separate health insurance arrangements were maintained.

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The Appellant had a gambling addiction. This alone impeded her in making any significant financial contribution.

The Court of Appeal also looked at the Appellant's relationship with the Respondent's daughters. The Court of Appeal found that a de facto relationship was established at least for the periods of cohabitation.

In his judgment Mason P went on to say:⁵⁵

In my view, the facts summarised show that the parties were a de facto couple at least during the periods in which the Appellant resided in the property. The relationship was not purely a commercial one, as was found by the primary Judge. Nor was it a merely casual, sexual relation without the requisite elements of mutual commitment.

There was a substantial sharing of the two lives especially at the emotional and mutually supportive levels... As regard to establishing a de facto relationship, there was substantially more than a pure 'boarder' situation. Taken together with the other matters, it was sufficient to satisfy the statutory criteria for a de facto relationship.

In that case the Court found that the parties lived in a de facto relationship for about 24 months between early 1996 and early 1998 and for a little over 4 years between late 1998 and August 2002.

COURTSHIP V COMMITMENT

*FO v HAF*⁵⁶

In this case the Queensland Court of Appeal looked at a situation where the appellant and the respondent began to see each other in July 1997 and a sexual relationship developed although they lived and worked in different cities. The respondent became pregnant in July 1998. In December 1998 the parties moved in together. Until that time each had met his or her own financial commitments and maintained separate homes. They had a son in April 1999. They purchased a home in September 1999 and the relationship

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ended in July 2002. The trial Judge in this matter had found that despite not living together until December 1998 that a de facto relationship had actually commenced in December 1997. On appeal the Court of Appeal allowed the appeal by the appellant and made the following comments:⁵⁷

In *PY v CY*, this Court confirmed the continuing cohabitation in a common residence is not necessary to establish the continuation of a 'de facto relationship' where the parties have lived together as a couple and have not effected a permanent separation. Nevertheless, the definition of 'de facto relationship' suggests that, usually, the parties should have, at some stage, been 'living together as a couple of a genuine domestic basis'. It must be shown that the 'parties have so merged their lives...that they [were], for all practical purposes, living together as a married couple.' The fact that the parties have never lived together in a common abode must be acknowledged to be a strong indicator that they have not 'lived together as a couple on a genuine domestic basis'. This indication will be especially significant where the parties have not shared the burden of maintaining a household.

The circumstances of human affairs are so various that the Courts should refrain from attempts to define more precisely than the legislature the kind of relationship regulated by Part 19 of the PLA. Nevertheless, as this Court said in *KQ v HAE*, it will be an exceptional case where two people who have not lived in a common residence, and who have not made actual provision for their mutual support, can be said to have been 'living together as a couple of a genuine domestic basis'. The case is not rendered exceptional in this context merely because the parties intend, eventually, to live together as a couple. That is simply a case where an existing courtship has not matured into the kind of commitment in which the parties have so merged their lives that they were, for all practical purposes, a married couple. Just as people who are affianced cannot be confused with people who are married, so people who intend to live together as a couple should not be confused with people who do not live together as a couple.

REGISTRATION OF A RELATIONSHIP

There are three States and a Territory in Australia where relationships can be registered. Those States are Tasmania (*Relationships Act 2003*), the ACT (*Civil Partnerships Act 2008*), Victoria (*Relationships Act 2008*) and NSW (*Relationship register Act 2010*).

The provisions of all four Acts in relation to registering a relationship are fairly similar. Applications can be made in each of those States by parties to a de facto relationship to register those relationships. They can be same sex or heterosexual couples.

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One of the factors a Court can look at under the *Family Law Act* in determining whether a de facto relationship exists is whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship.⁵⁸ Though the registration of a domestic relationship is only one factor to be taken into account and not determinative of the fact that a relationship exists it would be clear evidence to be provided to a Court, in my view, that a de facto relationship does in fact exist.

The *Relationships Act 2008* (Vic) defines a registrable relationship as:⁵⁹

... a relationship other than a registered 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 –

- a) For fee or reward; or
- b) On behalf of another person or organisation (including a Government or Government agency, a body corporate or a charitable or benevolent organisation).

DEFACTO RELATIONSHIPS UNDER THE FAMILY LAW ACT

There have been a number of de facto matters before the Federal Circuit Court (previously the Federal Magistrates Court) and the Family Court since the commencement of the new Act on 1 March 2009 which deal with the issue of what constitutes a defacto relationship.

THE EARLY FMC DECISIONS

*Korner v Armstrong*⁶⁰

This was a decision of Chief Federal Magistrate Pascoe in the Sydney Registry of the Federal Magistrates Court. It is not a property matter but related to parenting and a child conceived through assisted

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conception and one of the issues was whether the Applicant is a parent of the child. He dealt with the issue of whether a de facto relationship existed between the same sex partners in this matter. In the context of whether s 60H(1) of the *Family Law Act* required the existence of a de facto relationship at the time of conception or birth. It is an interesting and useful decision in that Chief Federal Magistrate Pascoe deals with all of the circumstances of a de facto relationship in the criteria set out in s 4AA(2) of the Act. He looks at each and every factor set out and then deals with the evidence in this matter in relation to each factor. In relation to the factor of a common residence interestingly His Honour states as follows:⁶¹

I give weight to this extrinsic material as provided by the Attorney General's department to the Senate Committee. As New South Wales caselaw indicates, the mere fact that the parties did not have a common residence throughout the duration of their relationship does not preclude them from the phrase 'living together'. The term 'living together' means a concept which is broader than just a common residence. However, a common residence is a good starting point in this endeavour.

His Honour then goes on to deal with various other factors including the sexual relationships between the parties, finances, ownership and use of property, the degree of mutual commitment to a shared life. It is an interesting case on how he determines whether a de facto relationship existed between the parties at the time of conception of the child. In this matter His Honour found that the living arrangements of the parties in April 2005 combined with all of the other circumstances do not constitute "living together on a genuine domestic basis". He said that the parties demonstrated a large degree of independence in almost all aspects of the relationship and therefore not in a de facto relationship. Again in relation to the issue of a de facto relationship His Honour makes an interesting observation, again dealing with the difficulties in establishing a de facto relationship as opposed to a marriage. He states as follows in his conclusion regarding the existence of a de facto relationship:⁶²

Perhaps the most difficult task in this regard is determining the point at which relationships cross an invisible line to become one recognised by law. The idea was espoused in *Houston v Bublter* (Supra) where Duttney J stated at [70]: It is of the nature of many de facto relationships that they develop over a period of time and a precise moment crosses the line to become one recognised by legislation is often difficult to discern.

Without the 'solemnities and formalities' by which some heterosexual couples declare that relationship in marriage, same sex relationships are fluid in the sense that it is difficult for them to discern what, if any,

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circumstances will carry them across an invisible threshold to be a relationship recognised by law.

*Vine v Carey*⁶³

In this matter the parties had commenced a relationship in 1988 which ended in about 1995/1996. In 1998 the parties recommenced their relationship and commenced living together in a property in New South Wales. It was a de facto relationship but there was a dispute between the parties as to when it ended. The respondent said that he decided the de facto relationship ended for him in May 2008 because the applicant had decided to move out of the main bedroom to not sleep with him and end the parties' intimate sexual relationship. He conceded that he did not tell anyone about it at the time and did not allege any time prior to 1 March 2009 that it had ended nor did he communicate that fact to any other person. The respondent also had another relationship for about three months over the Christmas period. The applicant on the other hand said the relationship ended on 29 March 2009 when she told the respondent the relationship was over.

In his judgment Slack FM looks at the shorter Oxford Dictionary definition of breakdown as "collapse, failure" and the Macquarie Dictionary which defines breakdown as "ceasing to function". He then goes on to say as follows before looking at the case of *S v B* and *Hiberson v George* which deal with the issue of when a de facto relationship ends:⁶⁴

It is in the nature of relationships that they tend to break down over time. I consider though that the term breakdown in the context of the Act and having regard to the referral of powers by participating States, should be interpreted such that the Court, before exercising power under the Act, should be satisfied, according to the requisite standard of proof (the balance of probabilities), that the de facto relationship had broken down to the point that it had failed and had ended.

He goes on to say:⁶⁵

I consider that the principles enunciated by Duttney J in *S v B* have application to matters under Part VIIIAB of the Act. For the applicant to succeed the onus is upon her to establish the de facto relationship did not break down until prior to 1 March 2009. The applicant cannot discharge her onus by mere proof that there was no express communication by either party that the relationship was at an end. Where there has been no express communication by either party to end the relationship but one party asserts that the

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relationship has ended, the applicant has an onus to satisfy the Court that objectively viewed the positive aspects of the relationship were consistent with and lead to a conclusion of a continuing de facto relationship.

In this case His Honour found that the relationship did not end until 29 March 2009 and therefore the Court had jurisdiction to deal with the matter. Upon finding that the Court had jurisdiction His Honour then dealt with an application for an order for interim maintenance.

*Aitken v Deakin*⁶⁶

In this matter Federal Magistrate McGuire dealt with the issue of the date of separation between the parties. In this case Mr Aitken, the applicant, alleged that he and Ms Deakin were in a de facto relationship from 1991 until 9 April 2009. Ms Deakin disputed, firstly, that the relationship between them was a de facto relationship within the meaning of the Act and, secondly, if it was, then the relationship ended in January 2009 and therefore the Court did not have jurisdiction to deal with the matter. The parties had been living together in an apartment registered in the name of Ms Deakin until 9 April 2009. Ms Deakin stated that she communicated her intention to Mr Aitken to separate in early 2009 and that they were separated under the same roof from January 2009.

In dealing with this matter Federal Magistrate McGuire made the comment that he had before him a discreet issue of disputed fact and credit as between the parties. That the standard of proof he needed to apply was "on the balance of probabilities" and that in making his determination he should be guided by the early decisions of the Family Court of Australia in respect of separation under the one roof in relation to divorce applications. He made the comment that those authorities made it clear that there were three elements of separation in a legal sense. They are:

- a) The development of an intention to separate. That intention need not be mutual.
- b) The communication of that intention to the other party. In my view such communication should be unambiguous and unconditional.

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c) Some form of action upon the determination to separate.

He went on to look at the Family Court authorities in relation to separation under the same roof and found that Ms Deakin determined to separate in January 2009 and communicated her intention at the time in unambiguous and unconditional terms to Mr Aitken. On that basis he found the Court did not have jurisdiction to deal with the matter.

*Hamblin v Dahl*⁶⁷

In this matter Federal Magistrate Demack looked at a case where the parties had been involved in a relationship between March 1994 and December 1998 and again between April 2008 and October 2009. He had to deal with the issue of the jurisdiction of the Court and whether there should be an aggregation of the periods of relationship. The applicant had argued that in the absence of any qualification contained in the relevant provisions the words that "that...the total of the periods...is at least two years" must be given their plain meaning whereas the respondent's arguments were that there was a 10 year gap between the first de facto relationship and the second de facto relationship. The first de facto relationship had completely ended or was wholly severed and the second relationship was for less than two years and therefore the Court did not have jurisdiction to hear the matter.

His Honour looked at the legislative framework in relation to a de facto relationship and the issue of aggregation. In dealing with the issue he went through various decisions including the various New South Wales decisions in relation to when a relationship ends. He went on to say:⁶⁸

In essence, it seems to me, that if two people commence or renew a relationship, then absent something extraordinary, they are renewing or recommencing the same relationship they had earlier. It would appear to be a fiction to suggest that two earlier intimates commenced a new relationship, rather than entering a new phase of their lapsed or previous relationship. And it would seem, that within the realms of human experience, having another intimate relationship for either a short or longer time, in the midst of another relationship, is not itself extraordinary.

In this case, it should be remembered that although the parties ceased sharing a common residence in December 1999 and from that time until the Applicant commenced her new de facto relationship with Ms

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M in 2006, the parties had maintained a relationship of some description. It is not a matter for this decision to clarify that relationship, but some relationship persisted during that time. In so much that it persisted in providing an ongoing link between the earlier and the later periods of cohabitation that a 10 year gap may not imply.

I cannot see that either the gap between the periods of cohabitation or the intervening de facto relationship between the Applicant and Ms M have any extraordinary features which would draw me to the conclusion that these were two separate relationships.

I am satisfied that a plain reading of the provisions should be preferred. The total periods of the relationship exceeded two years. This Court has jurisdiction to determine the matter. Pursuant to Section 90RD(1) of the Family Law Act, it is declared that a de facto relationship existed between the Applicant and the Respondent of at least two years.

Interestingly, in making the above comments His Honour made a comment in a footnote with regard to continuing an intimate relationship in the midst of another relationship by saying “[a]s could be inferred from the inclusion in the definition section the provision in s 4A5(b) ' a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.”⁶⁹

*Baker v Landon*⁷⁰

This was a matter involving parentage where the child was not biologically related to the applicant. The question was whether the applicant is a parent of the child and whether the applicant and respondent were in a de facto relationship at the time of conception.

Reithmuller FM summarised the definition in the legislation as follows:

The requirements of s 4AA in summarised form require a decision as to whether the parties 'have a relationship living together on a bona fide domestic basis'. In coming to this decision the court must have regard to 'all of the circumstances of the relationship', which may include the factors set out in s 4AA(2). Importantly, no finding as to a particular aspect of the relationship appears to be determinative (s 4AA(3))

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nor does the section attempt to prescribe the weight to be attached to any particular factor (s 4AA(4)). As a result, the definition cannot be said to be closely proscribed.⁷¹

In dealing with the matter Reithmuller FM looked extensively at all of the case law in relation to de facto relationships and made the following comments about the definition:

Significantly, the definition does not require an exclusive relationship and can be established even where one or both parties are married to others, or in de facto relationships with others at the same time. Kovacs argues that this "represents a significant extension of the existing law where a finding of a de facto relationship generally requires 'monogamy' to the exclusion of other de facto relationship's...

On one view the relationship defined by s 4AA must be broader than a 'marriage-like' relationship which would ordinarily require some consideration of the notion of exclusivity (in keeping with the prohibition on polygamy in marriage) even if it was not determinative of the nature of the relationship... As a result the phrase 'living together on a bona fide domestic basis' must be read broadly enough to at least allow for the possibility of cases where a person has multiple relationships in different households that simultaneously fall within s 4AA... The importance of this point is that there is only one definition, the breadth of which applies to all cases not just those involving multiple contemporaneous relationships. However, the broadening of the definition as a result of s 4AA(5) could be easily overestimated, particularly in cases where there are not multiple relationships. Whether the provision, in this broader sense is within the limit of powers referred to the Commonwealth under the State Act for the purposes of property division and spousal maintenance does not need to be decided here."⁷²

After looking at other legislation containing definitions of de facto relationships His Honour said "[t]he phrase 'living together' cannot be taken in isolation and read as requiring that de facto couples always live together..."⁷³

His Honour looked at the differences in the wording of different legislation and said:

As a result, it is likely that there will be differences in the relationships covered by the term 'de facto' as it appears in various enactments, as a result not only of differences in wording, but the different purposes of the statutory schemes. It may well be that a person is not in a relationship sufficient to satisfy section 4AA of the Family Law Act, yet not satisfy the relevant provision of the Social Security Act 1991. As a

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result, the receipt of the single rate of pension will not be determinative of the question of the Family Law Act, although the circumstances leading to such a pension being granted will be a factor to take into account.⁷⁴

*Dakin v Sansbury*⁷⁵

This was a Federal Magistrates Court judgment by Bender FM where there was an application for declaration of a "de facto relationship" pursuant to s 90RD of the *Family Law Act*. In adjustment Bender FM gave consideration of what is a de facto relationship under s 4AA of the Family Law Act.

Bender FM looked at the law and referred to the judgment of Reithmuller FM in the matter of Baker v Landon and summarised the findings of Reithmuller FM as follows:

- The definition does not require an exclusive relationship and thus the definition under s 4AA of the Act is broader than a "marriage-like" relationship which would ordinarily require some consideration of exclusivity;
- Whilst the definition is said to flow from the decision of Powell J in *Roy v Sturgeon* and from Social Security guidelines and the provisions of the New South Wales *Property Relationships Act*, there are differences between that legislation and the *Family Law Act* in terms of wording and the relevant considerations with the *Family Law Act* referring to a relationship as "a couple living together on a genuine domestic basis" rather than adults who "live together as a couple" that is referred to in earlier mentioned legislation;
- The term "living together" cannot be taken in isolation and read as requiring that de facto couples always live together;
- Whilst the definition of de facto relationship appears in a mirrored of legislative provisions there are differences in relationships covered by the term "de facto" as it appears in the different legislation, not only because of the different wording but also the different purposes of the statutory schemes⁷⁶

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Bender FM was in agreement with the decision of Reithmuller FM and went on to say:

Whether the parties have been living in a de facto relationship must be determined by reference to the definition as set out in the Family Law Act 1975. It cannot be determined by reference the definition of "de facto relationship" as contained in other legislation nor decisions interpreting such other legislation. Further, the nature of the relationship cannot be determined by looking at external societal views of what constitutes a de facto relationship, nor is it to be determined by what the parties themselves thought their relationship to be.⁷⁷

THE FAMILY COURT

*Moby v Schulter*⁷⁸

This is the matter that had previously been before Cronin J in the duty list in the Family Court of Australia at Melbourne and in January and April 2010 Mushin J heard the matter in relation to a declaration pursuant to s 90RD that a de facto relationship existed between the parties in the matter. Again, Mushin J had to determine whether the parties were in a de facto relationship and when the relationship ended, to see if the court had jurisdiction to deal with the matter.

Mushin J went through the legislation and the case law dealing with de facto relationships and went through all of the various circumstances that the Act sets out that can be taken into account to determine whether there is a de facto relationship.

He referred to the approach of both Powell J in *Roy v Sturgeon* and Kearney J in *Simonis v Perpetual Trustee Co Ltd* and though he agreed with their approach he went on to say:

... Before the definition may be considered as constituting 'a single composite expression of a comprehensive notion or concept', there are two specific elements of that definition which require individual consideration. The first of those is the concept of a 'couple'. For the purposes of the definition 'a couple' is constituted by two people whether of the same or opposite sexes...

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The second specific element is the concept of 'living together'. In my view, if a couple do not live together at any time, they cannot be seen as being in a de facto relationship. However, the concept of 'living together' does not import any concept of proportion of time. In particular, it does not require that a couple live together on a full time basis. On the basis that one or both members of the couple may also be legally married or in another de facto relationship at the same time as they were in the subject relationship, it must follow that it is feasible that the subject relationship might involve the parties living together for no more than half of the time of that relationship. Further, there is nothing to suggest that it must even be as much as half of the time.

Subject to the above, the question of whether the parties were in a de facto relationship must be considered on a case by case basis without circumscribing any particular factor.

Reithmuller FM took a similar approach to s 4AA in *Baker v Landon*... with which I also respectfully agree.⁷⁹

***Jonah & White* [2011]⁸⁰**

This was a judgment by Murphy J in the Family Court at Brisbane on 4 April 2011. In the matter the Applicant sought a declaration pursuant to s 90R that the relationship was a defacto relationship.

The facts of the matter were that the applicant and the respondent commenced an intimate relationship which continued with some interruptions until 2009. It was a 17 year relationship. During the whole period the Respondent was married with 3 children (His wife and children were not aware of the relationship). During the 17 years they spent time at various times in various places, had a sexual relationship and expressed love and affection for each other. Other relevant matters regarding the facts were as follows:

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- Each of the parties maintained their own household, independent of the time they spent together;
- The parties had travelled overseas together;
- They spent time together for about two or three days on each occasion every two to three weeks;
- The parties maintained a sexual relationship for the whole of the period;
- Each of the parties accorded to each their mutual love and affection;
- The parties at no stage made any investment in joint names, did not commit funds to any joint purchase and did not maintain a joint bank account.
- They each maintained their financial affairs independent of the other;
- There was some financial dependence on the part of the applicant. The respondent had paid \$24,000.00 towards the acquisition of a property for the Applicant and for 11 years paid to the applicant an amount of \$2,000.00 per month later increasing to \$2,500.00 and then \$3,000.00. He made those payments so that the applicant could give up her job which she did.
- The applicant claimed they were in a defacto relationship. The respondent claimed they were having an affair.

His Honour reviewed the authorities regarding what constitutes a defacto relationship and also the definition under s 4 AA of the Act.

Question of existence of Defacto Relationship not discretionary.

His Honour found that making a declaration of the type contemplated by s90RD of the Act does not involve the exercise of a judicial discretion but was a jurisdictional issue and went on to say⁸¹:

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“.....The question of whether a defacto relationship exists is a determination of fact (albeit based on findings in relation to a non-exclusive number of statutory considerations) which founds the jurisdiction to make orders of the type contemplated by that part of the Act. The ultimate question is in the nature of a jurisdictional fact.”

His Honour then went on to say that⁸²:

“...Determination of whether there is a defacto relationship (which can be seen to involve a “complex of elements”) enlivens the power of the court to exercise the discretion to grant the remedies in the Act which depend upon that fact”.

His Honour then reviewed the various NSW, Queensland and Family Court authorities as to what constitutes a defacto relationship. He then said as follows⁸³ :

“In my opinion, the key to that definition is the manifestation of a relationship where “the parties have so merged their lives that they were, for all practical purposes, ‘living together’ as a couple on a genuine domestic basis”. It is the manifestation of “coupledom”, which involves the merger of two lives as just described, that is the core of a de facto relationship as defined and to which each of the statutory factors (and others that might apply to a particular relationship) are directed.”

Counsel for the Respondent in the matter argued that a defacto relationship must be exclusive. This was rejected by Murphy J⁸⁴:

“I reject that submission. Marriage has exclusivity as an element because the Marriage Act 1961 (Cth) definition demands it. It is however, in my view in any event clear, by reference to the terms of s 4AA(5)(b) that exclusivity is not a necessary element of a de facto relationship.”

He then went on to say on the issue of living together⁸⁵:

“It seems to me to be clearly established by authority that the fact that, for example, the parties live in the same residence, for only a small part of each week does not exclude the possibility that they are “living together as a couple on a genuine domestic basis” or that the maintenance of separate

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residences is necessarily inconsistent with parties having a de facto relationship. So much is, in my view, clear from the statutory recognition that parties to a relationship can be married but also be in a de facto relationship.

The issue, as it seems to me, is the nature of the union rather than how it manifests itself in quantities of joint time. It is the nature of the union – the merger of two individual lives into life as a couple – that lies at the heart of the statutory considerations and the non-exhaustive nature of them and, in turn, a finding that there is a “de facto relationship”.

In the present case before him His Honour found that it did not constitute a defacto relationship as there was “no merger of two lives into one” or the “coupledom” as he had earlier referred to. He said as follows with regard to the relationship between the parties⁸⁶:

*“In my judgment, the evidence as a whole, sees here two people who each sought to, and did in fact, maintain separate lives – the respondent living with his wife and children in their matrimonial home and the applicant living by herself in her own residence – but who came together, on a regular basis, for periods of time during which they enjoyed a loving, sexual relationship. **But, absent from the relationship, in my judgment, was the “merger of two lives into one”, or the “coupledom” as earlier referred to.***

I accept that the long-standing nature of the relationship is a pointer toward the relationship being a de facto relationship. So too, the fact that the parties maintained a consistent sexual relationship, and that, for each of them, the sexual relationship was exclusive of other partners (noting that the respondent maintained a relationship with his wife and had “a few one night stands”). Similarly, the financial support provided to the applicant by the respondent for a number of years and the contribution by him to the applicant’s home are factors pointing toward that conclusion.

But, a number of other indicia point, in my view, to the opposite conclusion:

- *Each of the parties kept and maintained a household distinct from the other;*
- *In the respondent’s case, that household involved the maintenance of family relationships, including the support of children;*
- *The evidence does not reveal any relationship, or any intended relationship between the applicant and the respondent’s children who, it ought be observed, were relatively young when the relationship commenced;*
- *The relationship between the applicant and the respondent was clandestine and the time spent between the parties was spent (on either party’s case) very much together, as distinct from time spent socialising as a couple;*

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- *I accept the respondent's evidence that he continued to emphasise the limits of the relationship with the applicant and, in particular, I accept his evidence to the effect that, he told the applicant that, if circumstances ever required him to "make a choice", he would "choose" his wife and family over the applicant;*
- *Despite the regular monthly payments and the payment of \$24,000 earlier referred to, the parties maintained no joint bank account; engaged in no joint investments together; and acquired or maintained property in their own individual names;*
- *The parties rarely mixed with each other's friends. In that respect, the evidence of the applicant's witnesses – Ms R, Ms H and Ms W – is indicative of very little contact between the respondent and each of them. Ms R said she had never met the respondent, but had spoken to him on the phone. Ms H said her dealings with the respondent were "very limited". Ms W said she met the respondent "only once";*
- *The respondent ran what seems to have been a successful business, in which for some (early) years, the applicant was employed, but the parties did not mix with the respondent's business associates. After the applicant's employment with that business had ceased she had no involvement with it at all;*
- *There was virtually no involvement by the respondent in the applicant's life in Brisbane (where she lived between about 1996 and 2006), and virtually no involvement by the respondent in the applicant's life in S where she has resided since 2006. (I accept the respondent's evidence that he has visited S on only three occasions);*
- *The respondent accepted that he hoped that the relationship with the applicant was permanent but I accept, he made plain its nature as he perceived it. It was put by Mr Galloway to the respondent that the parties were in a long-term relationship to which the respondent replied "we were in a relationship; we were having an affair";*
- *There was very little time spent by the applicant and the respondent with the applicant's family. I regard the evidence of the respondent, when he said to the applicant's mother that their relationship "was not an adventure" as being more reliable than the evidence contained at paragraphs 36 and 37 of the applicant's affidavit. But, in any event, I do not consider that the evidence contained in those paragraphs is indicative of the "coupledom" or "merger" to which I have earlier referred;*
- *Despite (or, perhaps, because of) the evidence filed by friends of the applicant in support of her case, I do not accept that the applicant and respondent had a "reputation" as a couple; indeed, there was, on the evidence before me, very few public aspects to their relationship.*

The respondent readily accepts that, upon the cessation of the parties' relationship, he intended to "pay out [the applicant's] mortgage, her credit card and give her a lump sum". Whilst this may be indicative of his love and affection for the applicant (or, indeed, indicative of other emotions,

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for example, guilt) I do not consider that it is persuasive in characterising the nature of the parties' relationship prior to its cessation.

In all of the circumstances I am not persuaded that the relationship between the parties was a de facto relationship as defined in the Act.

APPEAL TO THE FULL COURT

*Jonah and White [2012]*⁸⁷

There were seven grounds of appeal to the Full Court.

The appeal challenged his Honour's application of s 4AA of the Act and, in particular, sub-s (5)(b). The arguments were that although his Honour set out the provisions of s 4AA at the beginning of his reasons, he did not sufficiently bear in mind that, unlike the State legislation to which he referred, the Act admits of the existence of a de facto relationship where one of the parties to that relationship may be married to another person or in another de facto relationship. It was argued that his Honour took into account irrelevant matters. It was also asserted that his Honour failed to accord sufficient weight to matters which should have led him to the conclusion that a de facto relationship existed.⁸⁸

The Full Court stated that *“It is immediately apparent that the touchstone for the determination of whether a defacto relationship exists is the finding that the parties are a “couple living together on a genuine domestic basis”.*⁸⁹

Living Together

With regard to the question of living together the Full Court noted that his Honour was alive to the issue that the term “living together” can encompass circumstances where parties live together “...for only a

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small part of each week...” and then went on to say:

“We agree that the definition may be fulfilled where parties have lived together for limited periods provided that other indicia or the circumstances of the matter enable a finding that they were “living together on a genuine domestic basis”.”⁹⁰

The Full Court also observed that the appellant’s emphasis on the words “living together” imports a somewhat artificial focus. *“The matter for determination was not solely whether the parties were “living together” at the relevant time. The Court must find that they were “as a couple living together on a genuine domestic basis”.”⁹¹*

They went on to say that His Honour’s conclusion that *“the proper focus of his determination was the nature and quality of the asserted relationship rather than a quantification of time spent together was, in our view correct”*⁹²

The Full Court concluded that:

“It is not sufficient for the appellant to argue, as here, that different weight could have been attributed to the factors to which the submissions refer. In order to demonstrate appealable error, it is necessary to establish that his Honour’s findings are “clearly wrong”. The appellant has not done so.

We find no substance in the challenge to his Honour’s findings of fact, nor the conclusions based on them.”⁹³

WHEN DOES A DEFACTO RELATIONSHIP END?

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VAUGHAN & BELE [2011]⁹⁴

This was a matter heard by Cronin J involving the question of when the defacto relationship ended. The Applicant sought orders in the Family Court for the alteration of property interests. He said a defacto relationship ended on 2 March 2009. The Respondent denied the existence of a defacto relationship on 1 March 2009 saying that to the extent that there was such a relationship it ended on 1 March 2008.

The parties had commenced a relationship in one form or another in 1993 at which time the respondent had a child living with her. The parties had a child of the relationship, The parties had both moved to the Netherlands and both had employment and in 1999 purchased a house in The Hague.

They pooled their incomes and met expenses together. In 2007 the Respondent purchased a property in her own name and her evidence was she intended to move into it on the basis that any relationship between them had come to an end. The Applicant's view was that he knew nothing about the purchase until after separation. There was other disputed evidence as to sleeping in separate bedrooms from September 2007, whether they cooked separately or not, as to holidays together, bike riding together, intimacy between them and other matters where there was disputed evidence between the parties.

As to the issue of whether the parties were in a defacto relationship His Honour said as follows⁹⁵:

“The critical question for jurisdictional purposes is whether the parties were in a defacto relationship as a couple living on a genuine domestic basis. On the findings I have made, they were living as a couple and were sharing all of the activities that one would normally expect in a domestic partnership. There was clearly financial interdependence between the parties and they made arrangements for financial support up until that was terminated by the Respondent around the end of February 2009. On any view of the facts, they were perceived by the authorities as living together.....

None of the factors set out in the Act as indicia of a defacto relationship is any more important than the other. It is not unexpected that after a relationship breaks down, the parties may have a jaundiced view of what they have done in the past particularly when one party is seeking to deny the existence of the relationship. In this case, the examples of the bike riding, the co-parenting, the ballroom dancing, the Christmas luncheon and the Rotary dinner would all indicate that there was a mutual commitment to a shared life. The degree of that commitment not only varies in every case but also from various perspectives of the parties themselves. The respondent went camping and shared accommodation facilities for conferences all of which would indicate the degree of comfort in each other's company. On any view someone outside looking in would perceive the applicant and the respondent as a committed family having regard to the activities to which I have just referred.”

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As to when the defacto relationship ended His Honour said that the respondent was required to formally tell the applicant. He said as follows⁹⁶:

“To bring the relationship to an end for the purposes of making it clear that there was no longer any defacto relationship, required the respondent to formally make the announcement to the applicant despite her view that she had withdrawn from any commitment to it well before March 1 2009. I find that formal commitment to end the relationship was made as the applicant said on 2 March 2009.”

SMYTH & PAPPAS [2011]⁹⁷

In this matter the Applicant sought a declaration pursuant to s90RD that she was in a defacto relationship with Mr Pappas on or after 1 March 2009 but also for specific periods prior to that date generally. The parties disputed the date that the defacto relationship ended. The Applicant alleged the relationship had begun in 1999 and finally ended in December 2009. The relationship was also suspended for two periods between December 2005 and July 2006 and again from December 2007 and December 2008.

In dealing with the issue of when a defacto relationship ends Cronin J made the following comments⁹⁸:

*“Of particular significance in this case is s 4AA(1)(c) and the legislature’s use of the words “all of the circumstances of their relationship”. Relationships appear in many forms but the legislature required the parties “have” a relationship “as a couple” living “together” on “a genuine domestic basis”. All of the indicea just mentioned were present and apparent at various times during the period that the applicant and the respondent knew one another. There is sufficient evidence to be satisfied that an at an identifiable point, the parties commenced a de facto relationship. The more difficult factual and indeed legal question is, whether and when, the de facto relationship (as distinct from some other form of relationship) ended. **The process to an ending can be sudden or it can be slow. Either way, the relationship ends and, in my view, that means, permanently. That requires an examination of what the parties were doing and saying over the life of the relationship as well as after it.***

*As to what sort of relationship satisfies the legislative definition, little in the authorities is helpful. In *Jonah and White (supra)* Murphy J at para 66 described the nature of the union as the merger of two individual lives into life as a couple. It is also conceivable however, that two people could*

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live very individual lives as a couple preferring not to merge their existences. As Coleman J said in Barry & Dalrymple [2010] FamCA 1271:

237 *The terms of s 4AA (2), and inclusion of provisions such as s 4AA (3) and (4) make clear the legislative intention that each case be assessed on its own facts and circumstances. To the extent that logic and common-sense suggest the drawing of an inference, there does not appear to be any prohibition upon doing so. Inferences reliant upon gendered assumptions or social stereotyping cannot be countenanced. In that sense, the absence of jurisprudence in relation to what may constitute a same sex de facto relationship may be a benefit.*

It is conceivable that just as peoples' lives merge or just join together, there is also a waning of interest in their joint relationship to a point at which the lives become distinctly individual again. The end is not often clear or finite. In Moby & Schuller [2010] FamCA 748, Mushin J observed that under the legislation, the parties were required to live together at some time but there was nothing in the section that required any concept of proportion of time nor that the time be full time in the sense of unbroken periods.

Provided the parties have lived together for some period on a domestic basis, they may be found to have been in a de facto relationship. If it is not necessary for there to be a constant common residence right throughout, as the relationship changes, the living arrangement is just one facet of their relationship; physical separation does not necessarily mean that the de facto relationship is ended. “

He goes on to deal with what factors end a relationship⁹⁹:

“In Truman and Clifton [2010] FCWA 91 Thackray CJ considered the ending of a de facto relationship and said:

358 *I adopt, with respect, the observations of Mahoney JA in Hibberson v George (1989) DFC 95-064, where his Honour said (at 75,766) in considering the time of cessation of a de facto relationship:*

There is of course, more to the relevant relationship than living in the same house. But there is, I think, a significant distinction between the relationship of marriage and the instant relationship. The relationship of marriage, being based in law, continues notwithstanding all of the things for which it was created have ceased. Parties will live in the relationship of

marriage notwithstanding that they are separated, without children, and without the exchange of incidents which the relationship normally involve. The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance: holidays and the like show this. But where one party determines not to “live together” with the other and in that sense keeps apart, the relationship ceases, even though it be merely, as was suggested in the present case, to enable the one party or other to decide whether it should continue.

359 *In Hibberson & George, the trial Judge had said:*

In the absence of any overt act or indication by the defendant to the plaintiff that she was staying away only temporarily and intended to return, it seems that I must find that the relationship had ceased by 1 July [i.e. the date of which the NSW De Facto Relationships Act 1984 commenced].

*I am also not convinced that “indications” necessarily conclusively end a relationship. There can be uncertainty about the future while living apart but the de facto relationship goes on even though the partners are not doing all of the things together that they had previously done. **The keeping apart has to have finality about it and that is best seen where the de facto relationship has none of its previous characteristics any longer. For example, some parties whose de facto relationship has ended, continue to parent children and perpetuate financial interdependence but they do so in a way which can only be objectively described as different from what had occurred previously when to a large degree, the relationship was a functional one. The ending of the relationship must have permanence about it rather than a temporary suspension.***

It is also difficult to grapple with the concept of a series of de facto relationships where there are suspensions. The legislation contemplates a variety of periods (see s 90RD(2)(a)).

With those uncertainties and little legislative guidance, I embark on looking at what the parties did, how they behaved and what they said, to decide when their de facto relationship came to an end and if there was more than one ending, what the relevant periods were.

His Honour then looked at all of the facts of the case and found that there was a defacto relationship from 1999 until December 2009 with two suspensions of the relationship prior to that time which had not ended the relationship. His Honour also makes an interesting observation when looking at the evidence in the matter of an extra- marital affair. He posed the following question¹⁰⁰:

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“For some independent observers of relationships, questions might be asked about how a de facto relationship can continue when one party is indulging in an extra-relational affair. However, the legislation contemplates that very thing occurring because parties to a de facto relationship can be seen to be in such a relationship despite also being married to someone else.”

RECENT CASES

There have been a number of cases dealt with by the Family Court and the Federal Circuit Court recently which deal with the issue of the threshold issue of what constitutes a Defacto Relationship. In her paper presented today and also entitled **“Defacto Relationships: are we there yet?”** Belle Lane discusses a selected number of cases from 2012 and 2013 from the Family Court, The Federal Circuit Court and also The Family Court of Western Australia dealing with this issue.

RIGHTS OF THE PARTIES WHERE THERE IS MORE THAN ONE 'SPOUSE' SEEKING A PROPERTY SETTLEMENT

The definition of a de facto relationship under the *Family Law Act* provides that a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.¹⁰¹ According to Professor Jenni Milbank, who has written a number of articles in relation to de facto relationships, the wording of the relationship is broad and could:

... encompass a situation where a person conducted two simultaneous de facto relationships over many years or a long term affair while still married (well known to relationship lawyers as the 'travelling salesman' cases) if such relationships were also accompanied by a high degree of emotional and/or financial commitment – even if only in the mind of one of the parties.¹⁰²

In such situations a Court exercising jurisdiction under the Act may be faced with a situation where they may have to deal with two long term "simultaneous relationships" and have to deal with how the assets of "the parties" will need to be adjusted. Of course, there could be examples where the relationships are not

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in fact simultaneous but there are simultaneous claims for an adjustment of property interests arising out of two different relationships over two different periods of time. For example, a person who is married separates but for some reason many years later has not effected a property settlement. In the meantime, the same person has become involved in a de facto relationship of medium to long term range which also ends and finds there are competing claims for a property settlement from the wife pursuant to Section 79 and from the de facto wife pursuant to s 90SM of the *Family Law Act*.

The Act also deals with consolidating cases. The Act allows de facto partners to join proceedings involving a s 79 Application between a married couple (s (10)(aa) and (ab)) and similarly a married person can join proceedings between a de facto couple (s 90SM910)(d) and (e)).

HOW TO PROVE THE EXISTENCE OF A DE FACTO RELATIONSHIP

After reviewing the judgments of the various Courts in relation to the requirement for a de facto relationship, the next question is how does a party to proceedings prove the existence of a de facto relationship? What sort of evidence would need to be shown in order to prove that a de facto relationship exists? The provisions of the Act and the State Court decisions will require a court to look at the evidence and make a valued judgment as to the circumstances of the relationship and whether they constitute a de facto relationship. The type of evidence that will be required to prove the various factors includes the following:¹⁰³

a) The duration of the relationship.

- The longer the relationship exists the stronger the argument that it was a "marriage type" relationship instead of some other relationship such as landlord/boarder, boyfriend/girlfriend, and business partner.

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- The Act requires a minimum duration of a total periods of two years except for various exceptions.
- The duration of the relationship will be determined by presenting evidence relating to most of the other factors set out below.

b) **The nature and extent of their common residence.**

- Parties residing in the same residence or residences during the course of the relationship.
- The parties living in the same residence for part of the relationship.
- Payment of board or rent by one of the parties.
- Circumstances or reasons why the parties may not be living in the same residence for periods of time (factors beyond their control).
- Address or residence of parties in official correspondence.
- Postal or mail deliveries to the parties.
- Address on the parties' licences.
- Address of the parties on the electoral roll.
- Address of the parties on their income tax returns.
- Address of the parties on their motor vehicle registration.
- Address of the parties in relation to their superannuation details.

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- Address given by the parties to their respective employers.
- Address given by the parties to Centrelink or other government agencies.
- Address given by parties in relation to memberships of clubs or associations.

c) Whether a sexual relationship exists.

- The sexual relationship of the parties.
- The frequency of the parties' sexual relationship.
- The mutual exclusivity of the parties' sexual relationship.
- Other sexual partners of the parties.

d) The degree of financial dependence or interdependence and any arrangements for financial support between them.

- Evidence of joint ownership of property.
- Joint bank accounts.
- Health insurance in joint names.
- Utility notices in joint names.
- Medicare card in joint names.
- Payment towards mortgage(s).
- Payments towards loans.

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- Sharing of household expenses.
- Payment of various expenses for each other.
- Income tax returns of the parties.
- How did the parties each spend their salary or income?
- Was one party financially dependant upon the other?
- Did either party perform any unpaid work or domestic duties?

e) **The ownership, use and acquisition of their property.**

- Joint ownership of real estate.
- Living together in a property.
- Payments or contributions towards the mortgage of a property owned by one of the parties.
- Purchase of furniture and chattels.
- Purchase of motor vehicles.

f) **The degree of mutual commitment to a shared life.**

- Living together in a common residence.
- Spending regular time together.
- Spending time with each other's friends and family.

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- Conversations and statements the parties make to each other.
- Conversations and statement the parties make to others.
- Sharing meals.
- Regular telephone conversations.
- Assisting with the care of each others children.
- Attending functions together such as weddings, christenings, parties.
- Invitations to functions, weddings, parties addressed to both parties.
- Photographs of the parties at weddings, christenings, parties, social events.
- Evidence of third parties of the parties attending functions together.
- Christmas cards, birthday cards, any other cards to each other or received jointly from others or jointly to others.

g) Whether the relationship is or was registered under a prescribed law of a state or territory as a prescribed kind of relationship.

h) The care and support of children if there are children of the relationship.

- Whether the parties have children from other relationships.
- Whether the parties care for or are involved with the children from other relationships.
- Whether there is financial support for children from other relationships.

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- Transporting children to various sporting activities or school.
- Transporting children to various parties and birthdays.

i) **The reputation and public aspects of the relationship, evidence of the parties socialising together.**

- Attending functions together such as weddings, christenings, parties.
- Invitations to functions such as weddings addressed to both parties.
- Photographs of the parties at weddings, christenings, parties, social events.
- Evidence of third parties of the parties attending functions together.
- Evidence of neighbours.
- Evidence of family and friends who visit the house.
- How the parties refer to each other to others.
- Do the parties use each other as emergency contacts for schools or health reasons?
- Provisions in the parties' wills.
- Beneficiaries under the parties' superannuation policies.

An interesting case of multiple relationships

An interesting case I came across, which illustrates a complex set of multiple relationships the case of

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Green and Ors v Green.¹⁰⁴ This was a decision of the Supreme Court of New South Wales Court of Appeal. The decision has nothing to do with the definition of a de facto relationship, though it did involve a de facto relationship and the death of a de facto partner. The reason I mention this case is to do with its facts and it would make an interesting case study as to how a Court exercising jurisdiction under the current *Family Law Act* would deal with this situation. Chief Justice Gleeson of the Supreme Court of New South Wales in dealing with the facts of this matter set out as follows:¹⁰⁵

The late Robert Green ('the deceased') was born in 1932 and died in 1981. He was survived by one lawful wife, two de facto wives and seven children. The respondent was one of the de facto wives and the mother of two of the children. He dealt extensively in cash and owned numerous parcels of real estate, including dwelling houses. It was his practice to arrange for titles to such real estate to be registered in the names of nominees. When he died his complicated financial affairs were in such a state that nobody was willing to accept appointment as his legal personal representative.

In 1966, the deceased whilst married to Beryl Green visited Bangkok and stayed at the Amaran Hotel. At the time he had also been involved for many years in a de facto relationship with one Margaret Green. Both the marriage and the de facto relationship produced children and in the somewhat unusual sense, that will be explained in due course. In 1966, the deceased was living with and he thereafter continued to live with both Beryl Green and Margaret Green. However, whilst a guest at the Amaran Hotel, the deceased met the respondent and formed a sexual relationship with her. At the time, she may have been as young as 13 or 14 years old. She spoke no English and the deceased did not speak her language. Through an interpreter the deceased asked her to come to live in Australia saying that he would look after her, pay her expenses and arrange for her education. She had no parents and was living with her grandmother. She agreed to come to Australia. When she arrived in Australia the deceased at first put her up in a motel room and later arranged for her to board with another lady of his acquaintance, Mrs Partington. She was provided with a little schooling. She could not write English although she could read a little. The deceased visited her regularly and a sexual relationship continued. In due course she...fell pregnant. Ultimately, she had children, one who was born in 1968 and another who was born in 1972.

By the time the deceased died in 1981, the various women and children in his life had become aware of the existence of one another. Exactly when and how that occurred is not entirely clear. The respondent gave evidence that when she came to Australia in 1966 the deceased had told her that he had a wife and children, but that he was separated from his wife and intended to marry the respondent when his children

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reached adulthood. It appears however, that the deceased's wife did not learn about the Respondent until quite late in the piece. The respondent gave evidence that she learned about the deceased's other de facto wife, Margaret Green, in around 1976...Margaret Green, for her part, said she first learned of the respondent's existence in about 1977 or 1978. She had been aware of the existence of the deceased's lawful wife and children at all material times.

The deceased appears to have maintained simultaneous domestic establishments with all three women and their respective children. In terms of division of his time he appears to have given preference to Margaret Green, but it seems that he spent two nights a week, regularly, with the respondent and at least according to her evidence, gave what she regarded as a plausible explanation of his absences. Presumably, over a number of years, he managed to achieve the same result with the other women. This is consistent with his apparent success as a used car salesman.

At the time of his death the deceased owned, or had an interest in, five residential properties. First there was the house and land at 4 Parkview Grove, Blakehurst which was owned in equal shares by the deceased and his wife and the deceased's parents. Secondly, there was a unit known as 11/2 Arthur Avenue, Cronulla of which the registered proprietor was the deceased's wife, Beryl Green. It had been referred to as 'Beryl's unit'. Thirdly, there was a house and land at 236 Terry Street, Connell's Point of which the registered proprietor and occupier was Margaret Green. It had been referred to as 'Margaret's house' and it is where the deceased from time to time resided with Margaret Green and their children. The two other parcels of real estate were in dispute in these proceedings and they have been referred to as the Kirawee property and the Blakehurst property.

I've gone into a little bit of detail about the circumstances of the case because if one was to use that as a case study and look at the three simultaneous relationships, the lawful wife and the two de facto wives, all with children, and apply the principles of the *Family Law Act* in relation to de facto couples to it, I think it may result in quite an interesting outcome.

Conclusion

The changes to the *Family Law Act* which were introduced on 1 March 2009 are in line with the trend that

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has emerged over recent years in the State legislation with regards to the rights of de facto partners to property. The changes to the *Family Law Act* however have been very significant in that they now give jurisdiction to Courts exercising power under the Act to adjust the property interests of de facto partners in the same way as they would for a married couple.

Patrick Parkinson, Professor of Law at the University of Sydney in his submission to the Senate Standing Committee on Legal and Constitutional Affairs argued that:

The sociological evidence available suggests that there are significant differences between people who have chosen to marry and those who have not. The evidence would suggest that de facto relationships are typically rather more conditional and are less likely to involve the sharing of property.¹⁰⁶

He went on to say that what the Bill (to introduce the Act) does:

Is to take the marriage paradigm, the idea that marriage is a lifelong socioeconomic partnership, and apply it to people who have never chosen that, who had a free choice whether to choose it, and who would be shocked to know that they are being treated as if they are married when they are not.

As a result it will continue to give rise to disputes between parties as to whether they were in fact in a de facto relationship or not. As we have seen from the cases that I have reviewed in this paper it is not always a simple exercise to determine whether a couple has in fact been in a "relationship" or a "de facto relationship". A Court has a range of factors that it will look at in determining whether a de facto relationship exists and each Court looking at the issue will have to attach value judgments to the various factors which are set out in the Act to determine whether such a relationship exists or not. There is likely, as a result, to be increased litigation on the preliminary point of whether a de facto relationship exists in any matter or not.

¹ *Family Law Act 1975* (Cth) s 90SM(1).

² *Ibid* ss 90UB-90UD.

³ *Ibid* s 90UJ.

⁴ *Ibid* s 90RD(1).

⁵ *FO v HAF* (2007) DFC 95-402 [21]

⁶ *Family Law Act 1975* (Cth) s 4AA(1).

⁷ *Ibid* s 4AA(5)(a).

⁸ *Ibid* s 4AA(5)(b).

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- ⁹ Ibid s 90SB.
- ¹⁰ Ibid ss 90SC, 90SG, 90SM.
- ¹¹ Ibid s 90SL.
- ¹² Ibid s 90SK.
- ¹³ Ibid s 90SK(1A).
- ¹⁴ Ibid s 4AA(2).
- ¹⁵ *Roy v Sturgeon* (1986) DFC 95-031
- ¹⁶ *Family Law Act 1975* (Cth) s 4AA(2)(g).
- ¹⁷ Ibid s 4AA(3).
- ¹⁸ Ibid s 4AA(4).
- ¹⁹ *Roy v Sturgeon* (1986) DFC 95-031.
- ²⁰ *The De Facto Relationships Act 1984* (NSW) was amended and renamed *The Property (Relationships) Act 1984* in 1999.
- ²¹ *Roy v Sturgeon* (1986) DFC 95-031 [75,364].
- ²² *Simonis v Perpetual Trustee Co Ltd* (1987) DFC 95-052.
- ²³ *Simonis v Perpetual Trustee Co Ltd* (1987) [75,589].
- ²⁴ *Light v Anderson* (1992) DFC 95-120.
- ²⁵ The *Family Provision Act 1982* (NSW) was repealed by the *Succession Amendment (Family Provision) Act 2008* (NSW) which commenced operation on 1 March 2009, which also amended the *Succession Act 2006* (NSW) to ensure that adequate provision is made for members of the family of a deceased person, and certain other persons, from the estate of a deceased person.
- ²⁶ *Light v Anderson* (1992) (1992) DFC 95-120 [76,555].
- ²⁷ *Hibberson v George* (1989) DFC 95-064.
- ²⁸ Ibid [75,766].
- ²⁹ *Lipman v Lipman* (1989) DFC 95-068.
- ³⁰ Ibid [75,807].
- ³¹ *Dridi v Filmore* (2001) DFC 95-232.
- ³² Ibid.
- ³³ *Devonshire v Hyde* (2002) DFC 95-247.
- ³⁴ *S v B* (2004) DFC 95-282.
- ³⁵ Ibid [78,022].
- ³⁶ Ibid.
- ³⁷ *Greenwood v Merkel* (2004) DFC 95-290.
- ³⁸ Ibid [78,072].
- ³⁹ Ibid [78,073].
- ⁴⁰ *Milevsky v Carson* (2005) DFC 95-314.
- ⁴¹ Ibid [78,328].
- ⁴² *Milevsky v Carson* (2005) DFC 95-314 [78,329].
- ⁴³ *W v T* (2005) DFC 95-317.
- ⁴⁴ Ibid [78,367].
- ⁴⁵ Ibid [78,368].
- ⁴⁶ *PY v CY* (2005) DFC 95-323.
- ⁴⁷ Ibid [78,426].
- ⁴⁸ Ibid [78,431].
- ⁴⁹ Ibid [78,432].
- ⁵⁰ Ibid [78,433].
- ⁵¹ *Horton v Russell* (2006) DFC 95-334.
- ⁵² Ibid [78,566].
- ⁵³ *Delaney v Burgess* (2008) DFC 95-412.
- ⁵⁴ Ibid.
- ⁵⁵ Ibid [44]-[46].
- ⁵⁶ *FO v HAF* (2007) DFC 95-402.
- ⁵⁷ Ibid [78,722], [78,723].
- ⁵⁸ *Family Law Act 1975* (Cth) s 4A(2)(g).
- ⁵⁹ *Relationships Act 2008* (Vic) s 5.

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- ⁶⁰ *Korner v Armstrong* [2009] FMCA Fam 92.
⁶¹ *Ibid* [67].
⁶² *Ibid* [112].
⁶³ *Vine v Carey* [2009] FMCA Fam 1017.
⁶⁴ *S v B* (2004) DFC 95-282 [18].
⁶⁵ *Vine v Carey* [2009] FMCA Fam 1017 [21].
⁶⁶ *Aitken v Deakin* [2010] FMCA Fam 35.
⁶⁷ *Hamblin v Dahl* [2010] FMCA Fam 514.
⁶⁸ *Ibid* [63].
⁶⁹ *Ibid*.
⁷⁰ *Baker v London* [2010] FMCAfam 280.
⁷¹ *Ibid* [11].
⁷² *Ibid* [13]-[14].
⁷³ *Ibid* [18].
⁷⁴ *Ibid* [22].
⁷⁵ *Dakin v Sansbury* [2010] FMCAfam 628.
⁷⁶ *Ibid* [11].
⁷⁷ *Ibid* [13].
⁷⁸ *Moby v Schulter* [2010] FamCA 748.
⁷⁹ *Ibid* [139]-[140].
⁸⁰ *Jonah & White* [2011] FamCA 221
⁸¹ *Ibid* at para 39
⁸² *Ibid* at para 40
⁸³ *Ibid* at para 60
⁸⁴ *Ibid* at para 62
⁸⁵ *Ibid* at paras 65 and 66
⁸⁶ *Ibid* at paras 66,67 and 69
⁸⁷ *Jonah and White* [2012]FamCAFC200
⁸⁸ *Ibid* paras 26 - 28
⁸⁹ *Ibid* at para 32
⁹⁰ *Ibid* at para 39 and 40
⁹¹ *Ibid* at para 43
⁹² *Ibid* at para 44
⁹³ *Ibid* at paras 68 and 69
⁹⁴ *Vaughan and Bele* [2011]FamCA436
⁹⁵ *Ibid* at paras 69 and 70
⁹⁶ *Ibid* at para 71
⁹⁷ *Smyth and Pappas*[2011]FamCA434
⁹⁸ *Ibid* at paras 67 and 89
⁹⁹ *Ibid* at paras 10,11,12 and 13
¹⁰⁰ *Ibid* at para 62
¹⁰¹ *Family Law Act 1975* (Cth) s 4A(5).
¹⁰² Jenni Milbank, *De facto Relationships, Sam Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms*
¹⁰³ CCH Australian De facto Relationships Commentary.
¹⁰⁴ *Green & Ors v Green* (1989) DFC 95-075
¹⁰⁵ *Ibid*.
¹⁰⁶ Marianne Nielson, *Law and Bills Digest Section, Family Law Amendment (De facto Financial Matters and Other Measures) Bill 2008*, Parliamentary Library at page 10.